

**UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
REGION 32**

In the Matter of:

AMERICAN BAPTIST HOMES OF  
THE WEST d/b/a PIEDMONT  
GARDENS,

Employer,

Case No. 32-CA-35247,  
32-CA-25248, 32-CA-25266,  
32-CA-25271 through 32-CA-25308,  
32-CA-25498

and

SERVICE EMPLOYEES  
INTERNATIONAL UNION, UNITED  
HEALTHCARE WORKERS-WEST,

Union.

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**RESPONDENT'S BRIEF IN SUPPORT OF LIMITED CROSS-EXCEPTIONS  
TO THE DECISION AND RECOMMENDED ORDER  
OF THE ADMINISTRATIVE LAW JUDGE**

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## **I. PRELIMINARY STATEMENT.**

American Baptist Homes of the West d/b/a Piedmont Gardens (“Respondent” or “Employer”) has excepted to certain limited portions of the Decision of Administrative Law Judge Burton Litvack (“ALJ”) in the instant matter. Specifically, Respondent excepts to the portion of the Decision where the ALJ concluded that Respondent violated Section 8 (a) (1) by allegedly disparately enforcing its no-access rule for off-duty employees against certain union activity-related visits, as well as the portion of the Decision where the ALJ concluded that Respondent violated Sections 8(a)(1) and (5) by allegedly refusing to provide full names (as opposed to initials) and home addresses of certain of the permanent replacement employees who were at the time filling positions previously held by striking employees. Finally, regarding the major portion of this case, namely the allegation that Respondent violated Section 8(a)(3) when it failed immediately to reinstate permanently replaced striking employees, the ALJ found that Respondent acted within its rights in that regard and concluded that no violation occurred. Of course, Respondent is not excepting to that conclusion. However, in so doing the ALJ made some conclusions, which while not affecting the ultimate Decision, nonetheless were contrary to the law and facts, meriting their own limited exceptions.

## **II. FACTS.**

### **A. The Employer And The Union Commenced Negotiations Over The Contract In February 2010.**

American Baptist Homes of the West operates retirement facilities throughout the western United States, including a community called Piedmont Gardens, located in Oakland, California. (Tr. at 34:4-7; ALJD at 3:16-19)<sup>1</sup>.

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<sup>1</sup>References to the official transcript are referred to as “Tr. at \_\_\_\_.” References to the Decision of the ALJ are “ALJD at \_\_\_\_.” General Counsel and Respondent’s exhibits are referred to as “G.C. Exh. \_\_\_\_” and “Resp. Exh. \_\_\_\_” respectively.

Piedmont Gardens is comprised of three interconnected buildings where varying levels of services are provided, including independent living, assisted living, and skilled nursing care. (Tr. at 31:10-15; ALJD at 3:19-22).

SEIU, United Healthcare Workers-West (the “Union”) represents approximately one hundred Piedmont Gardens employees for collective bargaining purposes. (Tr. at 40:8-10; ALJD at 4:4-10). These employees include dietary department workers (cooks, cook helpers, wait staff); nursing department workers (certified nursing assistants and activity assistants); housekeeping department workers (housekeepers, janitors and laundry workers); resident services workers, and general/administration workers (receptionists), among others. (Resp. Exh. 17 [Collective Bargaining Agreement], Section 1.1 – Recognition Clause). The parties’ collective bargaining agreement was set to expire on April 30th, 2010. (Tr. at 59:17-22; ALJD at 3:19-22). In anticipation of the contract’s pending expiration, the parties began bargaining sessions in February 2010. (Tr. at 213:21-214:3; ALJD at 4:12-14).

The bargaining sessions reached a stalemate in June 2010, with neither party willing to compromise on their bargaining positions on critical economic issues. (Tr. at 403:3-8; ALJD at 4:17-18). The Union’s bargaining team, interested in putting economic pressure on Piedmont Gardens, decided to call for a strike vote.<sup>2</sup> (Tr. at 114:13-18; 167:1-168:11; 243:10-244:4; 245:3-6; ALJD at 5:19-30).

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<sup>2</sup>Counsel for the Acting General Counsel did not except to the ALJ’s conclusion that the strike was an economic strike.

