

UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
REGION 29

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INDEPENDENCE RESIDENCES, INC.

and

Case Nos. 29-CA-26042  
29-CA-30566

WORKERS UNITED, SERVICE EMPLOYEES  
INTERANTIONAL UNION

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**OPPOSITION TO RESPONDENT'S MOTION TO DISMISS THE COMPLAINT**

The undersigned Counsel for the Acting General Counsel hereby submits its Opposition to Respondent's Motion to Dismiss the above-captioned Complaint, filed by Respondent Independence Residences, Inc., and respectfully requests that the Board deny Respondent's Motion in its entirety.

**I. Background:**

On April 24, 2003, Union of Needletrades, Industrial, and Textile Employees, AFL-CIO, CLC, herein called "UNITE," filed a petition seeking to represent all employees employed by Respondent, Independence Residences, Inc. Pursuant to a Stipulated Election Agreement, a mail ballot election was held on June 2, 2003. UNITE won the election and the Respondent filed objections. The objections, in part, raised the issue of whether a provision of New York State labor law warranted overturning the election. On November 18, 2003, a hearing on the objections was held before an Administrative Law Judge (ALJ).

On December 30, 2003, UNITE filed the charge in Case No. 29-CA-26042 alleging various 8(a)(1), (3), (4), and (5) allegations. On February 25, 2004, the Region

determined to issue complaint on the 8(a)(1) and (5) portions of the charge alleging unlawful statements and unilateral changes.<sup>1</sup> However, given that the objections to the election were pending before the ALJ, the Region decided to freeze the case because its outcome was dependent upon whether UNITE was certified as the representative of the Respondent's employees. With regard to the 8(1) allegations, the Region determined that it would have been an inefficient expenditure of resources to litigate the 8(1) violations without the corresponding 8(5) violations, particularly where some of the witnesses involved would testify to both the 8(1) and 8(5) allegations. All parties were informed of the Region's decision to freeze the meritorious portions of the charge.<sup>2</sup>

On June 7, 2004, the ALJ recommended overruling Respondent's objections. Respondent requested review of the ALJ's recommendation and the case was then submitted to the Board.

On August 27, 2010, the Board issued a Decision and Certification of Representative certifying UNITE as the collective bargaining representative of the Respondent's employees.

On January 3, 2011, Workers United, SEIU, herein called "Workers United," (UNITE's successor as alleged in the Order Consolidating Cases, Consolidated Complaint and Notice of Hearing discussed below), filed a charge in Case No. 29-CA-30566 alleging that the Respondent refused to bargain with it, and that Respondent refused to provide Workers United with information necessary for collective bargaining, in violation of Sections 8(a)(1) and (5) of the Act.

On February 28, 2011, the Regional Director for Region 29 issued an Order Consolidating Cases, Consolidated Complaint and Notice of Hearing, on the allegations

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<sup>1</sup> The non-meritorious allegations were withdrawn.

<sup>2</sup> Attorney for Respondent Colleen Sorrell was notified by the Board agent on February 27, 2004 of the Region's decision to freeze the meritorious allegations.

contained in both 29-CA-26042 and 29-CA-30566. A hearing is currently scheduled for May 23, 2011.

## II. Respondent's Motion to Dismiss:

Respondent argues that the allegations contained in Case No. 29-CA-20642 should be dismissed based upon the equitable defense of laches. First, it claims that the Region could have processed the 8(1) portion of the charge as these claims were not contingent upon the outcome of the representation proceeding. Secondly, it claims that the Board's delay in deciding the representation case was unreasonable and inexcusable. Lastly, Respondent argues that it was prejudiced by the delay in that two witnesses with knowledge of the events in question (one coordinator and one manager) no longer work for the Respondent.

## III. Argument:

Counsel for the Acting General Counsel argues that Respondent's Motion to Dismiss should be denied because the doctrine of laches is inapplicable to the instant proceedings.

The equitable defense of laches is generally not available in circumstances where public policy requires the vindication of rights of the employees who have been the targets of an employer's unfair labor practices. Aroostook County Regional Ophthalmology Center, 332 NLRB 1616, 1619 (2001). It has, in fact, long been observed by the Supreme Court and the Board that the defense of laches does not lie against the Board as an agency of the United States government. NLRB v. J.H. Rutter-Rex Manufacturing Co., 396 U.S. 258 (1969); Harding Glass Company, Inc. 337 NLRB

No. 175 at p. 4 (2002); Consolidated Casinos Corp., 266 NLRB 938, 992 (1983); Merill M Williams, 265 NLRB 506, 508 (1982).

