UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

IN THE MATTER OF:

MOUNTAIN VIEW COUNTRY CLUB, INC.,
Respondent

and Case: 21-CA-083930

LABORERS' PACIFIC SOUTHWEST
REGIONAL ORGANIZING COALITION,
LABORERS' INTERNATIONAL UNION OF
NORTH AMERICA, AFL-CIO,
Charging Party

RESPONDENT MOUNTAIN VIEW COUNTRY CLUB, INC.'S MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF EXCEPTIONS TO THE DECISION OF THE ADMINISTRATIVE LAW JUDGE

Respondent Mountain View Country Club, Inc. ("Respondent") takes exception to the January 24, 2013 Decision of the Administrative Law Judge ("Decision" or "ALJD") because of several legal errors. Specifically, the ALJ's legal conclusion that Respondent unreasonably delayed in providing the Union with information requested on about disciplinary actions of bargaining unit employees failed to account for: (1) the Union's waiver of its request; and (2) the totality of the circumstances involving the request.

STATEMENT OF FACTS

The evidence unmistakably established that the Union was operating a very slow pace – requesting approximately 4 to 5 meetings a year. (ALJD 2:35-36). On June 26, 2012, the Union's business agent, Michael Dea, met with Respondent's representative. Dea specifically told Respondent's representative that the Union was considering abandoning the bargaining unit and that Respondent need not provide any information concerning disciplinary actions while he considered what to do. At that meeting, he told Respondent's representative that he "thought of

abandoning the [bargaining unit] and that he "doubt[ed] their commitment" to the Union. (Employer Exh. 4, at pp. 6-7). Dea's dubiousness about continuing with bargaining was confirmed by the fact that he did not want to schedule another meeting. (*Id.* at 6). When Respondent's representative reminded Dea that he already had all of the relevant disciplinary information (and indeed that the Union had brought two charges related to that discipline on which the Region chose not to issue a Complaint), Dea responded "hold off, I'll let you know" whether the Union really wanted the disciplinary information. (*Id.* at 7).

Given the tenuousness of Dea's response and the snail's pace at which the Union was proceeding with bargaining, the evidence demonstrates that Respondent reasonably concluded that the Union had no interest inthe information. When the Union requested the information on July 18, 2012, Respondent's representative promptly called the Union and asked if they really wanted the information in light of Dea's previous indication that he was considering "abandoning the bargaining unit. (General Counsel Exh. 4). On August 14, 2012, Daniel Brennan, a different business agent for the Union, sent an e-mail to Respondent's representative asking him to send over the documents (*Id.*) and Respondent's representative did so by mail on August 17, 2012. (Employer Exh. 2). Apparently, the Union has a Post Office box and does not receive mail at their street address and had not seen the documents), so Respondent's representative e-mailed the documents to the Union on August 23, 2012. (Employer Exh. 2).

On these facts, given the totality of the circumstances, there is no question that Respondent acted in a timely manner in providing the Union with the requested information. The evidence demonstrates that the Union waived its initial request for the information or at the very least waived any claim of delay.

In addition, the ALJ erred by not giving appropriate weight to Employer's Exhibit 3, an e-mail which demonstrates the Union's lack of commitment to bargaining at the very time Respondent's alleged "delay" was occurring. In particular, that e-mail shows that in August

2012 while Respondent was supposedly "delaying" in providing documents to the Union, the Union itself was delaying in providing Respondent with a date for a bargaining meeting. (*Id.).* Indeed, the Union never responded to Respondent (until the day the meeting was supposed to take place) and then canceled the meeting (Respondent was going to drive two hours to get there). (*Id.*).

LEGAL ARGUMENT

A. The Union Waived Any Request For The Documents At Issue By Dea's Statements At The June 26, 2012 Bargaining Meeting

By law, a party may waive its right to bargain by "clear and unmistakable" conduct and, it follows, that a party can waive its right to information that it previously requested. *Metropolitan Edison Co. v. NLRB*, 460 U.S. 693 (1983); *see also The Berkline Corp.*, 123 NLRB 685, 695 (1959) (recognizing that party can waive a request for information by a "clear waiver."). The Union plainly and clearly waived its request for the disciplinary information at issue by Dea's conduct at the June 26, 2012 meeting. In particular, at a bargaining meeting, Dea specifically told Respondent's representative that the Union was considering abandoning the bargaining unit and that Respondent need not provide any information concerning disciplinary actions while he considered what to do. At that meeting, he told Respondent's representative that he "thought of abandoning the [bargaining unit] and that he "doubt[ed] their commitment" to the Union. (Employer Exh. 4, at pp. 6-7). Dea's dubiousness about continuing with bargaining was confirmed by the fact that he did not want to schedule another meeting. (*Id.* at 6). When Respondent's representative reminded Dea that he already had all of the relevant disciplinary information (and indeed that the Union had brought two charges related to that discipline on which the Region chose not to issue a Complaint), Dea responded "hold off, I'll let you know" whether the Union really wanted the disciplinary information. (*Id.*at 7). Dea's comments were recorded *verbatim* in notes taken by Respondent's representative at the bargaining session. (*Id.*).

For that reason, through June 26, 2012 and until another request was made (on August 14, 2012), the Union clearly and unmistakably waived its request for the disciplinary information at issue. The evidence is undisputed that Respondent mailed the information to the Union on August 17, 2012 (to the Union's Post Office box) and upon learning that the Union had not yet seen it, Respondent e-mailed a copy of the documents to the Union on August 23, 2012. Such a "delay" – if it can even be called that – is hardly unreasonable. *Cf. Gloversville Embossing Corp.*, 314 NLRB 1258 (1994) (delay of 2 months is unreasonable); *Postal Service*, 308 NLRB 547 (1992) (delay of 7 weeks unreasonable).