**B. For The Safety And Security Of Its Residents And Employees, The Employer Has Maintained A Work Rule That Prohibits Off-Duty Employees From Being On The Premises Except For Limited, Company-Related Reasons, With The Permission Of Their Supervisor.**

The Union conducted its strike vote on June 17th and 18 in the Employer's break room. (ALJD at 5:33-35). It is uncontroverted that the Union never sought the Employer's permission to use the Employer's break room for this purpose. (Tr. at 360:24-361:2; 361:5-7). Certain off-duty employees came onto the premises for the purpose of assisting in the balloting. In so doing they were in violation of the Employer's "access rule," which prohibits employees from being in the building without permission when they are not scheduled to work. (ALJD at 9:31-36) ("Employees may not clock-in for duty before their shift begins, nor are they to remain on the grounds after the end of their shift, unless previously authorized by their supervisor."). The "access rule" has been in effect since at least 1995, and is posted near the time clock and distributed to every employee. (Tr. at 297:13-17; 356:17-357:8).

According to the testimony of Union and Employer witnesses, Union shop stewards have been permitted to enter or remain on the premises during their off-duty time for the limited purpose of attending grievance and disciplinary meetings (ALJD at 9:38-10:3). Off-duty Union shop stewards also conducted other Union-related business at the facility, such as "pass[ing] out flyers or surveys or talk[ing] to [Union] members," or having meetings in the break room. (ALJD at 10:8-9; 10:26-28). During contract negotiations, off-duty Union members on the bargaining committee would come to the break room to give Union "members a regular update of what was happening . . . in bargaining." (ALJD at 10:34-35). For instance, Union shop steward Sheila Nelson testified that, as a shop steward, she used the Employer's break room for meetings with Union members to discuss Union-related updates (Tr. at 63:24-64:4; 64:9-15; ALJD at 10:3-6) and for

passing out Union flyers or surveys (ALJD at 10:8-9). She also met with Union members prior to grievance meetings relating to the enforcement of the Union contract. (Tr. at 64:4-6). She estimated that she had been to the facility approximately 20 or 30 times for union-related matters on days she was not scheduled to work, and that most of those instances were for grievances or disciplinary meetings. (ALJD at 10:49-52).

Off-duty employees were also allowed into the building for limited reasons directly related to their employment, such as to pick up paychecks. (ALJD at 9:38-10:3). Executive Director Gayle Reynolds testified that she was unaware of off-duty employees being in the break room except for shop stewards performing typical shop steward functions. (Tr. at 322:20-323:6). Reynolds also testified that she could only think of one instance since she began working at Piedmont Gardens in May 2009 that an off-duty employee wanted to be in the building on non-Union, non-company business, in violation of the access rule. (Tr. at 357:23-358:5). Security guard Francisco Pinto, who is contracted by the Employer to monitor the facility's entrances, similarly testified that to his knowledge, off-duty employees don't come in "that much" on their day off, except on company-related business. (Tr. at 506:25-507:9).

Because off-duty employees rarely come into the building for non company-related business, management does not generally go out of its way to seek out violations of its access rule. (Tr. at 357:23-358:7; ALJD at 11:2-5). However, as Reynolds testified, when violations of the rule are brought to her attention, the employee is asked to leave. (Tr. at 357:16-22; ALJD at 11:2-5).

**C. The Employer Asked Three Union Employees To Leave The Break Room On June 17 and 18.**

On June 17 and 18, 2010, Reynolds discovered three off-duty employees in the facility, in violation of the access rule. Reynolds discovered Union members

Sheila Nelson and Geneva Henry in the break room on June 17. Both claimed to be assisting with the strike vote. Neither was scheduled to work, so Reynolds asked them to leave the facility. (ALJD at 20:5-18). On June 18, Reynolds also discovered off-duty Union member Faye Eastman in the break room. She also claimed to be assisting the Union representative with the strike vote. Reynolds asked Eastman to leave as well. (ALJD at 20:18-20).

**D. The Union Requests Names and Home Addresses of Permanent Replacement Employees, and The Employer Responds.**

The Union members voted to engage in a strike, which took place from August 2 through August 7, 2010. (ALJD at 27:32). A mere twelve days after the conclusion of the strike, the Union made a written information request of the Employer, including a request that it disclose the names and home addresses of the replacement employees who were currently filling positions previously held by striking employees. (Tr. at 259:10-16; G.C. Exh. 3; ALJD at 17:8-14). The Employer responded with the full names and addresses of some of the permanent replacements (those that were hired from among current employees), but initially provided only the initials and no home addresses for those permanent replacements who were hired from outside sources. (Tr. at 263:11-13; 264:9-16; G.C. Exhs. 4, 5, 6; ALJD at 17:15-31). In its response, the Employer did not refuse to provide the sought-after information; rather, it expressed “privacy and confidentiality” concerns and proposed that the parties discuss “alternative arrangements” that might satisfy the concerns of its employees. The response (G.C. Exh. 4) provided in relevant part:

Regarding the permanent replacements who came from the outside, the Employer has a legitimate concern that providing this information might lead to harassment and possibly violence by the union or its supporters. As you know, some of their people were subjected to abuse and threats at the hands of the union and its supporters during the strike. They also have legitimate privacy and confidentiality concerns that must be considered. So in lieu of providing this information in the form you have requested, we have identified them by initials. We

propose that we notify them of your request, and for those employees who object, we arrange for some method whereby written communications could be forwarded to them by the Employer or even by a disinterested third party. My client is also open to discussing alternative arrangements that meet the legitimate interests of all concerned.

