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HTH Corporation, Pacific Beach Corporation, and
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UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

REGION 20, SUBREGION 37

HTH CORPORATION, PACIFIC BEACH CORPORATION, and KOA MANAGEMENT, LLC, a SINGLE EMPLOYER, dba PACIFIC BEACH HOTEL, Respondents, and HTH CORPORATION dba PACIFIC BEACH HOTEL,	CASE NOS.:	37-CA-7311 37-CA-7334 37-CA-7422 37-CA-7448 37-CA-7458 37-CA-7476 37-CA-7478 37-CA-7482 37-CA-7484 37-CA-7488 37-CA-7537 37-CA-7550 37-CA-7587
and KOA MANAGEMENT, LLC dba PACIFIC BEACH HOTEL,	CASE NO.:	37-CA-7470
and PACIFIC BEACH CORPORATION dba PACIFIC BEACH HOTEL,	CASE NO.:	37-CA-7472

and INTERNATIONAL LONGSHORE AND WAREHOUSE UNION, LOCAL 142, Union.	CASE NO.: 37-CA-7473 **RESPONDENTS' ANSWERING BRIEF TO COUNSEL FOR THE GENERAL COUNSEL'S CROSS-EXCEPTIONS TO THE ADMINISTRATIVE LAW JUDGE'S DECISION; CERTIFICATE OF SERVICE** Hearing: Judge: James Kennedy Date: November 4-12, 2008 February 19-27, 2009 Time: 9:00 a.m

RESPONDENTS' ANSWERING BRIEF TO COUNSEL FOR THE GENERAL COUNSEL'S CROSS-EXCEPTIONS TO THE ADMINISTRATIVE LAW JUDGE'S DECISION

The Counsel for the General Counsel filed several cross-exceptions to the Administrative Law Judge's ("ALJ") Decision. The Counsel for the General Counsel's exceptions are without merit and should be rejected for the following reasons.

I. Any Unfair Labor Practices Alleging A Discriminatory Refusal To Hire Unnamed Individuals Are Meritless And Should Be Rejected

The Counsel for the General Counsel argues that Respondents somehow committed a violation of Section 8(a)(5) of the National Labor Relations Act because Respondents did not hire certain *unnamed* individuals to work at the Pacific Beach Hotel starting on December 1, 2007. During the hearing in this matter, however, the Counsel for the General Counsel never proffered any evidence of who those so-called unnamed individuals might be.

In addition, the Complaint in this matter did not mention anything about discrimination against – or a failure to hire – those unnamed individuals. Furthermore, the Second Amended Charge in Case No. 37-CA-7478, which gave rise to the Counsel for the General Counsel's claim

for discriminatory hiring of other named employees, is devoid of any mention that Respondents discriminatorily refused to hire certain unnamed individuals.

Therefore, it is puzzling that the Counsel for the General Counsel would pursue charges of discriminatory refusal to hire unnamed individuals for whom no evidence was ever presented. In addition, it is also improper for the Counsel for the General Counsel to pursue such charges, because such charges were never part of the unfair labor practice charge giving rise to the claim for discriminatory hiring.

In addition, it appears the Counsel for the General Counsel is repeating their erroneous argument that Respondents were the "continuous" employer for the Hotel employees. In making this erroneous argument, the Counsel for the General Counsel may attempt to argue that former employees from Shogun restaurant are entitled to reinstatement. This argument, if made, should be rejected, however, because the Counsel for the General Counsel has already specifically stated that the former Shogun employees are *not* entitled to remedy. *See Transcript of Proceedings at 2324* (hereinafter *"Tr. at __.")*. Therefore, the Counsel for the General Counsel has effectively waived any claims that the Shogun employees would be entitled to remedy, and any attempt to add such a claim at this juncture is improper and should be rejected.

Finally, it is also important to point out that this cross-exception by the Counsel for the General Counsel clearly showed that the Counsel for the General Counsel itself agrees that any issue regarding the non-hire of these unnamed individuals – as well as the seven named individuals discussed in Respondents' Exceptions, *see Respondents' Brief in Support of Exceptions at 32-38* – should be analyzed under the Board's refusal to hire standard found in *Jerry Ryce Builders, Inc.*, 352 NLRB No. 143 (2008), and not the Board's discriminatory discharge standard found in *Wright-Line*, 252 NLRB 1083 (1980). Under the *Jerry Ryce*

standard, it is clear the Counsel for the General Counsel would be wholly unable to establish, let alone allege, a discriminatory refusal to hire violation by Respondents because the Counsel for the General Counsel has not even identified these unnamed individuals. Therefore, without even knowing the identities of these unnamed individuals, it would be impossible to determine whether they had "experience or training relevant to the announced or generally known requirements of the position for hire" as required by *Jerry Ryce*. *See Jerry Ryce*, 352 NLRB at 1269.

Accordingly, Counsel for the General Counsel's Exceptions 1 and 2 should be denied.

II. The Counsel For The General Counsel's Allegation That Respondents Changed Employee Wage Rates Is Factually Incorrect

The Counsel for the General Counsel also argued that Respondents unilaterally lowered the wages of certain employees as of December 1, 2007. This allegation is factually incorrect.