Accordingly, Respondent excepts to the ALJ's decision that it unreasonably delayed in providing the requested information to the Union.

B. The ALJ Erred By Failing To Consider The Totality Of The Circumstances Related To The Alleged "Delay"

The law is equally clear that in assessing whether an asserted delay is "unreasonable," the Board must take into account the "totality of the circumstances," which includes a "larger pattern of conduct regarding the relations of the parties." *See, e.g., Ampersand Publishing, LLC d/b/a Santa Barbara News Press*, 358 NLRB No. 141 (Sept. 27, 2012) (Slip Op. at 36). In *Ampersand*, for example, the Board relied on the fact that the employer had committed numerous other violations of Sections 8(a)(1), (3) and (5) in concluding that a delay was unreasonable. *Id.* at 37. Here, there are no such violations. On the contrary, the Union has pursued several charges against Respondent and Region 21 has declined to pursue each and every one of them.

Moreover, the totality of the circumstances shows that the Union has been tenuous at best in its representation of the bargaining unit. To wit, in over two years, the Union has requested a total of nine (9) meetings. (ALJD 2:35-36). The union has requested meetings and then, when such meetings are scheduled, has canceled the meeting on the day thereof. (Employer's Exh. 3). And, most significantly, during the very time that Respondent was supposedly "delaying" in providing the Union with the requested information, the Union's principal negotiator, Michael

Dea, expressly stated that he "thought of abandoning the [bargaining unit] and that he "doubt[ed] their commitment" to the Union. (Employer's Exh. 4, at pp. 6-7).

Moreover, the ALJ found, correctly, that their negotiations to date have been amicable. (ALJD 2:36). The Board has found that an employer's relationship with a union – whether one of "intense hostility" or otherwise – is relevant to determining whether a violation of Section 8(a)(5) occurred and here, the amicable relationship between the parties supports a finding that there was no such violation. *Quality Engineered Products, Inc.*, 267 NLRB 593, 598 (1983).

Finally, the Union itself has engaged in the very kind of "delay" of which it now accuses Respondent. As Employer's Exhibit 3 plainly shows, in August 2012 while Respondent was supposedly "delaying" in providing documents to the Union, the Union itself was delaying in providing Respondent with a date for a bargaining meeting. (Employer's Exh. 3). Indeed, the Union never responded to Respondent (until the day the meeting was supposed to take place) and then canceled the meeting (Respondent was going to drive two hours to get there). (*Id.*).

All of these factors are relevant to the "totality of the circumstances" and all weigh in favor of a finding that there was no reasonable delay here. For that reason, Respondent excepts to the ALJ's decision.

C. The Board Should Refrain From Taking Any Action In Connection With The ALJ's Decision Until There Is a Quorum

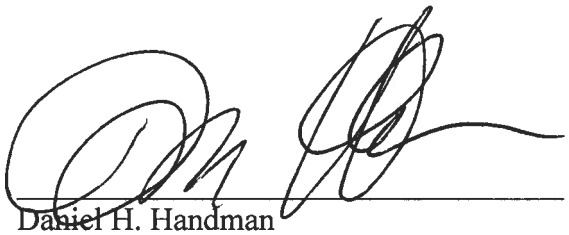
The United States Supreme Court has held that the Board lacks authority to act without a quorum. *See, e.g., New Process Steel*, 130 S.Ct. at 2638. The U.S. Court of Appeals for the D.C. Circuit has held that as presently constituted, the Board does not have a quorum and, as a result, it cannot lawfully act. *See, e.g., Noel Canning*, ___ F.3d ___ (D.C. Cir. Jan. 25, 2013) (Slip Op. at 3, 30, 44). Accordingly, Respondent respectfully submits that the Board has no power to take any action with respect to the ALJ's Decision.

CONCLUSION

For the foregoing reasons, Respondent respectfully excepts to the ALJ's decision and requests that it be reversed.

Dated: February 21, 2013

Respectfully submitted,



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PROOF OF SERVICE OF RESPONDENT MOUNTAIN VIEW COUNTRY CLUB, INC.'S MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF EXCEPTIONS TO THE DECISION OF THE ADMINISTRATIVE LAW JUDGE

I, the undersigned, am a resident of the State of California, over the age of eighteen years, and not a party to the within action. My business address is 233 Wilshire Boulevard, Suite 600, Santa Monica, California 90401. On February 21, 2013, I served the Memorandum of Points and Authorities ISO Exceptions to the Decision of the Administrative Law Judge by placing a copy of it in a sealed envelope(s) with postage thereon fully prepaid, in the United States mail at Santa Monica, California addressed as follows:

Laborers' Pacific Southwest Regional
Organizing Coalition
4401 Santa Anita Ave., Suite 214
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Los Angeles, CA 90010-3860

Olivia Garcia, Regional Director
National Labor Relations Board
Region 21
888 South Figueroa Street, Ninth Floor
Los Angeles, CA 90017-5449

National Labor Relations Board
Office of the Executive Secretary
1099 14th Street, NW
Washington, D.C. 20570

I also caused a copy of the Memorandum of Points and Authorities ISO Exceptions to the Decision of the Administrative Law Judge to be filed by hand on February 21, 2013 at:

National Labor Relations Board
Office of the Executive Secretary
1099 14th Street, NW
Washington, D.C. 20570

I am readily familiar with the firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited in the U.S. Postal Service on that same day with postage thereon fully prepaid in the ordinary course of business. I am aware that on

motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.

I declare under penalty of perjury under the laws of the State of California that the above is true and correct. Executed on February 21, 2013, at Santa Monica, California.

Patricia Dragotta