

**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.

**RESPONDENT'S REPLY TO ACTING GENERAL COUNSEL'S BRIEF
ANSWERING RESPONDENT'S LIMITED CROSS-EXCEPTIONS**

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I. PRELIMINARY STATEMENT.

American Baptist Homes of the West d/b/a Piedmont Gardens (“Respondent” or “Employer”) has excepted to portions of the Administrative Law Judge’s Decision to the extent that he concluded that Respondent disparately enforced 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 and home addresses of certain permanent replacement employees who filled positions previously held by striking employees. The Respondent also excepts to the ALJ’s dicta that Respondent relied on “unlawful considerations” when it failed to immediately reinstate permanently replaced striking employees, even though the Respondent did not act unlawfully when it refused to reinstate them.

Acting General Counsel’s Brief, which purports to “answer” Respondent’s Limited Cross-Exceptions, does nothing of the sort. It does not even address, much less repudiate, the arguments or (just as importantly) the case law cited in Respondent’s Brief. The specific failures are addressed below.

A. **The Administrative Law Judge’s Conclusion That Respondent Violated Section 8(a)(1) Through Disparate Enforcement Of Its Access Rule Is Not Supported By The Record Or Board Precedent.**

1. **The ALJ Applied The Incorrect Legal Standard By Relying On Evidence Of Access For Other Union-Related Activities.**

In concluding that the ejection of Nelson, Henry and Eastman on June 17 and 18 was discriminatory and therefore unlawful, the ALJ cited and relied upon examples of access to the building being allowed (or at least tolerated) for off-duty shop stewards who entered for the purpose of conducting union business. As we argued in Respondent’s Brief, in so doing the ALJ applied the wrong legal standard. A violation requires discrimination in favor of similar activity that is unrelated to union or protected, concerted activity. *See*, Respondent’s Brief, pp 7-

10 and cases cited therein. In its answering Brief, Counsel for the Acting General Counsel cites not one single case where the Board has found a violation where the favored activity was other union-related activity. Nor does it address Respondent's policy argument that adopting such an "all or nothing" rule regarding union activity would hamper the effective operation of the contractual grievance procedure, hardly an outcome that would effectuate the purposes and policies of the Act.

Rather than addressing Respondent's unassailable policy argument, Counsel for the Acting General Counsel makes its own, arguing that employers must prohibit all off duty union activity or none at all, as deviation from this absolute approach would allow employers to choose which union activity it favored and what it did not. The obvious answer to this argument is that all employers, especially employers who are charged with the safety and security of older and sometimes vulnerable residents, must make decisions regarding who and under what circumstances it will let people into the building. The argument that once an employer allows access for *any* union activity it must allow access for *all* union activity is not only unsupported by the case law, it would lead to absurd and potentially dangerous results. Under Acting General Counsel's theory of the law, would an employer who allowed off-duty shop stewards access to meet with employees regarding grievances, also be required to permit groups of off duty employees to roam through the halls in the middle of the night to conduct other but unspecified "union business?" It appears so.

Fortunately, the vision of the law articulated by Acting General Counsel is not the law. By allowing off duty shop stewards access to represent their constituents in the grievance process, Respondent did not forfeit the right to prohibit off duty employees from turning the employee break room into a *polling place* and to conduct a *two-day* vote without permission. 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).

Absent discrimination favoring non union-related activity over similar union-related activity, there is no violation and the ALJ committed reversible error in ruling otherwise.

2. The Limited Evidence Of Access For Non Union-Related The Activity Is Insufficient To Establish A Violation.

The ALJD referred to three instances of access for non union-related purposes: 1) the long-standing accommodation given to a female employee Geneva Henry, who had specifically requested permission to wait in the break room before her night shift because she "did not want to be out on the street late at night." (ALJD at 9:41-52); 2) one other off-duty employee, Matilda Imbukwa, who testified that on occasion, she would go the break room before her shift and wait for up to an hour to clock in; and 3) Respondent's practice of allowing off-duty employees access for the purpose of picking up their pay checks. In its Answering Brief, Acting General Counsel does not address, and indeed completely ignores Respondent's legal arguments and case law cited in support that these isolated instances cannot support a finding of unlawful discrimination as they are not "similar" to the type of activity that caused the ejection here. (See Respondent's Brief, pp. 10-11.) Nor does it distinguish *The Broadway*, 267 NLRB 225, 231 (1992), where the Board was unimpressed with evidence that employees were

allowed access to pick up paychecks. Again, the reason for this omission is obvious. There is no way to distinguish the cases cited by Respondent; nor can its arguments be refuted. These isolated and grossly dissimilar activities do not establish unlawful discrimination when Respondent ejected the employees who had set up a polling place on the Respondent's premises, and nothing in Acting General Counsel's Answering Brief supports any contrary conclusion.