As the Counsel for the General Counsel noted itself, employees did not have their wage rates changed. *See Brief in Support of Counsel for the General Counsel's Exceptions at page 7* (hereinafter "*GC Brief at __.*"); *see also Tr. at 113-115.* Rather, some employees held a different job position at the Hotel as of December 1, 2007. In some cases, the employee's new job position had a different wage rate than the employee's former job position. Therefore, the employee received a different wage rate because the employee held a different job position.

Clearly, Respondents did not change any terms and conditions of employment for any of the employees or job positions. Rather, the terms and conditions of the job positions remained the same, and some employees changed their job positions.

Therefore, Counsel for the General Counsel's Exception 3 should be denied.

III. The Counsel For The General Counsel's Request For An Order Reinstating Employees Who May Or May Not Have Been Terminated Within Their First 90 Days Of Employment Should Be Denied

The Counsel for the General Counsel argues that the ALJ should have instituted an order reinstating individuals who were terminated within a 90-day probationary period imposed by Respondents. This argument is completely tenuous for two reasons.

First, this request by the Counsel for the General Counsel is pointless, premature and improper. The request is pointless because the Counsel for the General Counsel has not named a single employee who was terminated within the 90-day probationary period. Therefore, there would be no reason for such an order because there are no employees who are alleged to have a need to be reinstated. This request is also premature for the same reason. There have been no allegations that any employees were terminated during the 90-day probationary period, and therefore, there is no reason for an order to reinstate employees who do not exist. Finally, the Counsel for the General Counsel's request is improper, because it would essentially preempt Respondents from terminating any employee from employment for any reason whatsoever if that termination were to occur within an employee's first 90 days of employment.

Second, this request is moot because Respondents were a new employer at the time they instituted the 90-day probationary period on the employees. Additionally, Respondents did not recognize the Union as the bargaining representatives of the Hotel employees as of December 1, 2007. Therefore, it was within Respondents' rights to set such a term and condition of employment on the employees. *See NLRB v. Burns Security Services,* 406 U.S. 272 (1972)(new employer has right to set initial terms and conditions of employment.).

Accordingly, the Counsel for the General Counsel's Exception 4 should be rejected.

IV. PBHM Was Not Respondents' Agent

In making the argument that PBHM was Respondents' agent, Counsel for the General Counsel made a huge error in logic by arguing that PBHM acted "on Respondents' behalf." *See GC Brief at 18 and 19.* Such an argument is erroneous because Respondents were *not* the employer of the Hotel employees from January 1 through November 30, 2007. Rather, Respondents were simply the *owners* of the Hotel. PBHM was the employer of the employees during that time. Therefore, any employment decisions PBHM may have made between January 1 and November 30, 2007 were made on behalf of itself.

As noted above, the Counsel for the General Counsel appears to be repeating its erroneous argument that Respondents were somehow the "continuous" employer of the Hotel employees, even though the ALJ never made this determination. Specifically, the Counsel for the General Counsel appears to be arguing that Respondents were the continuous employer, and therefore, when PBHM became the employer of the Hotel employees, it was really just acting on Respondents' behalf. This argument would be completely erroneous, however, because Respondents were not the continuous employer of the Hotel employees. Rather, PBHM was the employer of the Hotel from January 1 through November 30, 2007. Respondents simply owned the Hotel during that time.

Perhaps the Counsel for the General Counsel does not fully understand the workings of a typical management agreement or the difference between being an *owner* of a hotel and the *employer* of a Hotel. The distinction, however is quite significant. The *owner* of a hotel – or Respondents in this case – own the actual physical property of the Hotel itself. The owner of a hotel may also be responsible for payment such as rent, utilities, etc. The *employer* – or PBHM in this case – is in a completely different situation. The employer is responsible for handling the employment matters of all the employees, including hiring and managing the employees. Most

times, the owner and the employer are one and the same. Other times, such as when you have a management agreement like in the present case, the owner and employer are two separate parties.

In the present case, from January 1 through November 30, 2007, Respondents owned the Pacific Beach Hotel. During that time, however, PBHM was the employer for all employees at the hotel under the terms of a Management Agreement with Respondents. Therefore, PBHM did not act "on behalf of Respondents"; it acted on behalf of itself. Respondents were not involved in the employment matters at the hotel, at least not between January 1 and November 30, 2007.

Further, as the Counsel for the General Counsel has acknowledged, PBHM was not the agent of Respondents, because Respondents had no control over PBHM's actions. *See Restatement (Third) of Agency § 1.01 (2006).* Rather, PBHM was free to operate the workforce as it saw fit, and Respondents were not involved in the day-to-day operations of the hotel. PBHM was also responsible for negotiating a collective bargaining agreement with the Union, and the Respondents were not involved in such negotiations in any way. In fact, Respondents were never consulted about the negotiations, and were not even kept apprised of the negotiations process. Specifically, PBHM reached several tentative agreements with the Union, and did not consult with or inform Respondents of any of the tentative agreements before signing them. *See Tr. at 538.* In addition, during this time, Respondents did not ask to see or review any of the tentative agreements reached between PBHM and the Union. *Tr. at 568.*

The Counsel for the General Counsel may attempt to argue that Respondents had control over the negotiations because it retained approval authority over the final collective bargaining agreement. Such an argument would be patently untrue, but Respondents should address it anyway because the Counsel for the General Counsel has repeated this flawed argument several times throughout the proceedings.

