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11 West 51 Realty LLC d/b/a The Jewel Facing Rockefeller Center *and* New York Hotel and Motel Trades Council, AFL–CIO. Case 02–CA–256884

May 27, 2022

DECISION AND ORDER

BY CHAIRMAN MCFERRAN AND MEMBER KAPLAN

On February 25, 2021, Administrative Law Judge Benjamin W. Green issued the attached decision. The Respondent filed exceptions and a supporting brief, the Acting General Counsel filed an answering brief, and the Respondent filed a reply brief. The Charging Party filed cross-exceptions and a supporting brief.

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

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions[2] only to the extent consistent with this Decision and Order.[3]

I.

The Respondent operates the Jewel Hotel in New York, New York. The Jewel has 15 floors with 135 guestrooms, and it is managed by Club Quarters, a worldwide network of private hotels. Although Club Quarters–managed hotels typically adhere to specific branding and operating procedures, the Jewel is characterized as an independent "public hotel" by Club Quarters and generally does not use Club Quarters branding or operating procedures. Club Quarters Rockefeller Center (the Rockefeller) is another hotel located on the same city block as the Jewel. The Rockefeller is also managed by Club Quarters but, unlike the Jewel, operates using Club Quarters branding and operating procedures.

Prior to August 2019, some of the upper floors of the Jewel were used as overflow rooms for the Rockefeller when the latter hotel was overbooked. Because of their status as overflow, these upper floors of the Jewel were subject to Club Quarters branding and operating procedures, while the lower floors of the Jewel were not. On August 2, 2019, the Rockefeller's owners transferred management of that hotel from Club Quarters to a different company. As a result, the Jewel ceased operations as an overflow facility for the Rockefeller, and the upper floors of the Jewel that had previously operated subject to Club Quarters branding and operating procedures reverted to the same standards as the other floors of the Jewel. In addition, on September 4, 2019, the Union was certified as the exclusive bargaining representative of a unit of about 35 employees at the Jewel, including front desk, engineering, and housekeeping employees.

As relevant here, the record establishes that the public-hotel standards for the Jewel required king-size pillows on certain beds in the hotel. In November 2019, the Jewel's hotel manager notified the housekeepers that he planned to buy new king-size pillows for use at the hotel. The Respondent received its first delivery of 60 new king-size pillows in February 2020.[4] Upon receiving the new king-size pillows, the housekeepers discovered they were "puffier" than the Jewel's existing king-size pillows. Housekeepers Oana Georgescu and Havo Djeka testified that it was difficult to place the new pillows inside the old pillowcases, which were not large enough, and that it took longer to change those pillowcases. The housekeepers complained to Hotel Manager Anthony McDonald about the new pillows, and Georgescu, in particular, told him that she had injured her arm while placing one of the new pillows in an existing pillowcase. At least one employee, Georgescu, also notified the Union of the size issue with the new pillows.[5]

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

[2] For the reasons set forth by the judge, we adopt his finding that the Respondent violated Sec. 8(a)(5) and (1) by limiting paid annual vacation to 2 weeks without giving the Union notice and an opportunity to bargain. In addition, in the absence of exceptions, we adopt the judge's finding that the Respondent violated Sec. 8(a)(5) and (1) by unilaterally suspending its practice of granting wage increases to employees on their second anniversary of employment with the company. We note the Charging Party's cross-exception to the judge's failure to set the amount of backpay for employee Lisbeth de Jesus. We agree with the judge, however, that a determination regarding the amount of backpay owed to de Jesus is appropriately left to the compliance stage of this proceeding.

[3] We shall amend the judge's conclusions of law consistent with our findings herein. We shall modify the judge's recommended Order to conform to our findings, to the Board's standard remedial language, and in accordance with our decision in *Cascades Containerboard Packaging–Niagara*, 370 NLRB No. 76 (2021), as modified in 371 NLRB No. 25 (2021); *Danbury Ambulance Service, Inc.*, 369 NLRB No. 68 (2020); and *Excel Container, Inc*., 325 NLRB 17 (1997). We shall substitute a new notice to conform to the Order as modified.

[4] The record reflects that the Respondent was set to receive a second delivery of new king-size pillows sometime in March 2020.

[5] The record does not contain specifics about when employees first informed the Union, but it must have been promptly: the pillows were not received until sometime in February 2020, and the Union filed the instant unfair labor practice charges on February 20, 2020.

No evidence suggests that the Respondent reasonably could have anticipated the problems caused by the new pillows before they were purchased and put into use. McDonald told Georgescu he would look into buying pillowcases to fit the new pillows. Although Georgescu notified the Union of the size issue with the new pillows, the Union did not request to bargain with the Respondent over this matter. Instead, it filed an unfair labor practice charge alleging, among other things, that the Respondent unilaterally changed unit employees' terms and conditions of employment without notice and opportunity to bargain.[6]

II.

Citing *First National Maintenance Corp. v. NLRB*, 452 U.S. 666 (1981), the judge agreed with the Respondent's assertion that it had no obligation to bargain with the Union over the business transaction that resulted in the Jewel ceasing operations as an overflow facility for the Rockefeller. In addition, he determined that the Respondent's decision to purchase new pillows and place them in its guestrooms would likely have only an "indirect and attenuated impact on the employment relationship" and would not be amenable to bargaining. The judge, therefore, ruled that the Respondent did not have an obligation to notify and bargain with the Union over its *decision* to purchase and begin using the new pillows.

Even so, the judge that an employer would still be required to bargain over the *effects* of such a decision if they impacted employees' terms and conditions of employment. The judge found that the effects of the Respondent's decision to place new pillows on certain beds rendered the work of the housekeepers more onerous and time consuming, and he concluded that this effect was amenable to bargaining. Specifically, he found that the impact of the new, "puffier" pillows on the housekeepers' work was sufficiently material, substantial, and significant to impose a bargaining obligation on the Respondent once it learned of the effects of the new pillows.

The judge found that the Respondent acted unlawfully by failing to provide the Union with "advance notice of the change before it was implemented." While acknowledging that the Union had failed to request effects bargaining upon learning of the problems with the pillows from employees, the judge stated that because the change had already been implemented, the Union logically concluded that the proper course of action was to file a charge rather than demand bargaining. Based on the foregoing, the judge found that the Respondent violated Section 8(a)(5) and (1) by failing to notify and bargain with the Union over the effects of its decision to place the new pillows in certain of the Respondent's guestrooms. For the reasons discussed below, under the unique circumstances presented here, we disagree and dismiss this allegation.

III.

No party contests the judge's apparent conclusion that the Respondent was not required to bargain with the Union over its decision to purchase and place new king-size pillows on certain beds at the Jewel. Rather, in light of the Respondent's exceptions, the question before us is whether the judge erred in finding that the Respondent violated Section 8(a)(5) by failing to notify and bargain with the Union over the *effects* of that decision.[7]

It is well established that even when an employer is not required to engage in decisional bargaining with a union, it may nevertheless have an obligation to provide the union with notice and an opportunity to bargain about the effects of that decision on unit employees. See, e.g., *KIRO, Inc*., 317 NLRB 1325, 1327 (1995) (citing *First National Maintenance*, supra, 452 U.S. at 681–682). In such situations, "the employer's duty [is] to give pre-implementation notice to the union to allow time for effects bargaining." *Willamette Tug & Barge Co.,* 300 NLRB 282, 282 (1990). In the unique circumstances of this case, where there was no original obligation to notify and bargain over the *decision*, and no expectation that there would be any effects from that decision, we reverse the judge's finding of an effects-bargaining violation based on the Respondent's failure to provide the Union with "advance notice of the [pillow] change before it was implemented."