Indeed, the opposite is true – as already explained, employers can, consistent with their legal obligations, prohibit some forms of Union activity, but not others, without running afoul of Section 8(a)(1). *See* cases cited above.

3. 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 17th and 18th Is Unsupported By The Record; And In Any Event Was Not Alleged In The Complaint Or Litigated.

The ALJ concluded that the Employer actually created a new rule access rule prohibiting employees from entering its building on their days off, as the existing access rule (Rule 33) applied only to employees coming in early or staying late on scheduled work days. Acting General Counsel does not address Respondent's arguments that this conclusion is illogical and strained. Nor does it address Respondent's argument that the factual underpinning for this conclusion as articulated by the ALJ, that there was no evidence that the rule had been applied to employees seeking to enter on their days off, was faulty in light of undisputed testimony (not discredited by the ALJ incidentally) that Management was only aware of one instance of an employee entering on her day off, and that employee was asked to leave.

Acting General Counsel's response to Respondent's due process argument, that it was blindsided by the ALJ's determination that Respondent had unlawfully created a "new rule" prohibiting access on the employee's day off, is no better. As the Acting General Counsel fully acknowledged, the ALJ's interpretation that

Rule 33 did not apply to employees on their off-days, and the ALJ's creation of a "new work rule," is "inconsistent with both the Acting General Counsel and Respondent's view." (Answering Brief, p. 5). Moreover Acting General Counsel's attempts to salvage this denial of due process miss the mark. It first points out that the ALJ's determination that a new rule was created and the creation of same violated the Act does not detract from the validity of the finding that Reynolds ejected Nelson, Henry and Eastman. However, the issue is not whether the ejections occurred (which was never disputed) but whether the Employer created a new rule to deal only with union activity in violation of the Act. Acting General Counsel then states, without any citation to the record, that the new rule allegation was "fully litigated" and that it is "unclear" what additional evidence Respondent would have put on if it had known that it was being charged with creating a discriminatory rule. It is not for Respondent to establish, in a post hearing brief, what evidence it would have presented had it been on notice of the allegations against it. In any event, Respondent did articulate the types of evidence that it would have presented if it had been on notice of the charges that needed defending. (Respondent's Brief, p. 13). Discriminatorily enforcing an existing rule is an entirely different animal from creating a new rule in response to union activity. There are different elements, and different defenses. Acting General Counsel's attempts to gloss over this distinction are not persuasive and should be rejected.

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.

Respondent has argued to the ALJ that even in cases where the risk of disclosure does not rise to the level of a "clear and present danger," an employer nonetheless need not unconditionally disclose the requested information in cases where the disclosure raises legitimate confidentiality concerns. Once this is established, an employer meets its obligations to provide requested information by articulating its concern and seeking 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). The law does not require an all-or-nothing approach to information requests. *See Detroit Edison Co. v. NLRB*, 440 U.S. 301, 315 (1979).

Acting General Counsel spends significant time setting up a straw man by arguing that Respondent failed to prove that the disclosure presented a "clear and present danger" that the information would be misused. The issue is not whether a clear and present danger exists. Respondent has never claimed, either in its brief to the ALJ or in its Brief in Support of Limited Cross-Exceptions, that there was a "clear and present danger" that the Union would misuse the names and addresses of permanent replacements. The point is that the ALJ applied the wrong legal standard by requiring absolute and unconditional compliance with any request not involving financial information unless the employer can meet the lofty standard of "clear and present danger." Under applicable law, regardless of the type of information sought, the facts merely need to support a legitimate confidentiality concern.

