UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

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

Case Nos. 32-CA-25247
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

COUNSEL FOR THE ACTING GENERAL COUNSEL'S ANSWERING BRIEF TO RESPONDENT'S LIMITED CROSS-EXCEPTIONS

I. Preliminary Statement[1]

On August 9, 2011, Administrative Law Judge Burton Litvack, herein the ALJ, issued his Decision and Recommended Order in the above-captioned matter. The ALJ found, among other things, that Piedmont Gardens, herein the Respondent, violated Section 8(a)(1) of the Act by engaging in surveillance and/or creating the impression that it was engaging in surveillance of employees engaged in a strike vote and Respondent discriminatorily enforced its no-access policy by requiring employees who were assisting with the strike vote to leave the facility while allowing off-duty employees on the premises for other purposes. Finally, the ALJ found that Respondent violated Section

[1] References in this Reply Brief shall be designated by page and line number as follows: References to the Decision of the ALJ will be "ALJD [page]:[line]." References to the record will be designated as follows: Tr. for transcript; GC Exh. for General Counsel Exhibits; R Exh. for Respondent Exhibits; and Jt. Exh. for Joint Exhibits.

8(a)(1) and (5) of the Act by unlawfully refusing to furnish relevant information regarding striker replacements. The ALJ's decision in those regards is wholly supported by appropriate findings of fact and conclusions of law. However, the ALJ neglected to find that Respondent violated Section 8(a)(1) and (3) of the Act by refusing to reinstate or belatedly reinstating 38 bargaining unit employees who engaged in a strike at Respondent's facility.

On October 18, 2011, Respondent filed limited cross-exceptions to the ALJ's Decision and Order and supporting brief contending that the ALJ erred in concluding that Respondent violated Section 8(a)(1) and (5) of the Act. Essentially, Respondent argues that: (1) Respondent did not impose a new rule regarding access to its facility and did not disparately enforce its access rule; (2) Respondent did not display unlawful considerations in its intent to hire replacement employees; and (3) Respondent did not refuse to provide the Union with requested information that was relevant.[2]

Pursuant to Section 102.46(d)(1) of the Board's Rules and Regulations, Series 8 as amended, Counsel for the Acting General Counsel files this brief in answer to Respondent's limited cross-exceptions.

II. Respondent's Exceptions Should Be Overruled In Their Entirety

A. The ALJ Correctly Ruled That Respondent Enforced Its No-Access Rule In A Disparate Manner

Respondent argues that the ALJ erred in finding that Respondent enforced its no-access rule disparately. Despite this contention, the record is ripe with evidence to prove otherwise. According to the credited testimony of employee and non-employee supporters of the Union, Respondent Executive Director Gayle Reynolds entered the

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2 All references to the "Union" herein refer to the Service Employees International Union, United Healthcare Workers—West.

break room on June 17, 2011, where the Union was conducting a strike vote, and ordered off-duty employee/Union Steward Sheila Nelson and off-duty employees Faye Eastman and Geneva Henry to leave the facility because they were not scheduled to work. (Tr. 101-02, 311-12, 319-21). Similarly, on June 18, Reynolds again ejected Eastman. (Tr. 312).

As revealed by trial record, Respondent removed the aforementioned individuals because they were conducting the strike vote. Previous to June 17-18, Nelson went to the facility, while off-duty, and was not instructed to leave. (Tr. 103-104). To that end, Nelson attended approximately 10 Union meetings in Respondent's break room while she was off-duty since late 2009. (Tr. 64). Moreover, Union Steward Sajanette Fowler testified that she visited the facility weekly on her days off to conduct grievance meetings with Respondent. (Tr. 217-218) and assist the Union with other duties (Tr. 216-17). In doing so, Fowler even signed-in at the front desk. (Tr. 217, 221). As such, Respondent was well aware that Fowler was conducting Union business inside the facility while off-duty, but never disciplined her or asked to leave. (Tr. 218-20).

The past practice was not limited to off-duty employees accessing the facility for Union purposes. To the contrary, employee Geneva Henry, who was forced to leave by Executive Director Reynolds, routinely went to the break room hours before the start of her shift at 11:00 PM, where she waited to clock-in and would eat her dinner, read, and listen to music, because she did not want to wait outside late at night. (Tr. 283-84). Similarly, employee Matilda Imbukwa testified that she regularly went to the break room and sat for an hour while waiting for her shift to start and was never told that she was not allowed to do so. (Tr. 131-32).