The record demonstrates that the Respondent told employees that it planned to purchase new king-size pillows for use at the hotel to replace the existing pillows then in use. As the judge found, no party expected the substitution of new pillows to have any impact on the employees' working conditions. It was not until *after* the Respondent started using the new pillows that the employees realized the new pillows were more difficult to put into the old pillowcases. At that point, the employees notified both the Union and the hotel manager about this difficulty.

On these facts, we accept the judge's finding that before the new pillows were placed in the guestrooms, no party—

[6] On March 28, 2020, the Respondent closed the Jewel as a result of the COVID-19 pandemic and laid off all unit employees. The three employees who testified at the hearing appeared to believe that they were still employed by the Respondent and not permanently laid off.

[7] In its exceptions, the Respondent contends that the judge erred in finding an effects-bargaining violation because the complaint did not allege such a violation, and the alleged difficulty in fitting the new pillows into existing pillowcases was not fully litigated. For the purposes of this decision, we assume that the effects-bargaining violation found by the judge is properly before the Board for consideration and, as explained below, we dismiss the allegation.

including the Respondent—knew or could have reasonably foreseen that the new pillows would be more difficult for employees to work with. In view of that finding, the Respondent cannot fairly be faulted for failing to notify the Union and offer to bargain *before* the new pillows were put into use. Its decision to begin using the new pillows was not itself bargainable, and the arguable effects of that decision on employees' working conditions were not reasonably foreseeable. Moreover, the Union promptly learned on its own of the issue when it learned from the housekeepers that the new pillows were impacting employees' working conditions.[8] At that point, the Union did not test the Respondent's willingness to bargain over those effects—which the Respondent itself had just learned about—by requesting bargaining. Instead, it merely filed unfair labor practice charges. Contrary to the judge, we find that the Union was, indeed, required to request bargaining here and that, in the absence of such a request, the Respondent cannot be held to have violated its duty to engage in effects bargaining. See, e.g., *Associated Milk Producers*, 300 NLRB 561, 564 (1990) ("[I]t was incumbent on the [u]nion to request bargaining—not merely to protest or file an unfair labor practice charge.").[9]

The judge excused the Union's failure to request bargaining because the Respondent had already begun using the new pillows by the time the Union became aware of employee concerns, and as noted above, "the Union could logically conclude that the proper course of action was to file a charge rather than demand bargaining." The flaw in the judge's reasoning should be clear. As he himself found, the Respondent could not reasonably have foreseen that the new pillows might affect employees' working conditions. Its action in implementing the change, then, did not reflect an unwillingness to bargain, nor could it have reasonably been understood that way by the Union, which learned of the problem soon after the Respondent first learned of it.

We acknowledge that the Board's general rule is that effects bargaining must occur before implementation for bargaining to be meaningful. See, e.g., *Woodland Clinic,* 331 NLRB 735, 738 (2000); *Willamette Tug & Barge Co.,* above at 282–283. As explained above, however, we do not fault the Respondent for failing to engage in pre-implementation effects bargaining here. Moreover, the facts of this case demonstrate that, at the time the Union learned of the employees' issues with the new pillows, just shortly after the Respondent first learned of it, there was still an opportunity for the parties to engage in meaningful effects bargaining. See, e.g., *Berklee College of Music*, 362 NLRB 1517, 1518 (2015) (dismissing complaint where union failed to enforce its bargaining rights despite having ample time to bargain over the effects of a change to minimum course-enrollment requirements). For example, the parties could have bargained over the purchase and use of larger pillowcases for the new pillows, as the hotel manager had expressed a willingness to do, over the issue of whether the Respondent should delay use of the second shipment of new pillows it had already purchased; and/or over other changes or modifications to the housekeepers' routines that would have ameliorated the effects of the new, fluffier and more time-consuming pillows. In this unusual factual context, we find, contrary to the judge, that the Respondent's actions did not excuse the Union's failure to request bargaining.

Based on the foregoing, we reverse the judge's finding that the Respondent violated Section 8(a)(5) and (1) by failing to bargain with the Union over the effects of the decision to purchase new king-size pillows for use at the Jewel, and we dismiss this allegation.

AMENDED CONCLUSIONS OF LAW

Delete the judge's Conclusion of Law 3(c).

ORDER

The National Labor Relations Board orders that the Respondent, 11 West 51 Realty LLC d/b/a The Jewel Facing Rockefeller, New York, New York, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Changing the terms and conditions of employment of its unit employees by suspending its practice of granting wage increases to employees on their two-year anniversary of employment with the company and by limiting paid annual vacations to two weeks without first notifying New York Hotel and Motel Trades Council, AFL–CIO (the Union) and giving it an opportunity to bargain.

(b) 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.

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[8] Chairman McFerran believes the better course would have been for the Respondent to have notified the Union immediately upon learning from the housekeepers that the new pillows were impacting employees' working conditions. However, she agrees that the Union learned of that impact on its own and should have requested bargaining at that point.

[9] Because we find that the effects-bargaining allegation must be dismissed for failure of the Union to request bargaining, we find it unnecessary to decide the threshold issue of whether the effects of the new pillows on the housekeepers' work were sufficiently material, substantial, and significant to impose a bargaining obligation on the Respondent in the first place.

Although Member Kaplan agrees with his colleagues that the allegation should be dismissed because the Union failed to request bargaining, he would also find that the change to the new pillows did not constitute a material change to the housekeepers' working conditions that would warrant a bargaining obligation in the first place.

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

(a) Rescind the changes in the terms and conditions of employment for its unit employees, in particular the changes to the 2-year anniversary wage increase practice and the paid annual vacation policies, which were unilaterally implemented on December 29, 2019, and in February 2020, respectively.

(b) Before implementing any changes in wages, hours, or other terms and conditions of employment of unit employees, notify and, on request, bargain with the Union as the exclusive collective-bargaining representative of employees in the following bargaining unit:

> Included: All full-time and regular part-time Front Desk, Engineering, and Housekeeping employees, including, but not limited to, Floor Attendants, Guest Service Representatives, and Guest Service Managers, employed by the Respondent at its facility located at 11 West 51st Street, New York, NY.
>
> Excluded: All other employees, including office clerical employees, and guards, and professional employees and supervisors as defined in the Act.

(c) Make affected unit employees whole for any loss of earnings and other benefits suffered as a result of the unilateral changes in their terms and conditions of employment, in the manner set forth in the remedy section of the judge's decision as amended in this decision.

(d) Compensate affected employees for the adverse tax consequences, if any, of receiving lump-sum backpay awards, and file with the Regional Director for Region 2, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay awards to the appropriate calendar year(s) for each employee.

(e) File with the Regional Director for Region 2, within 21 days of the date the amount of backpay is fixed by agreement or Board order or such additional time as the Regional Director may allow for good cause shown, a copy of each backpay recipient's corresponding W-2 form(s) reflecting the backpay award.

(f) 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.

(g) Post at its 11 West 51st Street, New York, New York facility copies of the attached notice marked "Appendix."[10] Copies of the notice, on forms provided by the Regional Director for Region 2, 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. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. If 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, copies of the notice to all current employees and former employees employed by the Respondent at any time since December 29, 2019.