The Acting General Counsel merely repeats the ALJ's analysis that the cases cited by Respondent should be limited to requests for financial information and that for all other types of requests, the "clear and present danger" standard

applies. There is no cogent argument, much less case law support, for this artificial “financial/non-financial” dichotomy. The ALJ’s attempt to limit the cases to requests for financial information (of whatever type) and to deny their application to all other types of information is a distinction never articulated by the Board or the courts, and is not supported by logic or reason. Acting General Counsel articulates no reason why employers with confidentiality concerns over disclosure of financial information should be accommodated while employers with confidentiality concerns over disclosure of the *home addresses of strike replacements* should not.

Equally revealing is Acting General Counsel’s failure to address, much less distinguish, *Webster Outdoor Advertising Co.*, 170 NLRB 1395 (1968), where the Board acknowledged the employer’s hesitancy to “turn over to the Union a list of replacements without some assurances that information . . . won't be used to further facilitate harassment of replacements” and ruled that the employer did not violate Section 8(a)(5) simply by seeking such assurances. While the request included a request for payroll information of strike replacements, the case turned not on the fact that the information was “financial” but on the employer’s legitimate concern that it might be misused.

Acting General Counsel acknowledged that the Employer did not outright refuse to provide the full names and addresses to the Union; rather, the Employer “expressed reservation” in turning over the requested information. The Acting General Counsel dismisses this point by noting that “the Respondent did not even respond to the Union’s request until over a month after the strike.” (Answering Brief, p. 7). This is a distinction without a difference – the Union sent its information request on August 19, 2010, and the Employer responded a mere three weeks later, supplying the initials of the permanent replacements, and inviting the Union to engage in further discussion in order to meet the “legitimate privacy and

confidentiality concerns” of all the parties, an offer which was never accepted. (G.C. Exh. 4). For this reason, too, the ALJ’s legal conclusion is unsupported, and his decision must 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 two statements identified by the Acting General Counsel to reveal an “unlawful consideration” do not betray unlawful animus. First, Gayle Reynolds simply expressed a wish that the employees she hired would be “willing to work during the next strike.” (ALJD at 26:25-26). This is not an unlawful consideration. Of course an employer exercising its legal *Mackay* rights to permanently replace economic strikers can hope that the employees it hires will choose to work if the Union engages in a subsequent strike. It would be surprising indeed if any employer in the world, if put in the same situation, did *not* have that hope. Reynolds did not question the permanent replacements about their support for their Union, or condition their employment on their willingness to cross subsequent picket lines, if another strike should occur. Indeed, Reynolds knew that although the permanent replacements were willing to work during the August 2010 strike, there “there was certainly no guarantee” that they would be willing to work during any subsequent strike. (Tr. 474:1). But she hoped they would. This hope (one that common sense dictates is shared by any employer when facing a potential work stoppage) did not demonstrate any unlawful consideration in violation of Section 8(a)(3).

Second, in support of its argument that this “hope” demonstrated “unlawful discrimination in hiring practices,” the Acting General Counsel cites to *Planned Building Services*, 347 NLRB 670, 708 (2006). This was a case cited by the ALJ in its Decision, which the Respondent distinguished in its Brief Answering the

Board's Exceptions. Respondent's arguments therein go unaddressed by the Acting General Counsel.

Neither the Reynolds nor the alleged Durham statement (assuming *arguendo* that it was made) establish any unlawful consideration or purpose. The law clearly allows employers to exercise *Mackay* rights during economic strikes, even if motivated by seemingly punitive or deterrent factors. See *American Optical Co.*, 138 NLRB at 689 (weakening Union bargaining position); *Chromalloy Am. Corp.*, 286 NLRB at 871-72 (inducing employees to abandon the picket line).

II. 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 and in Respondent's Brief In Support Of Limited Cross-Exceptions.

DATED: November 15, 2011

Respectfully submitted,

By: 

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PROOF OF SERVICE

I am a resident of the State of California and over the age of eighteen years and not a party to the within-entitled action; my business address is Three Embarcadero Center, Seventh Floor, San Francisco, California 94111-4024.

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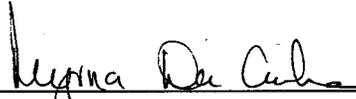
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