Respondent's arguments ignore the weight of the evidence, which clearly supports the ALJ's finding that it disparately enforced its access policy. Prior to June 17-18, employees freely accessed the facility while off-duty, for Union and other purposes. Yet on June 17-18, the days of the Union's strike vote, Respondent then for the first time ejected off-duty employees. Respondent's acts show an unequivocal disparate enforcement of its policy and its exceptions should be overruled.

B. The ALJ's Finding That Respondent Disparately Enforced Its Access Rule Is Supported By Case Law

The essence of Respondent's exception is that the ALJ erred in concluding that Respondent enforced its access policy in a discriminatory manner because the ALJ compared different types of union-related access whereas the ALJ should have compared similar union-related access. Respondent's argument is fundamentally flawed because it ignores that fact that unlawful discrimination can occur not only between union and non-union activities, but also between different forms of union activity. Indeed, acceptance of Respondent's position would allow it to choose among different forms of union activity that it would allow off-duty employees to engage in on its premises, i.e., it could decide to allow off-duty employees to engage in what it considers to be "good" union activities but disallow such employees to engage in "bad" union activities, however it chooses to define those terms. Respondent does not explain, however, how the latter form of discrimination would be lawful, and it has offered no case authority to support its position.

Moreover, Respondent's argument that it allowed off-duty employees inside its facility only for business purposes does not reflect the testimony at trial, as employees testified that they went to Respondent's facility, while off-duty, for union and non-union

related matters, that had nothing to do with Respondent's business. In turn, the ALJ's finding is in line with the Board's ruling in *Tri-County Medical Center*, 222 NLRB 1089 (1976), that held a rule denying off-duty employees access to an employer's premises is lawful only if, among other things, it applies to off-duty employees seeking access to the facility for any purpose and not just employees engaging in union activity. As explained above, Respondent's practice did not comply with this third-prong of *Tri-County* because Respondent allowed off-duty employees access to its facility to wait in the break room for hours, listen to music, eat food, and pick-up their paychecks.

Therefore, the ALJ's ruling is consistent with Board case law and Respondent's exceptions should be overruled.

C. Respondent's Argument That The ALJ Erred In Finding That Respondent Created A New Work Rule Is Frivolous

Respondent's Chart of Infractions Work Rule 33, which is quoted in paragraph 7(a) of the consolidated complaint, reads in pertinent part:

> 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 ALJ interpreted the above language as applying to situations where employees are on the premises before or after their shift and not to situations where they are on the premises on their off-days and, therefore, when Respondent evicted the off-duty employees assisting in the strike vote on June 17 and 18, it could not have been pursuant to Rule 33 but was pursuant to a new rule developed for the occasion. It appears that this interpretation is inconsistent with both the Acting General Counsel and Respondent's view, who are in agreement that Respondent relied on Rule 33 to evict the employees on June 17 and 18. However, the fact that the ALJ viewed the matter in

slightly different terms than the parties does not detract from his factual determination that Respondent discriminatorily evicted the employees on June 17 and 18 and that it violated the Act by doing so. In this regard, Respondent's argument that the Judge's new rule finding denied it due process exalts form over substance. The parties fully litigated the facts surrounding Respondent's eviction of the employees on June 17 and 18 and the issue of whether and under what circumstances off-duty employees were allowed onto the premises prior to those evictions, and everyone understood that the Acting General Counsel was contending that those evictions were unlawful. In such circumstances, it is unclear what additional evidence Respondent would have presented on the matter even had it known that the Judge viewed the situation as one involving a new rule as opposed to the enforcement of Rule 33. Accordingly, as this exception has neither a legal nor factual basis, it should be rejected.

D. The ALJ Correctly Ruled That Respondent Violated Section 8(a)(1) And (5) Of The Act By Refusing To Provide The Union With Requested Information Because There Was No Legitimate Confidentiality Or Safety Concern

In its exceptions, Respondent makes numerous arguments as to why the ALJ erred in concluding that it failed to comply with the Union's request for the names and addresses of the permanent strike replacements. None of these arguments has any merit.

First, Respondent asserts that there was a clear and present danger that the Union would somehow use the requested information to harm the replacement workers. However, there is nothing in the record to support such an argument. There is no evidence that the Union ever harmed any permanent replacement employee, that it had ever threatened to harm a permanent replacement employee, or that it had ever misused this kind of information. To the contrary, Respondent Executive Director Reynolds

testified that there were no incidents of violence or threats of violence between strikers and permanent replacements after strikers returned to work. (Tr. 463-64).