(h) Within 21 days after service by the Region, file with the Regional Director for Region 2 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. May 27, 2022

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[10] If the facility involved in these proceedings is open and staffed by a substantial complement of employees, the notices must be posted within 14 days after service by the Region. If the facility involved in these proceedings is closed due to the Coronavirus Disease 2019 (COVID-19) pandemic, the notices must be posted within 14 days after the facility reopens and a substantial complement of employees have returned to work, and the notices may not be posted until a substantial complement of employees have returned to work. Any delay in the physical posting of paper notices also applies to the electronic distribution of the notice if the Respondent customarily communicates with its employees by electronic means. 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."

Lauren McFerran, Chairman

Marvin E. Kaplan, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX

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

The National Labor Relations Board has found that we violated 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 change your terms and conditions of employment by suspending our practice of granting wage increases to employees on their 2-year anniversary of employment with the company and by limiting paid annual vacations to 2 weeks without first notifying New York Hotel and Motel Trades Council, AFL–CIO (the Union) and giving it an opportunity to bargain.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

WE WILL rescind the changes in the terms and conditions of employment for unit employees, in particular the changes to our wage increase practice and paid annual vacation policies, which were unilaterally implemented on December 29, 2019, and in February 2020, respectively.

WE WILL, before implementing any changes in wages, hours, or other terms and conditions of employment of unit employees, notify and, on request, bargain with the Union as the exclusive collective-bargaining representative of our employees in the following bargaining unit:

Included: All full-time and regular part-time Front Desk, Engineering, and Housekeeping employees, including, but not limited to Floor Attendants, Guest Service Representatives, and Guest Service Managers, employed by us at 11 West 51st Street, New York, NY.

Excluded: All other employees, including office clerical employees, and guards, and professional employees and supervisors as defined in the Act.

WE WILL make affected employees whole, with interest, for any loss of earnings and other benefits suffered as a result of our unlawful unilateral changes to their terms and conditions of employment.

WE WILL compensate affected employees for the adverse tax consequences, if any, of receiving lump-sum backpay awards, and WE WILL file with the Regional Director for Region 2, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay awards to the appropriate calendar year(s) for each employee.

WE WILL file with the Regional Director for Region 2, within 21 days of the date the amount of backpay is fixed by agreement or Board order or such additional time as the Regional Director may allow for good cause shown, a copy of each backpay recipient's corresponding W-2 form(s) reflecting the backpay award.

11 WEST 51 REALTY LLC D/B/A THE JEWEL FACING ROCKEFELLER CENTER

The Board's decision can be found at www.nlrb.gov/case/02-CA-256884 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273–1940.

Burt F. Pearlstone, Esq., and *Tanya W. Khan, Esq.,* for the General Counsel.

Louis J. Cannon, Esq. and *Christian R. White, Esq.* (Baker & Hostetler, LLP), for the Respondent.

Gideon Martin, Esq., for the Charging Party Union.

DECISION

STATEMENT OF THE CASE

BENJAMIN W. GREEN, Administrative Law Judge. This case

was tried before me by Zoom video conference on January 11 and 12, 2021. The General Counsel alleges that 11 West 51 Realty, LLC d/b/a The Jewel Facing Rockefeller Center (Respondent or the Jewel), a hotel, violated Section 8(a)(5) and (1) of the Act by unilaterally implementing the following changes without providing the New York Hotel & Motel Trades Council, AFL–CIO (Union) notice and an opportunity to bargain: (1) suspending its practice of granting wage increases to unit employees upon their second anniversary with the company;[1] (2) prohibiting bargaining unit employees from taking annual paid vacation longer than 2 weeks, and (3) rendering the work of housekeepers more onerous and time consuming as a result of a decision to change the pillows in hotel guestrooms. In its posthearing brief, the Respondent only contested the allegations regarding the changes in vacation policy and pillows. The Respondent did not deny that the General Counsel proved the allegation regarding the suspension of 2-year anniversary wage increases. For reasons discussed below, I find merit to all three allegations at issue in this case.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the posthearing briefs that were filed by the General Counsel and the Respondent, I make these

FINDINGS OF FACT[2]

JURISDICTION AND UNION STATUS

The Respondent admits, and I find, that it is a domestic corporation operating a hotel at 11 West 51st Street, New York, New York and, during the 12-month period preceding the issuance of the complaint, it derived gross revenues in excess of $500,000 and purchased and received at its facility goods and materials valued in excess of $5,000 directly from points outside the State of New York. The Respondent further admits, and I find, that at all material times, it has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act, and that the Union has been a labor organization within the meaning of Section 2(5) of the Act. Accordingly, I find that this dispute affects commerce and the Board has jurisdiction over this case pursuant to Section 10(a) of the Act.

ALLEGED UNFAIR LABOR PRACTICE

Background

The Jewel is a 15-floor hotel with 135 guestrooms that faces Rockefeller Center in Manhattan, New York. It is managed by Club Quarters. Including the Jewel, Club Quarters operates 16 hotels in various U.S. cities and London. Until August 2, 2019, in addition to the Jewel, Club Quarters operated a hotel called Club Quarters Rockefeller Center (the Rockefeller). The Rockefeller is located on the same block as the Jewel with one building separating the two hotels. Given their proximity, the Jewel and the Rockefeller were managed by the same managers. On August 2, 2019, the owners of the Rockefeller transferred management of that hotel from Club Quarters to a different company. (Tr. 106–113.)

Unlike the Rockefeller, the Jewel is considered an independent boutique or public hotel that did not use Club Quarters branding and, on most of its floors, did not use Club Quarters standard operating procedures. However, floors 10, 12, 14, and 15 of the Jewel were used for overflow from the Rockefeller when the latter was overbooked. Therefore, those floors did use Club Quarters standard operating procedures until management of the Rockefeller was transferred on August 2, 2019. (Tr. 107–110.)

Len Wolin is the Club Quarters corporate vice president of global operations with responsibility over all the Club Quarters hotels. Wolin is in charge of new programs, policies, and procedures. He is also responsible for profit and loss, employee satisfaction, and guest satisfaction. Each Club Quarters hotel has a hotel manager that reports to Wolin.[3] (Tr. 104–105.)

Anthony McDonald was the Jewel's hotel manager from October 2019 to August 2020. Club Quarters hotels generally employ individual department managers, including a housekeeping manager and senior guest service manager (responsible for the front desk). These department managers report to the hotel manager. McDonald was the Jewel's senior guest service manager from February 2018 to October 2019. (Tr. 109–110, 197–199,)

On August 27, 2019, the New York Hotel and Motel Trades Council, AFL–CIO (Union) won an election to be designated as the exclusive representative of employees in the following bargaining unit:

> Included: All full-time and regular part-time Front Desk, Engineering, and Housekeeping employees, including, but not limited to, Floor Attendants, Guest Service Representatives, and Guest Service Managers, employed by the Respondent at its facility located at 11 West 51st Street, New York, NY.
>
> Excluded: All other employees, including office clerical

[1] The complaint originally alleged that the Respondent discontinued a policy of granting employees a wage increase of $2 per hour upon their 2-year anniversary. However, at trial, the General Counsel amended the allegation to allege that those 2-year anniversary wage increases were at least $3 per hour. (Tr. 158–159.)

