

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

In the Matter of:

Case Nos. 32-CA-078124;  
32-CA-080340

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

Employer,

and

SERVICE EMPLOYEES  
INTERNATIONAL UNION, UNITED  
HEALTHCARE WORKERS-WEST,

Union.

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**RESPONDENT'S ANSWERING BRIEF TO CHARGING PARTY'S EXCEPTIONS  
AND BRIEF IN SUPPORT OF EXCEPTIONS TO THE DECISION AND  
RECOMMENDED ORDER OF THE ADMINISTRATIVE LAW JUDGE**

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David S. Durham  
Christopher M. Foster  
ARNOLD & PORTER LLP  
Three Embarcadero Center, 10th Floor  
San Francisco, California 94111-4024  
Telephone: 415.434.1600  
Facsimile: 415.677.6262

Attorneys for Respondent/Employer  
**AMERICAN BAPTIST HOMES OF  
THE WEST d/b/a PIEDMONT  
GARDENS**

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## I. PRELIMINARY STATEMENT.

Pursuant to the National Labor Relations Board's Rules and Regulations, Section 102.46(d)(1), American Baptist Homes of the West, d/b/a Piedmont Gardens ("Employer" and "Respondent") submits this Answering Brief to the Service Employees International Union, Union Healthcare Workers-West ("Charging Party") Exceptions And Brief In Support of Exceptions which was filed February 8, 2013.

Although the Respondent objects to the ALJ's Decision and Order—as detailed in its Limited Cross-Exceptions—because Respondent did not violate the Act, the Respondent also contends that *arguendo* even if the Respondent violated the Act, the Charging Party's exceptions are meritless factually and legally or else would constitute impermissible remedies because they would cause an undue burden and constitute punitive measures.

## II. ARGUMENT.

### A. Assuming *Arguendo* That The Respondent Violated Section 8(a)(1), Requiring Posting Of The Specified Notice For 60 Days Is Adequate.

In Exception 1, Charging Party alleges (without citing any authority) that the ALJ's remedy that the Employer post a notice to employees is inadequate because it "is required for only 60 days." Charging Party Brief ISO Exceptions at 1. Instead, Charging Party requests that the Board "adopt a new rule" by which "the posting time in cases should be extended to the length of time between when the complaint issues and when the posting actually occurs." *Id.* Charging Party alternatively requests that the Board adopt a new rule that the posting period should be extended "to a much lengthier time, such as a standard of a year." *Id.*

The Union has made no showing based on the record evidence that there are any unique circumstances justify the Board to depart from "the traditional posting period required by the Board" and to grant such an extraordinary remedy. *Canter's Fairfax Rest., Inc.*, 309 N.L.R.B.

883 (1992). In *Canter's Fairfax Restaurant*, the Board rejected a union's request for an "extraordinary 1-year posting period" to remedy fifty-two violations of the Act, at Sections 8(a)(1), (3), and (5) of the Act, which occurred over a two year period. Here, unlike *Canter's Fairfax Restaurant*, there are only three 8(a)(1) allegations stretching back less than a year; for this reason, it is even clearer than it was in that case that a departure from the Board's traditional posting period is unjustified.

Furthermore, the Charging Party has pointed to no record evidence to support its contention that a sixty day posting period would be inadequate as a practical matter. In fact, the record evidence supports the exact opposite conclusion. Indeed, in this case the Union was able to convey information about the *en masse* meeting at issue by posting a flyer one day in advance of its planned meeting.<sup>1</sup> (ALJD 30:24:-31:9). If, as Charging Party apparently believed, one day is sufficient time to convey information to members, surely sixty days is more than adequate.

**B. Assuming *Arguendo* That The Respondent Violated Section 8(a)(1), Physical Posting Without Electronic Distribution Is Adequate.**

In Exception 2, Charging Party alleges that "[t]he Board should amend the remedy to require that any notice be distributed electronically as required by *J. Picini Flooring*, 356 NLRB No. 9 (2010)." Charging Party Brief ISO Exceptions at 2. The record does not support the issuance of electronic notice, and pursuant to *J. Picini Flooring*, such method of notice is unjustified and inappropriate here.

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<sup>1</sup> References to the official transcript are referred to as "Tr. [pages:line]." References to the Decision and Order of the ALJ are referred to as "ALJD at \_\_\_\_." General Counsel and Respondent's exhibits are referred to as "G.C. Exh. \_\_\_\_" and "Resp. Exh. \_\_\_\_," respectively.