In NLRB v. J.H. Rutter-Rex Manufacturing Co., 396 U.S. 258, 264-265 (1969), the Supreme Court stated: "Wronged employees are at least as much injured by the Board's delay in collecting their backpay as the wrongdoing employer... the Board is not required to place the consequences of its own delay, even if inordinate, upon wronged employees to the benefit of wrongdoing employers."

In St. Anthony Hospital Systems, 319 NLRB 46 (1995), the Board affirmed an ALJ's conclusion that a 12-year delay in adjudicating the unfair labor practices involved therein did not result in "a due process level of prejudice" to the employer. In support of its prejudice claim, the employer in St. Anthony argued in part that during the 12-year delay, it experienced a complete turnover in human resource executives and the loss of all staff persons having labor relations responsibilities during the relevant time period. In rejecting the employer's prejudice argument, the ALJ with Board approval, pointed out that there was no showing made that individuals with germane knowledge of the past could not be located.

Based upon the case law cited above, the doctrine of laches is inapplicable to the instant proceedings and Respondent's Motion to Dismiss based solely on this doctrine should be denied.

With regard to Respondent's undue prejudice arguments, assuming a showing of undue prejudice could overcome the inapplicability of the laches doctrine, Respondent has not presented evidence sufficient to establish "a due process level of prejudice" based upon the approximately 7-year delay between the filing of the charge and the issuance of the Complaint. Respondent's prejudice argument is based upon the fact that two former supervisors (one coordinator and one manager) are no longer

employed by Respondent. In addition, the Respondent notes that it is “not aware” of where the coordinator lives, and it “believes” that the manager currently resides in Atlanta, Georgia. As in St. Anthony, supra, Respondent has failed to demonstrate that either of these individuals (or other individuals with germane knowledge of the past) could not actually be located. At this point, Respondent only speculates that these witnesses are unavailable. Thus, Respondent’s argument that it has been prejudiced via the unavailability of witnesses does not rise to a level of prejudice that would except this case from all other Board cases cited above where the doctrine of laches has been rejected. Respondent has not established in any manner that these two witnesses are unavailable.

With regard to Respondent’s argument that the 8(1) allegations should have been litigated, it was reasonable and efficient for the Region to hold the 8(a)(1) charges in abeyance along with the corresponding 8(a)(5) claims. Pursuant to the Board’s Case Handling Manual Section 10118.4 “Administrative Deferral,” a Regional Office may postpone determination of a ULP charge due to the pendency of closely related matters in other proceedings. As noted earlier, some witnesses that would have testified to the 8(5) allegations would also be needed to support the 8(a)(1) allegations. In the interest of efficiency and conservation of resources, it was reasonable for the Region to decide to hold all allegations in abeyance pending the outcome of the representation case.

Even if it could be argued that the Region’s decision was “unreasonable,” the Board and courts have held that the doctrine of laches does not apply to the NLRB even where the delay in fact was unreasonable. As the Board stated in *F.M. Transport, Inc.*, 302 NLRB 241 at 241 (1991), “Even in instances of unreasonable delay in the prosecution of cases before the Board, the doctrine of laches has not been applied where this would place the consequences of agency delay on wronged employees to

the benefit of those who have wronged them.” Thus, Respondent’s argument regarding the litigation of the 8(1) claims lacks merit.

IV. Conclusion:

Based on the above, Counsel for the Acting General Counsel respectfully urges that Respondent’s Motion to Dismiss be denied in its entirety, and that the hearing proceed as scheduled on May 23, 2011, on all the allegations set forth in the Consolidated Complaint.

Dated April 26, 2011, at Brooklyn, New York.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Emily A. Cabrera", written over a horizontal line.

Emily A. Cabrera  
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Date of Emailing: April 26, 2011

**STATEMENT OF SERVICE OF: COUNSEL FOR THE ACTING GENERAL COUNSEL'S OPPOSITION  
TO RESPONDENT'S MOTION TO DISMISS THE COMPLAINT.**

I, the undersigned employee of the National Labor Relations Board, hereby state, under penalty of perjury that, in accordance with NLRB Rules & Regulations § 102.114(i), a copy of the foregoing was sent to each party at the addresses listed below and on the date indicated above:

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