[2] The Findings of Fact are a compilation of credible testimony and other evidence, as well as logical inferences drawn therefrom. To the extent testimony contradicts the findings herein, such testimony has been discredited, either as in conflict with credited evidence or because it was incredible and unworthy of belief. In assessing credibility, I rely upon witness demeanor. I also considered the context of the witness's testimony, the quality of their recollection, testimonial consistency, the presence or absence of corroboration, the weight of the respective evidence, established or admitted facts, inherent probabilities, and reasonable inferences that may be drawn from the record as a whole. See *Double D Construction Group*, 339 NLRB 303, 305 (2003); *Daikichi Sushi*, 335 NLRB 622, 623 (2001) (citing *Shen Automotive Dealership Group*, 321 NLRB 586, 589 (1996)), enfd. sub nom., 56 Fed. Appx. 516 (D.C. Cir. 2003). Credibility findings need not be all-or-nothing propositions. Indeed, nothing is more common in judicial decisions than to believe some, but not all, of a witness's testimony. *Daikichi Sushi*, supra at 622; *Jerry Ryce Builders*, 352 NLRB 1262, 1262 fn. 2 (2008) (citing *NLRB v. Universal Camera Corp.*, 179 F.2d 749, 754 (2d Cir. 1950), rev'd. on other grounds 340 U.S. 474 (1951)). Where necessary, specific credibility determinations are set forth below.

[3] As noted above, the Jewel and the Rockefeller are an exception. Those two hotels were managed by the same managers because of their close geographic proximity.

employees, and guards, and professional employees and supervisors as defined in the Act.

The unit consists of about 35 employees. (Tr. 106.) On September 4, 2019, the Union was certified as the bargaining representative of the unit.

On March 28, 2020, the Jewel closed as a result of the COVID-19 pandemic and laid off all unit employees. The three employees who testified at trial appeared to believe that they were still employed by the employer and not permanently laid off. (Tr. 19–20, 42, 84.)

2–Year Anniversary Wage Increase

Lisbeth De Jesus is a guest service manager (GSM) or font desk clerk hired by the Respondent on December 20, 2017. De Jesus was told by McDonald and a human resources manager that she would receive a $2–per–hour wage increase on her second anniversary with the company. (Tr. 19–34, 209.) De Jesus also testified that employees receive annual raises of about $0.60 per hour every July. (Tr. 20.)

McDonald admitted that De Jesus was due, but did not receive, a wage increase on December 29, 2019, her second anniversary with the company.[4] McDonald did not grant De Jesus this wage increase because he was under the mistaken belief that the Respondent had implemented a wage freeze during its negotiations with the Union. (Tr. 208.) McDonald and Senior Guest Experience Manager Rene Lopez both told De Jesus she would not receive the 2–year raise until negotiations concluded. (GC Exhs. 3, 5.)

Vacation

As indicated in the Respondent's employee handbook, annual leave is earned as follows by full-time employees on the basis of length of service (GC Exh. 6 p. 23) (Tr. 81):

Years of Service	Per Year
After one full year from employment service date	2 Weeks (10 days)
5 – 10 Years	3 Weeks (15 days)
10 – 20 Years	4 Weeks (20 days)
20 Year and Beyond	5 Weeks (25 days)

The Respondent's employees submit requests for leave, including paid vacation, through a payroll system called "Dayforce." (Tr. 129–132, 163–172) (R. Exh. 4). The request is approved or denied by the hotel manager or the employee's direct department manager. (Tr. 163) In early 2020, the housekeeping manager was out on maternity leave. Therefore, McDonald approved vacation requests for the housekeeping department. (Tr. 163–164.)

Havo Djeka was a housekeeper or floor attendant hired by the Respondent on March 27, 2010. (Tr. 42.) Therefore, Djeka was entitled to 3 weeks of vacation as of March 27, 2015, and 4 weeks of vacation as of March 27, 2020. In 2019, Djeka took 2 weeks of vacation in the summer and 1 week in September. In 2018, Djeka took almost 4 weeks of vacation to travel internationally to her home country; 3 weeks being paid leave and the remainder being unpaid. Djeka took an extended vacation in 2016 as well because she travels to her home country every 2 or 3 years. (Tr. 50–52.)

Djeka testified that, in February 2020, she and three other housekeepers (Angelica, Buba, and Joyce) had a conversation regarding vacation during lunch in the fourth-floor breakroom. McDonald was present and eating lunch as well. According to Djeka, McDonald told the employees they could not take more than 2 weeks of vacation that year. The employees asked why, and indicated that 2 weeks was not enough time to travel to their home countries. In response, McDonald merely confirmed that vacation would be limited to 2 weeks this year. Djeka told McDonald the change in vacation policy was okay this year because she did not make plans for any vacation, but her tenth anniversary was next year, and she planned to take the 4 weeks of vacation she would be entitled to in order to go home to her country. McDonald shook his head from side to side and said, "let's see what happens next year." (Tr. 53–57, 71–73.) McDonald denied he told Djeka or any other employee that they could not take more than 2 weeks of vacation. (Tr. 209.)

According to Djeka, after McDonald finished his lunch and left the room, she spoke to Angelica about taking vacation. Angelica wanted to take a month off to go home to her country, but Djeka explained that the hotel was not allowing more than 2 weeks of vacation this year. Angelica asked, why? Djeka testified that, at this point, Club Quarters Regional Human Resources Manager Fidelina Escoto-Reyes entered the room and said, "because you're asking for a union." Djeka speculated that Reyes came in and said this because she overheard the employees talking about vacation. (Tr. 59–62.)

Reyes testified that, in about January or February 2020, she did have a conversation with Djeka and other housekeepers while they all (including Reyes) were having lunch in the breakroom. According to Reyes, the employees asked whether they could take more time off than they were entitled to in order to go home to their countries in Europe. Reyes testified that she said they could take whatever vacation they had, but, if they needed more time, it would have to be approved by the hotel manager. Reyes denied that she made any reference to the Union or modified the vacation policy during this conversation. (Tr. 190–192.)

The Respondent introduced into evidence an "Employee TAFW Report" which shows leave requests that were approved, denied, or pending from September 1, 2019 to March 28, 2020. (R. Exh. 4) The document does not indicate that any employee

[4] The General Counsel introduced payroll records purporting to show that GSMs other than De Jesus received certain wage increases in excess of $3 per hour on or after their 2–year anniversary. (GC Exhs. 7–10) (Tr. 154–159). However, it was not clear whether the wage raises reflected in those exhibits were anniversary wage increases or the annual (July) raises referenced by De Jesus. Further, even where the raises appeared to take effect on an employee's anniversary date, it was not necessarily the employee's 2-year anniversary (as opposed to a different year). I do not find that this ambiguity negates the Respondent's liability since the Respondent offered no defense to the allegation and as discussed more fully in my analysis, McDonald admitted that De Jesus was due, but did not receive, a wage increase on her 2-year anniversary. However, the amount of the raise De Jesus was due is not clear. Accordingly, I will leave that issue to a compliance proceeding, if necessary.

requested more than 2 weeks of vacation (either in one request or cumulatively in multiple requests) in February and March 2020.