The Employer did not provide the full names and addresses of all the permanent replacements due to concerns over the safety of its employees. (Tr. at 422:22-423:1). The strikers had been loud and aggressive, and the police had been called on several occasions. (Tr. at 424:16-25). Some of the employees, including permanent replacements, were frightened by strikers who had shouted things like "You'll get yours" and "You'll be sorry" to non-striking employees. (Tr. at 429:12-19). One employee reported that a group of strikers had surrounded his car on the street to prevent it from moving. (Tr. at 431:23-432:4; ALJD at 18:20-23). Others had taken to covering their faces with scarves so that the strikers would not see them. (Tr. at 432:23-25; ALJD at 18:23-25). One employee asked to spend the night at the facility so that she would not have to cross the picket line in view of the strikers. (Tr. at 441:15-19). Due to these concerns, the Employer set up a separate entrance into the facility, so that employees would not have to walk past the strikers. (Tr. at 434:5-17; ALJD at 18:23-25).

The Employer's Human Resources Director, had even received death threats and anti-Semitic hate mail. (Resp. Exhs. 12 and 13; ALJD at 18:28-31). These letters, mailed to Piedmont Gardens and to her home, made various threats of violence. (Tr. at 449:11-19). The sender stated an intent to "blow her house up," called her "a dead bitch" and threatened "you can call the police all you want I'm still gon [sic] get you Jewish Bitch!" (Resp. Exh. 12). These threats were clearly directed at the HR director in her position as a Piedmont Garden representative, and were clearly Union related. For example, the letters stated "If you think Piedmont can save you got another thing coming" and praised the Union: "SEIU

Rules” and “Thanks Donna Mapp.” (Resp. Exh. 13; ALJD at 18:30-31). (Donna Mapp was the Union representative.) (ALJD at 5:33).

The Union never responded to the Employer’s request to bargain over the confidential nature of the sought-after information or alternative means of disclosure. At the hearing, Ms. Escamilla, the Union representative, testified that she believed that the allegations of threats against permanent replacements were “bogus and completely ridiculous” and there was “no point in us having an argument or dialogue about it.” (Tr. at 266 at 5-11; ALJD at 17:31-34).

### III. ARGUMENT.

#### A. **The Administrative Law Judge’s Conclusion That The Employer Violated Section 8(a)(1) Through Disparate Enforcement of its No-Access Rule By Asking Off-Duty Employees Nelson, Henry And Eastman To Leave The Facility On June 17 and 18 Is Not Supported By The Record Or Applicable Board Precedent.**

The Administrative Law Judge found that the Employer violated Section 8(a)(1) of the Act by enforcing its access rule in a “disparate manner or implementing a new work rule” and evicting off-duty employees from the facility. (ALJD at 29:12-15). The Judge erred in reaching this conclusion both legally and factually.

#### 1. **Section 8(a)(1) Violations In Disparate Enforcement Cases Require Evidence That The Employer Tolerated Access For Similar Activity Unrelated To Union Or Protected, Concerted Activity.**

It is well established that even in the case of facially valid access rules such as the instant one, an employer nonetheless runs afoul of Section 8(a)(1) when it discriminates in its enforcement policies to disadvantage union or other protected, concerted activities vis-à-vis other activities unrelated to such activities. For example, in *Opryland Hotel*, 323 NLRB 723 (1997), the Board found a violation of Section 8(a)(1) where the employer enforced no-talking rules in such a manner that employees could discuss all personal topics except those related to the Union.

