

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
Washington, D.C.**

SODEXO AMERICA LLC

and

Case 21-CA-39086

PATRICIA ORTEGA, an Individual

SODEXO AMERICA LLC; AND
KECK HOSPITAL OF USC, formerly
USC UNIVERSITY HOSPITAL

and

Case 21-CA-39109

SERVICE WORKERS UNITED

KECK HOSPITAL OF USC, formerly
USC UNIVERSITY HOSPITAL

and

Cases 21-CA-39328
21-CA-39403

NATIONAL UNION OF HEALTHCARE
WORKERS

**ACTING GENERAL COUNSEL'S ANSWERING BRIEF TO
RESPONDENT'S EXCEPTIONS AND REQUEST FOR STAY**

Pursuant to Section 102.46 of the Board's Rules and Regulations, Series 8, as amended, acting General Counsel hereby files this answering brief to the exceptions to the administrative law judge's decision on remand, request for stay and brief filed in support thereof submitted by Keck Hospital of USC, formerly USC University Hospital, and hereafter Respondent.

I. OVERVIEW

In the underlying case, Sodexo America LLC, 358 NLRB No. 79 (2012), the Board found that Respondent and Sodexo America LLC, its subcontractor, maintained a no-access rule covering off-duty employees that violated Section 8(a)(1) of the National Labor Relations Act (Act). This portion of the Board's decision, i.e., the legality of Respondent's no-access rule is currently pending before the United States Court of Appeal for the D.C. Circuit upon Respondent's petition for review and the Board's application for enforcement.¹

In its underlying decision in Sodexo America, *supra*, the Board noted that Respondent had admitted that it disciplined employees Torres, Aguirre, Corea and Duran because they violated the unlawful no-access rule; however, under current Board law, the Board deemed Respondent's admission legally insufficient to establish that the employees' discipline, in and of itself, violated the Act. See Continental Group, 357 NLRB No. 39, slip op. at 4 (2011). Accordingly, the Board remanded to the administrative law judge the issue of whether the activity of the four employees implicated concerns underlying Section 7 of the Act with the clear instruction that if their conduct did so, then their discipline violated Section 8(a)(1). Thus, the Board's decision was procedurally bifurcated to the extent that the no-access rule was headed up to the circuit court, while the issue of the discipline of employees, pursuant to the rule, was headed back down to the administrative law judge.

¹ On January 25, 2013, contemporaneous with its decision in Noel Canning v. NLRB, ___ F.3d ___ (D.C. Cir. 2013) the D.C. Circuit, on its own motion, ordered that the cases before the court be held in abeyance.

II. THE REMAND BEFORE THE ALJ

On December 5, 2012, the remand came before Administrative Law Judge William G. Kocol (ALJ); whereupon, largely upon the request of Respondent, the parties forewent a full evidentiary proceeding, and stipulated that the activities of the affected employees, covered in paragraphs 12 (a), (b) and (c) of the consolidated complaint, as well as paragraph 10(b) of the amendment thereto, implicate concerns underlying Section 7 of the Act.² The parties further stipulated that the conduct covered by the aforementioned paragraphs of the consolidated complaint, and its amendment, is unlawful only if the no-access rule described in the Board's underlying decision is itself unlawful. The ALJ's and the parties' full stipulation and remarks are found in the official transcript of the proceedings, which is part of the record. Therefore, contrary to Respondent's exceptions, there is no need for the ALJ's supplemental decision on remand (ALJD-R) to be amended to set forth the entire stipulation.

On January 18, 2013, Judge Kocol issued his ALJD-R, wherein he concluded that Respondent had engaged in unfair labor practices in violation of Section 8(a)(1) of the Act. Further, the ALJD-R describes Respondent's unlawful conduct as: 1) threatening to arrest an employee [Torres] if he did not leave the hospital; 2) verbally warning employees Aguirre, Corea and Duran; and, 3) suspending and demoting Torres because all four workers entered the Hospital while off duty to engage in conduct that implicates concerns underlying Section 7 of the Act. (ALJD-R 3:7-12). In the ALJD-R, Judge Kocol neither discusses Respondent's motivation nor finds a violation of Section 8(a)(3) of the Act, which, even if found in the ALJD-R, would not, and does not, affect the remedy in the instant matter. Thus, Respondent's request that the ALJD-R be amended to clarify the Section 8(a)(3) allegation is superfluous.

² Respondent Sodexo America LLC did not enter into the stipulation because its position was that the issue on remand related only to Respondent Hospital.