Pillows

Housekeepers are assigned to clean a certain section of rooms each day. The number of rooms must constitute 19 "credits." Generally, one room is worth one credit. However, larger rooms can be worth more than one credit. (R. Exh. 5.) Prior to February 2020, it took a housekeeper about 20–22 minutes to clean a one credit room. Housekeepers are assigned to clean a certain section of rooms on a 6-month rotating basis. After a housekeeper cleans one section of rooms for 6 months, he/she is assigned to clean a different section of rooms for the next 6 months. (Tr. 93–94, 121–122, 202–207) (R. Exh. 5–6).

Club Quarters and the Respondent maintain standard operating procedures for housekeeping. These standards contain specific guidelines for the makeup and cleaning of each room. More specifically, the standard operating procedure for pillows in Club Quarters and public hotels (like the Jewel) are as follows (R. Exh. 1):

	CQ Hotel		**Public Hotel**		
Pillows	**Weekday**	**Weekend**	**Weekday**	**Weekend**	
Queen Beds	2k	2k	2k/2k	2k/2k	k=king
King Beds	4k	4k	2k/2k	2k/2k	k=king
Twin Beds	1k	1k	1k/1k	1k/1k	k=king

Wolin explained that this standard reflects that queen-sized beds in Club Quarters hotels have two king-size pillows and queen-size beds in public hotels have four king sized pillows. According to Wolin, until August 2, 2019, the Club Quarters pillow standard applied to floors 10, 12, 14, and 15 of the Jewel because those floors were used for overflow from the Rockefeller (a Club Quarters hotel). However, after Club Quarters stopped operating the Rockefeller on August 2, 2019, the pillow standards on floors 10, 12, 14, and 15 of the Jewel reverted back to the same public hotel standards as the other floors (floors 2–9). Thus, consistent with its pillow standard for public hotels, the Respondent arranged to put four king size pillows on the beds in the rooms on the upper floors. (Tr. 108–115, 122–1226) (R. Exh. 8).

McDonald testified that, dating back to February 2018, each bed on floors 2–9 of the Jewel had 4 king size pillows. (Tr. 200.) Housekeepers Djeka and Oana Georgescu testified that, until February 2020, the Jewel had two queen-size pillows on queen-size beds and four pillows (two king size and two queen size) on king-size beds. (Tr. 45–46, 65–67, 86–88.)

Wolin testified that he has, on dozens of occasions, cleaned rooms at Club Quarters hotels. Wolin further testified that the Jewel and other Club Quarters hotels use the same type of pillows. According to Wolin, it takes about 15 seconds to change a pillowcase. Wolin did not specifically identify the rooms he cleaned in which hotels. (Tr. 120–122.)

McDonald testified that, as hotel manager, he cleaned rooms about 2–3 times per week. McDonald further testified that, as senior guest service manager, he cleaned rooms about 1 time per week. Like Wolin, McDonald claimed that it takes about 15 seconds to change a pillowcase. McDonald did not specifically identify which rooms he cleaned. (Tr. 200–201.)

In about November 2019, then Hotel Manager Zvi Cohen notified housekeepers that he planned to buy new king size pillows and put four of those pillows on every king and queen-size bed in the hotel. (Tr. 88–89.)

The Respondent received its first delivery of 60 new king size pillows in February 2020, and placed an order for another 60 king size pillows in early-March 2020.[5] (R. Exh. 8.)

The new king size pillows were placed in rooms on the upper floors of the hotel, with four pillows on each bed. (Tr. 75–79, 86–88.) The Respondent's old pillows weighed 40 ounces (queen size) and 52 ounces (king size), while the new king size pillows weighed 50 ounces. (R. Exhs. 10–12.) However, it is undisputed that the new pillows were "puffier" than the old pillows (which apparently lost some of their "puffiness" with use). (Tr. 187–188.) Djeka and Georgescu testified that it was extremely difficult to place the new pillows inside the old pillowcases, which were not big enough. Georgescu noted that the old pillows were easier to bend and stuff inside the pillowcases. Georgescu and Djeka both told management of the problem. (Tr. 46–49, 69–71, 88–89, 90–92.) Georgescu told McDonald she injured her arm while struggling to change the pillowcase of one of the new pillows. McDonald told Georgescu he would buy the right sized pillowcases for the new pillows. (Tr. 90–92.) In addition to notifying McDonald, Georgescu notified the Union of the problem with the new pillows. (Tr. 91–92.)

Georgescu estimated that it took an extra 10–20 minutes to clean a room that contained the new king size pillows. (Tr. 93) Although McDonald and Wolin both testified that they have cleaned hotel rooms, neither manager specifically testified that they changed the pillowcase of the new king-sized pillows.

On February 20, 2020, the Union filed an unfair labor charge alleging that the Respondent unilaterally changed unit employees' terms and conditions of employment. (GC Exh. 1.)

[5] The evidence does not indicate whether the 60 pillows the Respondent ordered in early-March 2020, were actually received before the hotel closed on March 28, 2020. However, the Respondent has expressed no intent to permanently close. The Respondent also admits that it planned to place new pillows on the upper floors of the Jewel. (R. Br. p. 6.) Therefore, we can expect the Respondent to use the additional pillows, if it has not already done so.

Analysis

Suspension of Wage Increases

The General Counsel contends that the Respondent violated Section 8(a)(5) and (1) of the Act by unilaterally suspending its practice of granting wage increases to employees on their second anniversary of employment with the company. The Respondent did not, in its posthearing brief, deny this allegation.

Following the election of a union as the bargaining representative of a unit of employees, the employer must refrain from changing the wages, hours, and other terms and conditions of employment of those employees until it bargains with the union to impasse or agreement. *Atlanticare Management LLC*, 369 NLRB No. 28 (2020). Rather, an employer must maintain the status quo, which includes any practice of providing regularly scheduled wage increases. Id. Here, the Respondent does not deny that it has, at all relevant times, maintained a practice of granting wage increases to employees upon their 2–year anniversary with the company.

McDonald testified that he was mistaken in his belief that the Respondent had implemented a wage freeze during negotiations with the Union. However, a mistake is no defense since the "unilateral change to a mandatory subject is a per se breach of the Section 8(a)(5) duty to bargain, and no showing of a bad-faith motive is required." *Viejas Band of Kumeyaay,* 366 NLRB No. 113 (2018) citing *NLRB v. Katz*, 369 U.S. 736, 743 (1962).

For a unilateral change to violate the Act, "an employer's action must effect a material, substantial, and significant change in terms or conditions of employment." *EOD Motors Eastern Air Devices, Inc.*, 314 NLRB 564, 566 (1994) citing *Millard Processing Services*, 310 NLRB 421, 425 (1993). The Board has held that the unilateral modification of a wage scheme to the disadvantage of a single employee is considered a significant and illegal change of a mandatory subject of bargaining. *Seven Seas Union Square, LLC*, 368 NLRB No. 92 (2019); *Carpenters Local 1031*, 321 NLRB 30 (1996); *Ivy Steel & Wire, Inc.*, 346 NLRB 404, 418–419 (2006). Thus, the Respondent had an obligation to maintain its practice of granting 2-year anniversary wage raises even though its failure to do so apparently affected a single employee (i.e., De Jesus).

Based on the foregoing, I find that the Respondent violated Section 8(a)(5) and (1) of the Act by suspending its practice of granting wage increases to employees on their second anniversary of employment with the company.

Limitation of Annual Vacation to 2 Weeks

The General Counsel contends that the Respondent prohibited employees from taking more than 2 weeks of annual paid vacation when McDonald announced the same in February 2020. The Respondent defends against this allegation by asserting that McDonald made no such statement and, even if he did, the change in policy was never implemented.