Similarly, in *Benteler Industries, Inc.*, 323 NLRB 712 (1997), the Board found the employer's refusal to permit employees to post union-sponsored literature on bulletin boards unlawful, where the employer permitted the posting of other personal, non work-related notices. In contrast, the Board has consistently allowed employers to enforce valid access rules, as long as it does so in a fashion that does not disadvantage union-related access. *See, e.g., Crowne Plaza Hotel*, 352 NLRB 382 (2008). In order to support its finding that the Employer discriminatorily enforced the access rule, the record must contain evidence of instances where the employer enforced the rule to deny access to off-duty employees conducting Union activities, but allowed access to off-duty employees for purposes unrelated to the union. *See Guardian Indus. Corp. v. NLRB*, 49 F.3d 317, 319 (7th Cir. 2995) ("A person making a claim of discrimination must identify another case that has been treated differently and explain why that case is 'the same' in the respects the law deems relevant or permissible as grounds of action.") Without a "control group" of similar non-union activities, any attempt to prove disparate enforcement fails.

**2. The Administrative Law Judge Erred In Basing His Finding Of A Violation On The Fact That The Employer Allowed Shop Stewards Access For Activities Related To The Processing Of Grievances While Not Allowing Them Access To For The Purpose Of Conducting A Strike Authorization Vote On The Company's Premises.**

In the instant case, rather than comparing access for union-related purposes with access for non union-related purposes, the ALJ based his conclusion that a violation occurred on a comparison of *different types on union-related access*. "In addition, I credit shop stewards Nelson and Fowler that, on their days off, each has entered Respondent's facility in order to engage in Union-related activities and has never been either questioned about her presence inside the facility or asked to leave . . ." (ALJD at 21:5-8). According to the ALJ's reasoning, because the

Employer denied access to off duty employees who were there to assist the union agents in conducting a non-authorized on-premises strike vote, the Employer discriminatorily enforced its no-access rule in violation of Section 8(a)(1). In so doing, the ALJ created a rule, completely unsupported by the case law, that once an employer allows access for *some types of union activity*, it must allow access for *all types of union activity*.

The ALJ cites three cases in support of this conclusion, but none of them involved comparisons of different types on union-related activity. In *Benteler Industries*, 323 NLRB 712 (1997) the Board concluded that the employer unlawfully denied employees permission to post union-sponsored literature on a workplace bulletin board, while allowing employee postings of other kinds of non-union literature such as listings of items for sale and thank you notes. Similarly, in *Opryland Hotel*, 323 NLRB 723 (1997) the finding of a violation was premised on a finding that the employer prohibited discussion of union-related matters, but allowed employees to discuss “football or any other subject of personal interest while waiting to work, except the Union.” 323 NLRB at 724. The third case cited by the ALJ, *Baptist Memorial Hospital*, 229 NLRB 45, 45 n. 4 (1977), is also inapposite, because it dealt with the *facial validity* of a no-access rule, whereas here, the government does not allege that the Employer’s rule is facially invalid (only unlawful as enforced). (ALJD at 20:22-24). We have been unable to locate a single case (and the General Counsel’s brief cites none), where a violation was based on a comparison of access allowed for some but not all kinds on union activity. And the Board should decline to expand that law at this juncture.

Moreover, strong public policy considerations cut against this new rule as articulated by the ALJ. The Judge’s holding would punish employers for allowing shop stewards off-duty access to the facility for the purpose of limited Union activities such as the processing of grievances. If, by allowing Stewards off-duty

access to perform legitimate Shop Steward functions, the employer loses the ability to limit access for *any* union related activity, no employer will allow any access whatsoever, hardly an outcome that facilitates the purposes and policies of the Act.

**3. Limited Evidence That The Employer Allowed Off-Duty Employees Access To The Administrative Offices For The Purpose Of Picking Up Their Paychecks Or To Wait For Their Shifts To Start Is Insufficient To Establish Unlawful Disparate Enforcement.**

In his analysis, the ALJ also noted that “. . . Respondent admitted that it permits off duty employees to enter its facility under certain circumstances including to obtain their paychecks . . .” (ALJD at 21:1-3). However, this finding does not support a violation. Under applicable Board precedent, an employer does not engage in unlawful discriminatory enforcement when it allows access for business-related purposes but precludes access for other non-business related purposes. *See Southdown Care Ctr.*, 308 NLRB 225, 231-32 (1992) (upholding as facially valid employer’s rule that limited off-employees’ access to interior areas of nursing home; rule made exception for purpose of visiting family or friends who were residents, but not otherwise); *The Broadway*, 267 NLRB 385, 394, 404-05 (1983) (holding that retail employer’s restrictions on solicitation by off-duty employees on sales floor struck a “reasonable balance” between the rights of the business and employees’ right to return to the property as shoppers or for the “limited purpose” of picking up a paycheck); *see also Teletech Holdings, Inc.*, 342 NLRB 924, 929-931 (2004) (holding that employer’s grant of permission to nonemployee food vendors to sell food in parking lot and cafeteria, for the benefit of employees, was not sufficiently similar to distribution of union handbills to justify finding of discrimination when it denied access to nonemployee union handbilling); *6 West Ltd. v. NLRB*, 237 F.3d 767, 779-80 (7th Cir. 2001), *denying enf.* 330 NLRB 527 (2000) (applying similarity test to determine whether

employee union solicitations were comparable to employee-to-employee sales of girl scout cookies, Christmas ornaments, and hand-painted bottles).