III. RESPONDENT'S EXCEPTIONS

Beyond Respondent's two enumerated exceptions, found at page 2 of its exceptions and previously addressed above, Respondent states therein:

[I]n light of the fact that jurisdiction over this entire action now resides exclusively in the United States District Court (sic) for the District of Columbia, the Hospital requests that further action in this matter be stayed pursuant to the Order issued by the D.C. Circuit in this case on January 25, 2013 holding all proceedings in abeyance pending further order of the Court.

Respondent's request should be denied because this entire matter is *not* before the D.C. Circuit and, therefore, not in abeyance; rather, the issue of the legality of the no-access rule alone is before the Court. The Board did not decide anything more than that; concomitantly, the Board seeks enforcement of only that portion of its decision and Respondent petitions for review thereof.³ The Court's Order of January 25, 2013, which is based solely upon its decision in Noel Canning, *supra*, does not refer to the remanded portion of the underlying decision.⁴

Moreover, a stay to the proceedings related to the ALJD-R is unwarranted and would upset the Board's orderly processes. It has been the Board's policy to "adhere to its previous holding until the Supreme Court of the United States has ruled otherwise." Pathmark Stores, Inc, 342 NLRB 378, n 1 (2004), quoting Iowa

³ At the remand hearing, the Respondent agreed to withdraw, from the record, its motions to hold this matter in abeyance and stay the Board's proceeding, as a result of which GC withdrew his opposition thereto. As such, the Board did not rule on the motion. Thereafter, on about February 13, 2013, Respondent filed a motion for reconsideration and for stay to the ALJ, which by order dated February 19, 2013, he denied. Nonetheless, by renewing this procedural issue in its exceptions, Respondent seeks yet another opportunity to postpone full adjudication of this unfair labor practice.

⁴ In footnote 2 of its exceptions, Respondent claims that it is not re-asserting its position that the Board had no jurisdiction in this case; however, to the extent that there is any ambiguity regarding this issue, the Board has stated referring to D. C. Circuit's decision in Noel Canning: "This question remain in litigation, and pending a definitive resolution, the Board is charged to fulfill its responsibilities under the Act." Sub-Acute Rehabilitation Center, 359 NLRB No. 77 at n. 1 (March 13, 2013).

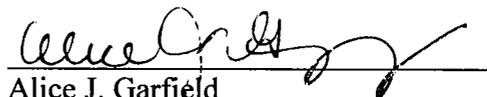
Beef Packers, Inc., 144 NLRB 615, 616 (1963); Insurance Agents Int'l. Union, 119 NLRB 768, 773 (1957). “Only by such recognition of the legal authority of Board precedent, will a uniform and orderly administration of a national act, such as the National Labor Relations Act, be achieved.” *Id.* Respondent’s attempt to stay this matter challenges this longstanding principle, would undermine the orderly administration of the Act, and is against the public interest.

Finally, Respondent’s reliance on Griggs v. Provident Consumer Discount Co., 459 U.S. 56 (1982) in its request for stay is misplaced. First, the issue of the lawfulness of Respondent’s employees’ discipline has not been adjudicated by the Board and, therefore, is not before the Court of Appeal. Second, in Griggs, the petitioners were private parties seeking vindication of private rights, whereas here the General Counsel seeks to effectuate the Act for the purposes of securing statutory rights for all employees. Lastly, the Board remanded the narrow issue of employee discipline on July 3, 2012, and the ALJD-R issued on January 18, 2013, but the D.C. Circuit’s order pertaining to the Board’s underlying decision did not issue until January 25, 2013. Therefore, continued processing of this matter not only allows the Board to comply with its responsibilities but, in all likelihood, will enable the Court, at such time as it becomes possible, to rule expeditiously on this case in its entirety.

IV. CONCLUSION

In light of the above, and the record as a whole, General Counsel requests that the Respondent’s exceptions and request for stay be denied and that the Board affirm the findings of fact and conclusions of law of the administrative law judge.

Respectfully,



Alice J. Garfield
Counsel for the Acting General Counsel
National Labor Relations Board
Region 21

Dated: April 12, 2013

STATEMENT OF SERVICE

I hereby certify that a copy of Acting General Counsel's Answering Brief to Respondent's Exceptions was submitted by e-filing to NLRB's Executive Secretary in Washington, D.C. on April 12, 2013. The following parties were served with a copy of the same document by electronic mail:

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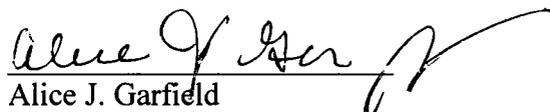
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