In *J. Picini Flooring*, the Board ruled that “respondents in Board cases should be required to distribute remedial notices electronically when that is a customary means of communicating with employees or members.”<sup>2</sup> (Emphasis added).

There was no record evidence ever proffered that that the Employer has a customary means of communicating with employees or members. Indeed, the Charging Party in this case announced its meeting by distributing and posting a flier. Similarly, the Respondent posted a flier. Thus, the means of posting the ALJ-ordered notice sufficiently ensures that the notices will be “adequately communicated to the employees.” *J. Picini Flooring*, 356 N.L.R.B. No. 9 (2010).

Additionally, as a practical matter, there is no record evidence that any of the members here have email addresses, regularly use email, or that Respondent has any employees’ email addresses, let alone majority of employees’ email addresses, or that it would otherwise be possible or effective or not create a burden to provide the notice to employees in such a manner. *Id.* (Slip Op. at 3) (“A respondent’s customary use of an electronic means of communication also demonstrates that the use of the same means for communication of the Board’s notice does not entail an unreasonable burden for the respondent”).

**C. Assuming *Arguendo* That The Respondent Violated Section 8(a)(1), The Notice Should Still Inform Employees That Under The Act They May “Choose Not To Engage In Any Of These Protected Activities.”**

In Exception 3, Charging Party requests (without citing any authority) that the Board delete the statement in the ALJ-ordered notice that reiterates a basic tenant of the Act, namely that employees may “choose not to engage in any of these protected activities.” In support of its

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<sup>2</sup> The *J. Picini Flooring* Board also reasoned that “Notices posted on traditional bulletin boards may be inadequate to reach employees and members who are accustomed to receiving important information from their employer or union electronically and are not accustomed to looking for such information on a traditional bulletin board.” 356 N.L.R.B. No. 9 (Slip Op. at 3).

transparent attempt to obfuscate rights that it may find to be inconvenient and/or undesirable, the Charging Party contends that there is no issue in this case regarding employee rights to “refrain from protected concerted activity.”

Despite the Union’s baseless assertion, the rights of employees to refrain from attending Union meetings is directly at issue here because the Employer sought to ensure that its break room remained available to all employees, union-represented or otherwise, including those employees who did not want to participate in the all-day meeting but instead wanted to enjoy an uninterrupted break. (Tr. 112:16-21).

Additionally, the purpose of a Board-ordered remedial notice is to convey information to employees about their rights under the Act. *NLRB v. Falk Corp.*, 308 U.S. 453, 462 (1940). In *Ishikawa Gasket America, Inc.*, 337 N.L.R.B. 175 (2001), *enfd.* 354 F.3d 534 (6th Cir. 2004), the Board ruled that notices should be drafted so that they clearly and plainly “apprise employees of their rights” as well as the violations found. *See* NLRB Opers. Mgmt. Mem. 02-43 (Mar. 11, 2002) (“[T]he audience for a Board notice of the group of individuals to whom we are explaining legal rights”). Indeed, a Board-issued notice plays straightforward purpose of informing employees what is the National Labor Relations Board, what is the National Labor Relations Act, what happened in this case, and what the parties will have to do or not do in the future. Informing employees that they have a right under the Act to not engage in any protected activities is consistent with Board law and practice.

In any case, the Charging Party asserts no potential or real harm, based on the record evidence or otherwise, that would result of informing Employees of their basic rights under the Act.

**D. Assuming *Arguendo* That The Respondent Violated Section 8(a)(1) By Interfering With An Alleged Union Right To Hold A Meeting In The Break Room, The Respondent Should Not Be Required To Allow The Union To Have Ten (Or Any) Meetings On Employer-Paid Time In The Respondent's Only Break Room.**

In Exception 4, Charging Party contends (without citing any authority) that because “the employer unlawfully refused the Union the right to have a meeting in the break room,” “the Union should be allowed to have 10 such meeting [sic] at a time of it [sic] choosing on employer paid time.”<sup>3</sup> This exceptional remedy is not supported by the record and would create an undue burden on the employer as well as third-party residents, many of whom are elderly and infirm and who rely on the Employer and its union-represented employees to deliver care. Additionally, the proposed remedy would be punitive, and would therefore exceed the Board’s authority under the Act.