I credit Djeka's testimony as to her February 2020 conversation with McDonald in the breakroom regarding vacation. Djeka was a credible witness who, in her demeaner, appeared to provide neutral and spontaneous testimony pursuant to an honest recollection of events. Her testimony regarding the conversation with McDonald was detailed and specific. I note that Djeka still considers herself an employee of the Respondent and presumably expects to return to work at the Jewel when the pandemic allows. The Board has "recognize[d] that the testimony of current employees which contradicts statements of their supervisors is likely to be particularly reliable . . . ." *Flexsteel Industries*, 316 NLRB 745 (1995).

McDonald denied he modified the vacation policy or told employees they could not take more than 2 weeks of vacation. Although I recognize that a witness cannot necessarily provide specific details regarding a conversation that did not take place, I would have liked to hear a little more testimony than a simple denial. Did McDonald *ever* talk to employees in the breakroom about vacation in February 2020?[6] If so, who was present and how did the topic arise? What was said? The Respondent's failure to inquire more fully of a possible conversation works in favor of crediting Djeka. I also note that any conversation regarding the duration of vacations may have been less significant to McDonald than Djeka since Djeka maintained a practice of taking lengthy international vacations every 2 or 3 years. Ultimately, I found Djeka more reliable than McDonald in her testimony regarding the conversation in question, including her testimony that McDonald told employees they could not take more than 2 weeks of vacation that year.

In so finding, I reject the Respondent's assertion that I should credit McDonald over Djeka because the General Counsel did not call employees that Djeka placed in the room at the time of the vacation conversation. Those employees are not agents or otherwise under the control of the General Counsel, and it cannot be assumed that they would be favorably inclined toward any party. Indeed, as noted above, it would not be surprising if employees were reluctant to testify against a current employer. And although the General Counsel could have subpoenaed the employees to testify, the Respondent could have done so as well. Under these circumstances, the absence of corroborating witnesses does not warrant a negative inference regarding Djeka's credibility. *Winkle Bus Co., Inc.*, 347 NLRB 1203, 1244, fn. 8 (2006); *Torbitt & Castleman, Inc.*, 320 NLRB 907, 912, fn. 6 (1996).

The Board has routinely held that changes in vacation policy are considered significant alterations of employees' terms and conditions of employment. See e.g., *Vanguard Fire & Supply Co.*, 345 NLRB 1016, 1017–1018, 1033–1034 (2005); *Alwin Manufacturing Co., Inc.*, 314 NLRB 564, 566 (1994). Here, the Respondent does not deny that certain employees were entitled to take more than 2 weeks of annual paid vacation. Further, as noted above, I credit Djeka's account of McDonald announcement in February 2020 that vacation would be limited to 2 weeks that year.

Nevertheless, the Respondent contends that, even if Djeka is

[6] Although Reyes had a different recollection of her conversation with employees in the breakroom regarding vacation, she admitted that a conversation about that general subject matter did take place. Thus, the employees did have at least one conversation in the breakroom regarding vacation.

credited over McDonald, the change in vacation policy was never implemented. I reject this defense. The announcement of a unilateral change will be held unlawful if it would cause a reasonable employee to view the change as effectively implemented. See *ABC Automotive Products Corp.*, 307 NLRB 248, 250 (1992); *Kurdziel Iron of Wauseon*, 327 NLRB 155, 156 (1998). As the Board noted in *ABC Automotive*, "The damage to the bargaining relationship had been accomplished simply by the message to the employees that the Respondent was taking it on itself to set [an] important term and condition of employment, thereby emphasizing to the employees that there is no necessity for a collective bargaining agent.'" 307 NLRB at 250 quoting *Famous-Barr Co. v. NLRB*, 326 U.S. 376, 384–386 (1945). Here, in February 2020, McDonald was categorical and unqualified in announcing that vacation would be limited to 2 weeks that year and possibly longer. He did not indicate that the Respondent was merely proposing the same in negotiations with the Union or that the change required some further action to be implemented. Rather, a reasonable employee would understand McDonald's comments regarding the 2-week limitation on vacations to be implemented and effective immediately.

The Respondent is misplaced in its reliance on evidence that no employee requested more than 2 weeks of vacation following McDonald's announcement. (R. Exh. 4.) The absence of such a request is actually evidence that employees understood the new limit on vacation to be implemented and in place.[7]

Based on the foregoing, I find that the Respondent violated Section 8(a)(5) and (1) of the Act by limiting employees' annual paid vacation to 2 weeks.

Change in Pillows – Housekeeper Work Rendered more Onerous and Time Consuming

The General Counsel contends that the Respondent violated Section 8(a)(5) and (1) of the Act by requiring that four new king-sized pillows be placed on beds, thereby rending the work of housekeepers more onerous and time consuming. The Respondent defends against this allegation by asserting that the change was a management prerogative under *First National Maintenance Corp. v. NLRB*, 452 U.S. 666 (1981), and, even if it was not, the change was not so material, substantial, and significant as to require bargaining. Before I address the legal issues, I will clarify certain facts.

I credit Djeka's and Georgescu's testimony that it took them considerably longer to change the new pillows than the old pillows. McDonald and Wolin both testified that they have cleaned rooms and that it took them about 15 seconds to change a pillowcase. However, the new king size pillows were not placed in all of the rooms, and neither manager specifically testified that they cleaned a room which contained the new pillows. Further, neither manager brought one of the new pillows to the hearing to demonstrate the speed and ease of changing the pillowcase. Accordingly, we do not have a situation where, "if the pillows fit, I must acquit." Rather, the testimony of housekeepers Djeka and Georgescu regarding the time and difficulty of changing the new king size pillows is essentially uncontested.

Georgescu testified that it took about 20 minutes to clean a room with the old pillows and about 30–40 minutes to clean a room which contained the new king size pillows. Wolin claimed that an employee would receive coaching if it took 30–40 minutes to clean a room. However, the Respondent did not clearly demonstrate how or if it tracks the time it takes a housekeeper to clean each individual room. We do not know whether a housekeeper could compensate for the additional time of changing the pillowcases of the new pillows by working late, working through lunch, and/or expediting other less difficult tasks or rooms that did not contain the new pillows. Further, even if the Respondent was aware of the time it was taking Djeka and Georgescu to clean the rooms, the Respondent may have decided not to discipline them because McDonald was aware that it was not the housekeepers' fault.[8] Thus, Wolin's hypothetical testimony regarding disciplinary coaching that "would" occur if a housekeeper took 30–40 minutes to clean certain rooms did not effectively rebut Georgescu's testimony to that effect.[9]

McDonald did not deny the conversation in which Georgescu told him the pillowcases were too small and she hurt her arm trying to change one of them. Likewise, McDonald did not deny that he told Georgescu he would purchase the correct size pillowcases for the new king size pillows. Accordingly, taking Georgescu's credible and uncontested testimony as true . . . McDonald effectively admitted that the old pillowcases did not fit on the new pillows.

Turning to the legal issues, I certainly agree with the Respondent's assertion that it had no obligation to bargain with the Union over a business transaction that resulted in Club Quarters ceasing business at the Rockefeller hotel. In *First National Maintenance*, 452 U.S. 666 (1981), the Supreme Court held that a housekeeping company did not violate the Act by unilaterally terminating its contract with a customer without offering to bargain over that decision. In so holding, the Court noted that "some management decisions, such as choice of advertising and promotion, product type and design, and financing arrangements, have

[7] At least one employee, Angelica, expressed a desire to travel internationally for a vacation longer than 2 weeks and was troubled by McDonald's statement regarding the Respondent's 2-week limit on vacations. That Angelica did not request an extended vacation tends to suggest that she believed such a request would be denied.