In contrast to the numerous examples of off-duty union-related activity that the Employer allegedly permitted in its facility, the ALJ's Decision references only one other situation where the Employer allowed access to the facility for off-duty, non-union activity. Mentioned by the ALJ in the Decision (albeit not in the "Legal Analysis And Findings" section) was the longstanding accommodation of a single night shift employee (Geneva Henry) who was allowed to come to the facility early because she was too afraid for her personal safety to travel from her home to the facility late at night. (Tr. at 283:22-284:1). However, this long-standing but isolated incident does not establish unlawful discriminatory enforcement against union-related activity. Executive Director Gayle Reynolds testified that this arrangement was in effect for several years. (Tr. at 301:2-8). This isolated and long standing accommodation is a far cry from the activity of conducting an official union strike vote on an employer's property, thus precluding a finding that the two activities are similarly situated. *Guardian Indus.*, 49 F.3d at 319 (holding that burden is on party challenging restrictions on union activity to show that other, permitted activities, were legally the "same" as the union activity); *see also Lucile S. Packard Children's Hosp. v. NLRB*, 97 F.3d 583, 587 (D.C. 1996) (holding that a claim of access discrimination must be supported by proof of "similar" non-union activities).

**4. No Evidence Existed To Support The Administrative Law Judge's Conclusion That The Employer Applied A "New Work Rule" When Asking Off-Duty Employees To Leave The Facility On June 17 and 18.**

In its complaint, the General Counsel assumed the facial validity of the access rule (Rule 33) and only alleges that the Employer "disparately enforced" the access rule with respect to off-duty employees on June 17 and 18. (Complaint,

Para. 7.) In his Decision, the ALJ stated that despite the General Counsel's allegations, "I think it may be more correctly argued that Respondent's actual unlawful acts and conduct involve applying a new work rule to Sheila Nelson, whose day off was June 17, and, perhaps, to Geneva Henry...." (ALJD at 20:25-28).

The Judge based this "new work rule" determination on his interpretation that the Rule 33 does not on its face apply to employees on their days off, only to off duty employees who were previously working ( or would be working later) that day. This is a strained and distorted reading of the rule whose terms provide that employees are not allowed "to remain on the grounds after the end of their shift, unless previously authorized by their supervisor." (ALJD at 9:31-36). The rule clearly applied to off duty employees, whenever their actual shifts. The Judge's attempt to draw a dichotomy between employees in the facility on their day off and employees who finished working earlier in the day but remained at the facility is artificial and misplaced. The same legitimate concerns apply to both situations, regardless of whether an employee was scheduled to work earlier in the day.<sup>3</sup>

The ALJ's also based his "new rule" conclusion on his finding that the Employer had never enforced the access rule against any off-duty employee who came in on their days off. (ALJD at 21:9-10). However, since there was no evidence that any other employees actually came onto the premises for non union-related purposes on their days off (or more importantly that the Employer had knowledge of same), the Employer could hardly be faulted for being unable to point to instances where the rule had been "enforced" against such activity.

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<sup>3</sup>Significantly, no employees testified that they thought Rule 33 applied only to situations involving access by employees who were also scheduled to work that day.

Indeed, Reynolds' uncontroverted testimony was that she could only recall *one instance* when an off-duty employee wanted to be in the building on non-Union, non-company business, in violation of the access rule, and that individual was asked to leave. (Tr. at 357:23-358:5).<sup>4</sup>

**5. In Any Event, The Administrative Law Judge's Conclusion That The Employer Violated Section 8(a)(1) By Applying A "New Work Rule" When Asking Off-Duty Employees To Leave The Facility On June 17 and 18 Was Not Alleged In the Complaint Or Litigated Below.**

Owing to the limited authority granted to the Board by Congress it is well established that "[t]he Board may not make findings or order remedies on violations not charged in the General Counsel's complaint of litigated in the subsequent hearing." *NLRB v. Blake Construction*, 663 F. 2d 272, 279 (DC Cir. 1981). This also a basic requirement of due process. Here, the ALJ's finding of a violation over the Employer's creation of a "new work rule" on June 17 and 18, was not alleged in the Complaint – nor was it litigated or even argued by the General Counsel or the Union at the administrative hearing. Indeed, such an allegation was not even mentioned by General Counsel its post hearing brief.