First, after Ms. Gayle Reynolds posted the sign informing union-members that they could not have the Union-meeting as advertised by Ms. Donna Mapp, members continued to meet with their representative so there is no need to take extraordinary efforts to encourage meetings between the Union and its members. (ALJD 4:3-4).

Second, Charging Party’s requested remedy would create an undue burden on the employer and cause potential harm to its approximately 300 elderly residents because the meeting at issue here was designed to be an all-day meeting all member meeting lasting from 7:30 to 6:00 pm in three segments. Union-represented employees are an integral to providing assistance to residents with their activities of daily living (*e.g.*, eating, bathing, etc.) and to monitoring resident’s medical condition. (Tr. 104:7-24). Thus, an order requiring the Employer

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<sup>3</sup> The Charging Party’s Exception 4 was apparently an afterthought since the Charging Party’s brief concludes by requesting that “these three exceptions” be granted. Charging Party, Exceptions and Brief ISO Exceptions at 2 (emphasis added).

to “allow” the Union to hold such meetings would create undue hardship and create real danger for residents since they would potentially not receive the necessary support during the proposed meetings.

Third, there is no record evidence that employees have ever received pay for attending Union meetings. As a result, the proposed remedy would not only be extraordinary, it would be unprecedented.

Fourth, the Charging Party’s request is purely punitive, and as such beyond the scope of the Board’s authority. *See Republic Steel Corp. v. NLRB*, 397 U.S. 7 (1940) (“The Act is essentially remedial. It does not carry a penal program declaring the described unfair labor practices to be crimes”). The proposed remedy is beyond an invitation to institute the ancient law of an eye for an eye, it is instead a request for a more draconian ten eyes for an eye, a remedy more appropriate for imperial Rome than the administrative arm of a modern Democratic state. Remarkably, the Union has given no justification for why it is seeking a total of ten meetings.

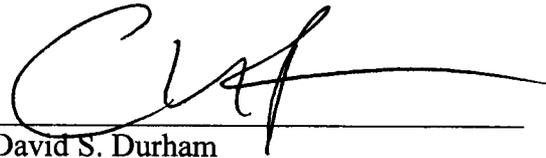
Fifth, the requested remedy is superfluous if the Employer is already required to permit meetings and employees have been informed of their rights per the notice ordered to be posted by the ALJ.

**III. CONCLUSION.**

Because the Respondent did not violate the Act, because the Charging Party's exceptions lack factual and legal merit, and because of each and every reason explained above, all of the Charging Party's exceptions should be denied.

DATED: March 12, 2013

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'C. Durham', written over a horizontal line.

David S. Durham  
Christopher M. Foster  
ARNOLD & PORTER LLP  
Three Embarcadero Center, 10th Floor  
San Francisco, California 94111-4024  
Attorneys for Respondent/Employer

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

33359065

## PROOF OF ELECTRONIC SERVICE

I am a citizen of the United States and a resident of the State of California. I am employed in the County of San Francisco, State of California. My business address is Three Embarcadero, 10th Floor, San Francisco, CA 94111-4024. I am over the age of eighteen years and not a party to this action.

On March 12, 2013, I served the following documents:

Respondent's Cross-Exceptions to the Decision and Recommended Order of the Administrative Law Judge;

Respondent's Brief in Support of its Cross-Exceptions to the Decision and Recommended Order of the Administrative Law Judge; and

Respondent's Answering Brief to the Charging Party's Exceptions to the Decision and Recommended Order of the Administrative Law Judge.

I served the documents on the following persons:

David A. Rosenfeld  
Manuel A. Boigues  
Counsel for Charging Party SEIU-UHW West  
Weinberg, Roger & Rosenfeld  
1001 Marina Village Parkway, Suite 200  
Alameda, CA 94501  
drosenfeld@unioncounsel.net  
Mboigues@unioncounsel.net

Judith J. Chang  
National Labor Relations Board, Region 32  
1301 Clay Street, Room 300N  
Oakland, CA 94612-5211  
Judy.Chang@nlrb.gov

The documents were served by the following means:

**By Electronic Service (E-mail).** By electronically mailing a true and correct copy through Arnold & Porter's electronic mail system from Bridget.Smith-Eastman@aporter.com to the email addresses set forth above.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Dated: March 12, 2013

Signature: \_\_\_\_\_



Bridget Smith-Eastman