Similarly, Respondent cites numerous cases for the proposition that it does not have to turn over requested information that is confidential. However, all of Respondent's cases deal with economic information, which is totally inapposite to the situation at hand. Here, the Union merely requested the name and addresses of the replacement workers. It is well settled that this information is relevant and must be provided upon request. *See Beverley Health & Rehabilitation Services*, 346 NLRB 1319, 1326 (2006); *see also Stanford Hospital & Clinics,* 338 NLRB 1042 (2003). Moreover, Respondent failed to articulate a reason as to why it holds the names and addresses of employees confidential from the certified bargaining representative who will likely represent the employees in question.

Respondent further argues that the ALJ's finding of a violation is improper because it did not refuse to supply the Union with requested information but only rather expressed reservation in turning over the requested information. However, as noted by the ALJ, Respondent did not even respond to the Union's request until over a month after the strike. (ALJD at 28: 46-49). Moreover, this is an entirely disingenuous claim since it is absolutely clear that Respondent did not ever provide the Union with requested names and addresses of the permanent strike replacements.

As a final argument, Respondent contends that the Board should overrule established law and find that the names and addresses of strike replacements are not presumptively relevant. In support of this request, Respondent offers nothing more than a rehash of its speculation that there is a "risk" that the Union might misuse the information and its unsupported assertion that there is an "undeniable conflict of interest"

between the Union and its members and the permanent strike replacements. This totally baseless argument should also be rejected.

E. The ALJ's Finding That Respondent's Reason For Hiring Permanent Replacements—Based On Unlawful An Purpose—Was Legally Founded And Wholly Supported By The Record

Although the ALJ erred in not finding Respondent's permanent replacement of strikers based on an unlawful purpose a violation of Section 8(a)(3), the ALJ correctly credited Union Attorney Bruce Harland's testimony that Respondent Attorney David Durham informed Harland that Piedmont Gardens wanted to teach the strikers and the Union a lesson by permanently replacing the strikers. (ALJD at 26: 19-20). The ALJ also correctly noted that the unlawful consideration that Respondent relied on was that the replacement employees would likely work during future stoppages because they were willing to cross the picket line here. (ALJD at 26: 24-26). The ALJ further noted that Respondent's Executive Director Reynolds testified that Respondent's reason for permanently replacing strikers was to forestall future strikes by hiring workers who demonstrated that they were unlikely to join a union or strike in the future. (ALJD at 26: 21-27).

Contrary to Respondent's assertion, this is clear and unmistakable evidence of an unlawful consideration for hiring. Respondent's Executive Director Reynolds stated that Respondent chose to convert temporary replacements to permanent workers because they demonstrated that they would not engage in a future strike. In other words, Reynolds wanted employees who would be less likely to engage in Section 7 activity. Moreover, Durham clearly admitted Respondent's retaliatory motive for permanently replacing the strikers. Such blatant discrimination and disregard for Section 7 rights is at the essence of unlawful discrimination in hiring practices. *See generally, Planned Building Services*,

347 NLRB 670, 708 (2006) (adopting the judge's finding that successor employer's refusal to hire incumbent employees was unlawful because employer's motivation was premised on a concern that incumbent employees would go on strike based on previous picketing).

Reynolds and Durham's "smoking gun" statements are clear proof of Respondent's unlawful consideration and purpose. Therefore, the ALJ correctly noted that it was an unlawful consideration and Respondent's exception thereto should be rejected.

III. Conclusion

For the reasons set forth above, Counsel for the Acting General Counsel submits that Respondent's exceptions should be rejected. Counsel for the Acting General Counsel further submits that the ALJ's finding and conclusions should be affirmed and his recommended order adopted to the extent not excepted to by Counsel for the Acting General Counsel.

DATED AT Oakland, California this 31st day of October, 2011.

Respectfully submitted,

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FORM NLRB-877

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AFFIDAVIT OF SERVICE OF THE COUNSEL FOR THE ACTING GENERAL COUNSEL'S ANSWERING BRIEF TO RESPONDENT'S LIMITED CROSS-EXCEPTIONS

I, the undersigned employee of the National Labor Relations Board, being duly sworn, depose and say that on the date indicated above I served the above-entitled document(s) by postpaid mail upon the following persons, addressed to them at the following addresses:

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Subscribed and sworn to before me this 31st day of October 2011.	DESIGNATED AGENT /s/ Shirley M. Owens **NATIONAL LABOR RELATIONS BOARD**