If the Employer had been on notice that it was being charged with the creation of a new work rule and that accordingly the ALJ would consider the dichotomy between "day off" versus "came in early or stayed after on scheduled work day" to be significant, the Employer would have presented evidence that the access rule was, and has always been, applied equally to both groups, and that the Employer and the Union both interpreted the access rule in this manner. Since none of this evidence was relevant to a disparate enforcement case, which was the only allegation the Employer was aware of, no such evidence was presented. The

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<sup>4</sup>In addition, security guard Francisco Pinto was also uncontroverted in his testimony that off-duty employees simply do not come in "that much" on their day off, except on company or union-related business. (Tr. at 506:25-507:9).

allegation in the complaint required evidence of “union” versus “non-union related” activities, not “day off” versus “work day” activities, so the Employer could hardly be faulted for not presenting evidence on this “non-issue.”

Because the allegation that the Employer created a new rule directed against access by employees on their days off was not alleged or litigated, the ALJ’s conclusion that this action violated section 8(a)(1) cannot stand.

**B. The Administrative Law Judge’s Decision That The Employer Violated Section 8(a)(1) and (5) By Refusing To Provide Names And Addresses Of Its Permanent Replacement Employees Is Unsupported Factually and Legally.**

The ALJ’s Decision contained a conclusion that the Employer violated Section 8(a)(5) of the Act when it “refused” to provide the full names and home addresses of the newly hired permanent replacement employees in response to the Union’s information request. However, that conclusion is both factually unsupported and legally flawed. The evidence is undisputed that the Employer never refused to supply this information. Moreover, in dismissing the Employer’s amply supported confidentiality concerns, Judge applied the incorrect legal standard. In any event, if the Board disagrees and concludes that the ALJ’s reasoning is consistent with current Board law, we submit that such law is inconsistent with the purposes and policies of the Act and should be changed by the Board.

**1. The Legal Standard.**

Under applicable law, there are various obligations placed on the requesting union and the responding employer, based on the individual situation. At one end of the spectrum is a situation where the union requests presumptively relevant information in a context free of danger or legitimate confidentiality concerns. In that case, absent facts not relevant here, the employer must supply the requested information. *See, e.g., Finch, Pruyn & Co.*, 349 NLRB 270, 275-276 (2007). At

the other end of the spectrum is a situation where there is a “clear and present danger” that the Union will misuse the information. In that case, the employer is privileged to refuse to provide the requested information until or unless those dangers have been sufficiently mitigated. *See, Shell Oil Co. v. N.L.R.B.*, 457 F.2d 615, 618-19 (9th Cir. 1972) (refusing to enforce Board’s order requiring employer to disclose names and addresses of non-union employees were a “clear and present danger” of harassment and violence was shown).

However, there is a middle ground established in the law, where the facts do not establish a “clear and present danger” of misuse, but where the employer nonetheless has a factually-based legitimate confidentiality concern. In that situation, information that may otherwise be relevant to the Union’s statutory duties may be withheld when the interest in confidentiality outweighs the union’s need for information. *Detroit Edison Co. v. NLRB*, 440 U.S. 301, 315 (1979) (on a case-by-case basis, the Board is required to balance union’s need for the information against any “legitimate and substantial” confidentiality interests). Where the employer has legitimate and substantial confidentiality concerns regarding the information sought by the union, it is “entitled to discuss confidentiality concerns regarding the information request with the Union so as to try to develop mutually agreeable protective conditions for its disclosure to the Union.” *Silver Bros. Co.*, 312 NLRB 1060, 1062 (1993).

In *Silver Brothers Co.*, the Union requested financial information which, according to the Board, was relevant to the Union's performance of its duties as collective-bargaining representative. *Id.* at 1061. Even so, the employer in that case was not automatically obligated to furnish the information because it had “substantial and legitimate confidentiality concerns” regarding the use of the information. The Board cited *Minnesota Mining & Mfg. Co.*, 261 NLRB 27, 30

(1982) for the proposition that an employer is entitled to bargain with a union to resolve confidentiality concerns:

[I]n dealing with union requests for relevant but assertedly confidential information, we are required to balance a union's need for such information against any "legitimate and substantial" confidentiality interests established by the employer, accommodating the parties' respective interests insofar as feasible in determining the employer's duty to supply the information. The accommodation appropriate in each individual case would necessarily depend upon its particular circumstances.