[8] Georgescu told McDonald how difficult and time consuming it was to change the new pillows. Wolin testified that the Respondent would attempt to discern the reason why it was taking a housekeeper so long to clean a room before administering discipline. In this case, the Respondent was aware of the reason.

[9] For much the same reason, I credit the testimony of Djeka and Georgescu regarding the number and size of the old pillows on king and queen-size beds before February 2020. The housekeepers were the people actually cleaning rooms on a daily basis and, despite the standard operating procedures and McDonald's testimony, they credibly testified to what they saw and did in those rooms. However, for reasons discussed below (infra fn. 10), I do not believe that a change in the number and size of the pillows is significant to my finding of a violation. I would not find a violation if the evidence were limited to a change from two queen to four king-size pillows on queen-size beds and from two queen/two king to four king-size pillows on king-size beds. I only find a violation here because the new king-size pillows did not fit in the old pillowcases.

only an indirect and attenuated impact on the employment relationship." Id. at 676. The decision of a hotel to purchase new pillows and place four of those pillows on each bed arguably falls within this category. However, the Supreme Court made clear that an employer is still required to bargain over the effects of such a decision if they impact employees' terms and conditions of employment. Id. at 682. See also *Litton Business Systems*, 286 NLRB 817, 819 (1987) aff'd. in relevant part 893 F.2d 1128, 1133 (9th Cir. 1990), rev'd. in part, 501 U.S. 190 (1991).

Here, the Respondent's decision to place four new pillows on certain beds had the effect of rendering the work of housekeepers who changed those beds more onerous and time consuming.[10] That effect was amenable to bargaining. The Respondent might have agreed to purchase new pillowcases or assign an increased number of credits to rooms that contain the new pillows. Indeed, McDonald effectively admitted to Georgescu that there was a problem since he told her the Respondent would buy pillowcases that fit the new pillows. For its part, the Union might have offered some concession to offset the Respondent's cost of purchasing new pillowcases. Whether we characterize the issue as decision or effects bargaining, the Respondent was obligated to give the Union an opportunity to engage in that bargaining process once McDonald learned of the problem from Georgescu *if* the impact on unit employees' terms and conditions of employment was material, substantial, and significant. *EOD Motors Eastern Air Devices, Inc.*, 346 NLRB 1060, 1065 (2006), citing *Millard Processing Services*, 310 NLRB 421, 425 (1993).

In my opinion, the impact of the change in pillows on unit employees comes close to falling below the standard that requires bargaining, but just marginally hovers above it.[11] Djeka and Georgescu credibly testified that they cleaned certain rooms that contained the new pillows, but it is not clear how many of those rooms were cleaned each day by each housekeeper. On the other hand, I credit the housekeepers' testimony that it was significantly more onerous and time consuming to change the new pillows. McDonald effectively admitted that the old pillowcases were too small after Georgescu injured her arm trying to change one of the new pillows. The Respondent also admits that housekeepers could be subject to disciplinary coaching if it took them considerably longer than 20 minutes to clean a room.

In *The Bohemian Club*, 351 NLRB 1065, 1066 (2007), the Board found that the assignment to cooks of an extra 30 minutes of cleaning tasks per day was "more than a minimal amount" and "constituted a material, substantial and significant change." Here, even if certain housekeepers were only assigned to clean a few rooms containing the new pillows each day, it could increase their daily workload by about 30 minutes. And while I do have some sympathy for managers who may question the legal significance of a change in pillows, the evidence indicates that it had a greater adverse impact on housekeepers than was perhaps expected. Under these circumstances, I find that the effect of the change in pillows on housekeepers' work was sufficiently material, substantial, and significant to impose a bargaining obligation on the Respondent.

Although neither party addressed the issue, I find a violation even though the evidence does not indicate that the union demanded bargaining. In my opinion, the Respondent did not have an immediate obligation to notify and bargain over the purchase and use of the new pillows because, it appears, nobody expected the change to adversely impact the terms and conditions of employment of unit employees. However, housekeepers told McDonald and the Union about the problem once they began having trouble changing the pillowcases of the new pillows. In *Fountain Valley Regional Hospital*, 297 NLRB 549, 551 (1990), the Board stated as follows regarding the obligation of an employer to notify the union of a change and the obligation of a union to demand bargaining:

> It is true that "actual notice" of a contemplated change in employment conditions supplied from a source other than the employer may be sufficient to trigger the union's obligation to request bargaining. See, e.g., *Kansas Education Assn.*, 275 NLRB 638, 639 (1985). But, such notice must be clear and must be received sufficiently in advance of implementation to allow a reasonable opportunity to bargain concerning the change. See, e.g., *American Distributing Co. v. NLRB*, 715 F.2d 446, 450 (9th Cir. 1983), cert. denied 466 U.S. 958 (1984), enfg. 264 NLRB 1413 (1982). What constitutes sufficient notice of a change depends on all the circumstances of a case. *Emhart Industries*, 297 NLRB 215 (1989).

Here, the Union did not receive advance notice of the change before it was implemented. Although this was not necessarily the Respondent's fault (as nobody seemed to know that the new pillows would cause a problem), a unilateral change violation does not turn on bad faith. *Seven Seas Union Square, LLC*, 368 NLRB No. 92 (2019); *Carpenters Local 1031*, 321 NLRB 30 (1996); *Ivy Steel & Wire, Inc.*, 346 NLRB 404, 418–419 (2006). Further, the Union quickly manifested its opposition to the Respondent's change in pillow policy by filing an unfair labor practice charge on February 20, 2020. And although a union cannot normally be content with merely protesting an employer's proposed change in terms and conditions of employment by filing a

[10] I do not find it particularly significant whether, prior to February 2020, queen-size beds had two pillows instead of four and king-sized beds had two king and two queen-size pillows instead of four king-sized pillows. Even if housekeepers were required to change more pillows or, at least, more king size pillows, it would not have made their jobs significantly more onerous or time consuming if the old pillowcases fit on the new pillows. Conversely, the problem of changing four new king size pillows which did not fit in the old pillowcases would be the same even if there were four old king size pillows on every bed before February 2020.

[11] Even though Georgescu injured her arm while changing a new pillow, I do not adopt the General Counsel's argument that the new pillows made employees significantly "less safe." The General Counsel relies on *Northside Center for Child Development*, 310 NLRB 105, 105 (1993), in which the question was whether guards would carry guns, thereby potentially affecting "the safety, and indeed the life, of the guard involved." It is, to say the very least, a stretch to equate pillows and guns. The fact that Georgescu hurt her arm while changing a new pillow, does suggest that it was considerably more difficult than changing an old pillow, but does not establish that the new pillows created an ongoing "health and safety" issue, as the General Counsel asserts.

charge without making a demand to bargain, the change in question had already been implemented. Thus, at this point, the Union could logically conclude that the proper course of action was to file a charge rather than demand bargaining.

Based on the foregoing, I find that the Respondent violated Section 8(a)(5) and (1) of the Act by rendering the work of housekeepers significantly more onerous and time consuming as a result and effect of its decision to place new pillows on the beds in certain rooms.