The simple fact is that it was *not* Respondents, but rather a bank called UBS that retained approval authority over any major contracts. Prior to PBHM assuming operations of the hotel, Respondents refinanced the Hotel through a loan with UBS. As a condition of the loan, UBS retained the right to approve or deny any "major contracts" that had a financial impact on the Hotel. This approval authority applied equally to Respondents or any other party who was in charge of the Hotel. From UBS' viewpoint, in order to provide security for its loan to Respondents, any major contract that impacted the financial status of the hotel needed to be approved by UBS. Therefore, Respondents did not retain approval authority; UBS did.

Surely, the fact that UBS had the right to approve or reject contracts that had a financial impact on the Hotel did not render Respondents as having control over PBHM. After all, it was the bank, and not Respondents, who retained control over the approval of any major contracts. Therefore, if the Counsel for the General Counsel attempts to make this argument again, it should be rejected.

V. The Counsel For The General Counsel's Argument That All Tentative Agreements Should Be Reinstated Is Disingenuous

Counsel for the General Counsel has repeatedly accused Respondents of failing to bargain in good faith and even went so far as to claim that "Respondents did not bargain in good faith at any time" and that Respondents' actions have "robbed" the Union of an opportunity to reach a collective bargaining agreement. *See Counsel for the General Counsel's Answering Brief at 101-102.* Based on such accusations, Counsel for the General Counsel seeks a one-year extension – or essentially a complete renewal – of the certification period. In addition, the Counsel for the General Counsel has even asked that Respondents be required to pay for the Union's costs for negotiations.

At the same time, however, the Counsel for the General Counsel obviously believes that the negotiations between Respondents and the Union were fruitful, because they are now requesting that all 170 tentative agreements between Respondents and the Union be reinstated. Therefore, it is disingenuous for the Counsel for the General Counsel to accuse Respondents of completely failing to bargain with the Union, and at the same time, ask that all agreements reached between Respondents and the Union be honored.

On the other hand, if Respondents and the Union are required to honor the 170 tentative agreements that were reached over the course of 36 bargaining sessions, then a full one-year extension of the certification period would not be warranted. As noted by Respondents through the post-hearing proceedings, there are only a few outstanding issues left to be resolved in the negotiations for a collective bargaining agreement. And now, the Counsel for the General Counsel has essentially acknowledged that fact by asking that all tentative agreements reached between the parties be reinstated. Therefore, if such tentative agreements are reinstated, the Counsel for the General Counsel's request for a full one-year extension of the bargaining period should be rejected.[1]

VI. Compounded Interest Is Contrary To Board Law

Under prevailing Board law, interest on any backpay award is to be paid under the formula prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

Since the issuance of *New Horizons*, several General Counsels have attempted to argue that this Board should adopt a policy of awarding compounded interest, but with no success. *See GC Memorandum 07-07.* In addition, in March 1992, the Board published a notice of

[1] Respondents maintain their position that they should not be required to recognize the Union and that no extension of the certification period should be granted because the Union has lost majority status of the employees and the Counsel for the General Counsel has been unable to establish the alleged unfair labor practice charges against Respondents.

rulemaking that to establish a policy of awarding compounded interest on a daily basis for monetary remedies. *See Id.* After receiving comments on the proposed rule regarding compounded interest, however, the Board declined to implement the proposed rule. *See Id.*

Therefore, the Counsel for the General Counsel's argument that the ALJ erred by not awarding compounded interest should be rejected. The ALJ was acting in accordance with Board policy, and therefore, his decision to decline to award compounded interest on any monetary awards should be upheld.

DATED: Honolulu, Hawaii, December 23, 2009.

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and	CASE NO.:	37-CA-7470
KOA MANAGEMENT, LLC dba PACIFIC BEACH HOTEL,		
and	CASE NO.:	37-CA-7472
PACIFIC BEACH CORPORATION dba PACIFIC BEACH HOTEL,		
and	CASE NO.:	37-CA-7473
INTERNATIONAL LONGSHORE AND WAREHOUSE UNION, LOCAL 142, Union.	**CERTIFICATE OF SERVICE**	

CERTIFICATE OF SERVICE

I hereby certify that on December 23, 2009, the foregoing RESPONDENTS' ANSWERING BRIEF TO COUNSEL FOR THE GENERAL COUNSEL'S CROSS-

EXCEPTIONS TO THE ADMINISTRATIVE LAW JUDGE'S DECISION; CERTIFICATE OF SERVICE was electronically filed with OFFICE OF EXECUTIVE SECRETARY in Washington, D.C., and a copy of the same was hand delivered to:

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