*Silver Bros. Co.*, 312 NLRB at 1061. Similarly in *Webster Outdoor Advertising Co.*, 170 NLRB 1395 (1968), the Union asked to examine the employer's payroll records to determine whether unlawful wage raises had been granted to strike replacements. As in the present situation, the replacements had been harassed and threatened by some of the striking employees. The employer expressed hesitation to turn over the list of replacements without assurances that the information "won't be used to further facilitate harassment of replacements." *Id.* at 1396. The Board agreed with the employer's position:

Under such circumstances, Respondent was justified in seeking assurances that the payroll information was necessary for legitimate union purposes and would not be used to facilitate further harassment of replacements. Moreover, Respondent did not categorically reject the Union's request. It merely expressed reluctance about turning payroll information over to the Union until adequate assurances had been given and legitimate need established. It is also significant that the Union, after receiving Respondent's explanation, did not renew its request. In these circumstances, we find that Respondent's denial of the Union's request did not violate Section 8(a)(5).

*Id.* See also *Allen Storage & Moving Co.*, 342 NLRB 501, 502 (2004) (employer lawfully refused and failed to provide union with requested information where employer sought to accommodate union's need for information but union—without discussion or explanation—did not accept employer's offer); *Metropolitan Edison Co.*, 330 NLRB 107, 109 (1999) (finding a violation in the failure to bargain over an accommodation, and directing the parties to explore reasonable alternatives to direct disclosure of names); *Page Litho, Inc.*, 311 NLRB 881, 883

n.7 (1993) (employer's actions did not constitute an unlawful refusal to furnish information where union requested information, employer made a counterproposal, and union failed to pursue further information).

**2. The Record Evidence Established The Employer's Legitimate Confidentiality and Privacy Concerns, Thus Triggering The Union's Duty To Discuss Those Concerns In A Good Faith Effort To Ameliorate Same.**

Here, the Union requested personal information about the permanent replacement employees mere days after the bitter strike ended. The permanent replacements, who had been subjected to abuse and threats by employees and union supporters during the strike, continued to express fear of retaliation, harassment, and possibly violence by the Union, as well as apprehension about the confidentiality of their personal information. The Employer, putting the permanent replacements' fears in the context of the strikers' harassment and also the Union-related death threats received by its HR Director, had legitimate concerns about providing the names and addresses of the permanent replacements to the Union. However, the Employer did not refuse to provide the requested information. Indeed, it provided the bulk of the information requested, but temporarily withheld, pending further discussions with the Union, only the most sensitive information which triggered the greatest confidentiality concerns, namely the home addresses of the newly-hired strike replacement employees and their full names.<sup>5</sup> The Employer explained its concerns, the basis therefore and proposed a compromise, namely that "[W]e notify them of your request, and for those employees who object, we arrange for some method whereby written communications could be forwarded to them by the Employer or even by a disinterested third party." (G.C. Exh. 4, p.1). Significantly, the Employer did not present its suggested resolution as an ultimatum. Rather, it invited further

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<sup>5</sup>The employer provided initials.

discussion on the matter in hopes of reaching a solution with which everyone would be comfortable. “My client is also open to discussing alternative arrangements that meet the legitimate interests of all concerned.” (G.C. Exh. 4, p.1). At this point the Employer was “entitled to discuss confidentiality concerns regarding the information request with the Union so as to try to develop mutually agreeable protective conditions for its disclosure to the Union.” *Silver Bros. Co.*, 312 NLRB at 1062. Instead, the Union ignored the Employer’s invitation to discuss reasonable alternatives decided instead to pursue a litigation strategy. Given the Employer’s right to discuss the information request with the Union, its indication of willingness to meet for such discussions, and the Union’s refusal to meet to arrive at a resolution, the Employer did not unlawfully withhold or delay providing the requested information and the Judge’s Decision to the contrary must be reversed.