CONCLUSIONS OF LAW

1. The Respondent, 11 West 51 Realty LLC d/b/a The Jewel Facing Rockefeller Center, is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union, New York Hotel and Motel Trades Council, AFL–CIO, is a labor organization with the meaning of Section 2(5) of the Act.

3. The Respondent violated Section 8(a)(5) and (1) of the Act by unilaterally changing, as follows, the terms and condition of employment of bargaining unit employees without notifying the Union and giving it an opportunity to bargain:

(a) Suspending regular wage increases granted to employees on their 2-year anniversary with the company.
(b) Limiting paid annual vacation to 2 weeks.
(c) Rendering the work of housekeepers significantly more onerous and time consuming as a result and effect of its decision to place new pillows on the beds in certain rooms.

4. The unfair labor practices committed by the Respondents affect commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

Having found that the Respondent, 11 West 51 Realty LLC d/b/a The Jewel Facing Rockefeller Center, engaged in certain unfair labor practices, I shall order the Respondent to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act. Specifically, having found that the Respondent violated Section 8(a)(5) and (1) of the Act by unilaterally changing the terms and conditions of employment of unit employees, I shall order the Respondent to notify and bargain with the Union before implementing any further changes in wages, hours, or other terms and conditions of employment of unit employees. Further, having found that the Respondent violated Section 8(a)(5) and (1) by suspending its practice of granting regular wage increases to employees on their 2-year anniversary with the company, limiting paid annual vacation to 2 weeks, and rendering the work of housekeepers significantly more onerous and time consuming as a result and effect of its decision to place new pillows in certain rooms, I shall order the Respondent to restore the status quo ante.

The Respondent shall make whole its unit employees for any loss of earnings and other benefits suffered as a result of the unlawful suspension of wage increases, reduction of paid vacation, and change in the work of housekeepers. The make-whole remedy shall be computed in accordance with *Ogle Protection Service*, 183 NLRB 682 (1970), enfd. 444 F.d 502 (6th Cir. 1971), with interest as prescribed in *New Horizons*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB 6 (2010).

Additionally, I shall order the Respondent to compensate affected unit employees for the tax consequences, if any, of receiving lump-sum backpay awards, in accordance with *Don Chavas, LLC d/b/a Tortillas Don Chavas*, 361 NLRB 101 (2014), and file with the Regional Director for Region 2, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay award to the appropriate calendar year for each affected employee in accordance with *AdvoServ of New Jersey, Inc*., 363 NLRB 1324 (2016). To better effectuate the Social Security reporting remedy, the General Counsel asks me to order the Respondent to furnish to the Regional Director copies of "appropriate W–2 forms" for affected employees. The Board has broad discretionary authority under Section 10(c) to fashion appropriate remedies that will effectuate the purposes of the Act. See, e.g., *NLRB v. J.H. Rutter-Rex Mfg. Co.*, 396 U.S. 258, 262–263 (1969). Having considered this proposal in a recent and similar case, the Board agreed that requiring employers subject to a backpay obligation to furnish appropriate W–2 forms will effectuate the purposes of the Act. *Cascades Containerboard Packaging*, 370 NLRB No. 76, slip. op. at 2–3 (2021). Accordingly, I shall order the Respondent to do so.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[12]

ORDER

The Respondent, 11 West 51 Realty LLC d/b/a The Jewel Facing Rockefeller Center, New York, New York, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Unilaterally changing the terms and conditions of employment of unit employees by suspending its practice of granting regular wage increases to employees on their 2-year anniversary with the company, limiting annual paid vacation to 2 weeks, and rendering the work of housekeepers significantly more onerous and time consuming as a result and effect of its decision to place new pillows in certain rooms, without notifying the Union, New York Hotel and Motel Trades Council, AFL–CIO, and giving the Union an opportunity to bargain.

(b) In any like or related manner interfering, 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) Make affected unit employees whole for any loss of earnings and other benefits suffered as a result of the unlawful unilateral changes it implemented, in the manner set forth in the remedy section of this decision.

(b) Compensate unit employees for the adverse tax

[12] 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.

consequences, if any, of receiving lump-sum backpay awards.

(c) Within 21 days of the date the amount of backpay is fixed by agreement or Board order, or such additional time as the Regional Director may allow for good cause shown, file with the Regional Director for Region 2 a report allocating the backpay award to the appropriate calendar years for each affected employee.

(d) File with the Regional Director of Region 2 a copy of each backpay recipient's corresponding W–2 form(s) reflecting the backpay award.

(e) Before implementing any changes in wages, hours, or other terms and conditions of employment of unit employees, notify and bargain with the Union as the exclusive collective-bargaining representative of employees in the following bargaining unit:

> Included: All full-time and regular part-time Front Desk, Engineering, and Housekeeping employees, including, but not limited to, Floor Attendants, Guest Service Representatives, and Guest Service Managers, employed by the Respondent at its facility located at 11 West 51st Street, New York, NY.
>
> Excluded: All other employees, including office clerical employees, and guards, and professional employees and supervisors as defined in the Act.

(f) Restore the unit employees' terms and conditions of employment to the status quo before the unlawful unilateral changes were made.

(g) 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.

(h) Post at its 11 West 51st Street, New York, New York facility copies of the attached notice marked "Appendix." Copies of the notice, on forms provided by the Regional Director for Region 2, 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. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. 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, copies of the notice to all current employees and former employees employed by the Respondent at any time since December 20, 2019.

(i) Within 21 days after service by the Region, file with the Regional Director for Region 2 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

APPENDIX

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 unilaterally change your terms and conditions of employment without notifying your Union, New York Hotel and Motel Trades Council, AFL–CIO, and giving the Union an opportunity to bargain over such changes, including the suspension of our practice of regularly granting wage increases to employees on their 2-year anniversary with the company, the reduction of paid annual vacation, and changes in supplies (e.g. pillows) which have the result and effect of rendering your work more onerous and time consuming.

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

WE WILL make affected unit employees whole, with interest, for any loss of earnings and other benefits suffered as a result of our unlawful unilateral changes to your wages, benefits, and working conditions.

WE WILL compensate affected unit employees for the adverse tax consequences, if any, of receiving lump-sum backpay awards.

WE WILL file with the Regional Director for Region 2, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay awards to the appropriate calendar years for each affected unit employee.

WE WILL file with the Regional Director of Region 2 a copy of each affected unit employee's corresponding W–2 form(s) reflecting the backpay award.

WE WILL, before implementing any changes in wages, hours, or other terms and conditions of employment of unit employees, notify and bargain with the Union as the exclusive collective-bargaining representative of our employees in the following bargaining unit:

> Included: All full-time and regular part-time Front Desk, Engineering, and Housekeeping employees, including, but not limited to, Floor Attendants, Guest Service Representatives, and Guest Service Managers, employed by 11 West 51 Realty LLC d/b/a The Jewel Facing Rockefeller Center at its facility located at 11 West 51st Street, New York, NY.

Excluded: All other employees, including office clerical employees, and guards, and professional employees and supervisors as defined in the Act.

WE WILL restore unit employees' terms and conditions of employment to what they were before we unlawfully changed them.

11 WEST 51 REALTY LLC D/B/A THE JEWEL FACING ROCKEFELLER CENTER

The Administrative Law Judge's decision can be found at www.nlrb.gov/case/02-CA-256884 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.