**3. The Administrative Law Judge Applied The Incorrect Legal Standard In Rejecting The Employer’s Defenses Supporting The Lawfulness Of Its Response To The Union’s Information Request.**

The ALJ considered and rejected the Employer’s defense described not on the basis of any finding that the Employer did not in fact have “legitimate confidentiality concerns,”<sup>6</sup> but instead based on his legal conclusion that the cases relied on by the Employer apply only to requests for financial information. Thus according to the ALJ, in situations not involving requests for financial information, there are only two potential situations: 1) Where the “clear and present danger” standard has been met; and 2) where it has not. However, in so doing, the ALJ unreasonably and incorrectly limited the holdings of the case law to requests for financial information. While most of the cases cited involved such requests, there is nothing in the decisions themselves so limiting them nor is there

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<sup>6</sup>The Decision contains no such finding.

any logical reason to do so. While financial information certainly is the type of information that often raises legitimate confidentiality concerns, that is not the only type of situation in which confidentiality concerns may be legitimate. Given the Employer's legitimate, factually based confidentiality concerns, it was not required to cast aside those concerns and turn over this private information without question. It was entitled at a minimum to a dialogue with the Union over a procedure that could allay those concerns while still providing the Union with the information it felt it needed.

We will never know what the outcome of those discussions would have been. Perhaps the Employer would have been willing to provide the information based on the simple assurance from the Union that it would not share the replacements' home addresses with rank and file employees. Maybe the parties would have agreed that the Union could hold meetings with the replacement employees at the work site. But that is precisely the point. By failing to respond to the Employer's invitation to engage in a dialogue, the Union waived any right to engage in those discussions as well as the potential fruits of those discussions. Accordingly the Decision of the ALJ that the Employer violated Sections 8(a)(1) and (5) is not supported by the facts or law and must be rejected.

**4. In any Event, The ALJ's Determination That The Employer Violated Sections 8(a)(1) and (5) Is Based On The Unsupported Factual Finding That The Employer Refused To Provide Full Names and Home Addresses Of The Strike Replacements.**

The ALJ based his decision on the factual finding that the Employer refused to provide the full names and home addresses of the replacements. (ALJD at 28: 49-29: 2). This finding is completely unsupported. The Employer's written response (G.C. Exh. 4) contained no refusal, only an interim response and an invitation for further discussions. Since the factual underpinnings of the ALJ's

legal conclusion are unsupported, his decision must, for this reason as well, be reversed.

**5. The Identity Of Permanent Replacements Should Not Be Presumptively Relevant Information Under Board Law Due To The Inherent Conflict Of Interest Between The Union And the Replacement Employees Who Are Filling Positions Previously Held By Its Dues-Paying Members.**

As the ALJ correctly noted, under current Board law the names and addresses of strike replacement employees is presumptively relevant, at least after the strike has concluded. *Beverly Health and Rehabilitation*, 346 NLRB 1349 (2006). However, we respectfully submit that such a rule is completely irrational, ignores the realities of the immediate post-strike situation and should be reversed. In the instant case some 38 striking employees were denied reinstatement and instead placed on a preferential recall list because their positions were filled with the same permanent replacements whose home addresses the Union was seeking. We do not know why the Union was seeking this information, but the risk of misuse is overwhelming in light of the undeniable conflict of interest between Union and its members on one hand, and the replacements on the other. There was only one thing standing between the replaced strikers and their reinstatement: The fact that the replacement employees were currently filling those positions. There is a tremendous interest on the part of the Union to do whatever it could to see to it that these replacements vacated their positions so the strikers could be reinstated. We submit that the Board's mechanical treatment of this situation as being the same as any other request for information about unit members ignores the realities of post-strike situations where permanent replacements have been hired and their continued employment is blocking the immediate reinstatement of strikers. In light of the undeniable conflict of interest between permanent replacements and the Union, we submit that the cases holding that the normal presumptions apply to requests for information about them should be reversed.

**C. The Administrative Law Judge's Conclusion That The Employer's Articulated Reason For Hiring Permanent Replacements Was An "Unlawful Consideration" Is Erroneous.**

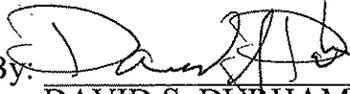
The ALJ dismissed the 8(a)(3) allegations related to the hiring of permanent replacement employees, concluding that the factors considered by the Employer in hiring permanent replacements were legally irrelevant. However, in so doing, he made the following statement: "the 'more important' and, I think unlawful, consideration was that they would work during another work stoppage . . . ." (ALJD at 26:24-26). It is not clear whether the ALJ was actually making a legal conclusion here. In any event, the ALJ's hesitancy was understandable as the utilization of such factors by employers in deciding to hire permanent replacements is not unlawful. Respondent addresses this issue fully in its Brief Answering the General Counsel's Exceptions, which is being filed concurrently.

**IV. CONCLUSION.**

For each and all of the foregoing reasons the Employer requests that the ALJ's Decision should be reversed and the Complaint dismissed as to the issues addressed herein.

DATED: October 18, 2011.

Respectfully submitted,

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