UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 22

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REGENCY HERITAGE NURSING
AND REHABILITATION CENTER

and Case No. 22-CA-074343

1199 SEIU UNITED HEALTH CARE
WORKERS EAST, NEW JERSEY REGION

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CHARGING PARTY'S ANSWERING BRIEF
TO RESPONDENT'S EXCEPTIONS

Charging Party, 1199 SEIU Healthcare Workers East, New Jersey Region ("Union" or "Charging Party"), by its attorneys, Gladstein, Reif & Meginniss, LLP, submits this answering brief in opposition to Regency Heritage Nursing and Rehabilitation Center's ("Regency Heritage" or "Respondent") Exceptions to Administrative Law Judge Steven Fish's ("ALJ") June 6, 2013 Decision and Order in the above-captioned case. Herein, Charging Party addresses only Respondent's Exceptions to the ALJ's finding that the underlying unfair labor practice charge ("charge") was timely filed. The Union relies on the brief of Counsel for the Acting General Counsel to address all of Respondent's remaining Exceptions.

ARGUMENT

The ALJ's conclusion that the Union's charge was timely filed is fully supported by the record and applicable Board law. Respondent does not dispute the ALJ's finding that the six-month limitations period prescribed by 10(b) begins to run only when a party has "clear and unequivocal notice," either actual or constructive, of the violation. Nor does Respondent dispute that it bears the burden of proving such clear and unequivocal notice. Moreover, the material

facts related to Respondent's 10(b) defense are not in dispute. Rather, Regency Heritage's exceptions simply recycle the arguments made to the ALJ in the hopes that the Board will reach a different result.

Specifically, Respondent claims that the Union should have been alerted to the violation outside of the 10(b) period because: a) the 2011 arbitration put the Union on notice that employees hired after expiration of the CBA were receiving less than the minimum rate, b) "nothing stopped" the Union or the workers from discovering the violation outside of the 10(b) period, c) the Union "had every reason to be on the lookout" for rate violations, and d) Respondent stated in bargaining that it did not want to renew the contractual minimums for new hires and never denied that it was hiring at rates incompatible with the expired contract's minimums. Exceptions Brief at 21-24. These arguments were all before the ALJ and were properly rejected.

I. THE ALJ CORRECTLY DETERMINED THAT THE 2011 ARBITRATION DID NOT PUT THE UNION ON NOTICE OF THE VIOLATION.

The ALJ properly concluded that the 2011 arbitration proceeding ("arbitration") and the current charge involve distinct violations. ALJD at 24. The charge alleges that Regency Heritage violated the National Labor Relations Act by unilaterally changing the rate of pay for employees hired after expiration of the collective bargaining agreement ("CBA"). The issue in the arbitration was whether Regency Heritage violated the CBA by failing to implement increases to the post-probationary contractual minimums effective December 1, 2010. On May 5, 2011, an arbitrator held that Regency Heritage's failure to implement these contractual minimums violated the CBA and ordered Regency Heritage to pay the correct contractual rate to

all employees.[1] ALJD at 3. The arbitrator also ordered the parties to create a spreadsheet to calculate back pay owed to the affected employees. ALJD at 4.

The ALJ forcefully rejected Respondent's claim that the documents exchanged between the Union and Regency Heritage to calculate back-pay establish that the Union was, or should have been, on notice that Respondent was underpaying employees hired after expiration of the parties' CBA. ALJD 24-20. According to the ALJ, the undisputed fact that Respondent excluded from these documents more than fifty employees hired after contract expiration "eviscerates any possible 10(b) defense." ALJD at 27. Respondent has provided no explanation for its omission of these names.[2] That the names of a few employees hired after contract expiration "slipped through the cracks" and were inadvertently included in these documents is simply insufficient to establish that the Union had clear and unequivocal notice of the violation outside of the 10(b) period. This is particularly true given that the sole purpose of examining these records was to calculate back-pay for employees covered by the arbitration award. ALJD at 26. The Union is simply not required to notice a needle in a haystack. Any finding to the contrary would render the clear and unequivocal notice standard meaningless.[3]

Finally, there is no basis to argue that, because of the arbitration proceeding, the Union was required to investigate other violations. The arbitration proceeding fully resolved the issue

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[1] As explained by the ALJ, as of May 5, 2011, no employee hired after contract expiration had yet completed his or her probationary period. Therefore, the violation that is the subject of the current charge had not yet occurred at the time the arbitration was decided. For this reason alone, the issue was clearly not before the arbitrator. ALJD at 21-23.

[2] The most likely explanation is that Respondent, like the Union, did not believe that employees hired after contract expiration were the subject of the arbitration and therefore, excluded their names.

[3] Respondent's argument is particularly absurd given that the documents used to calculate back-pay were missing information for a number of employees. Critically, the documents omitted key pay rate information for Reggie Reyes, the one individual named in Respondent's Exceptions in support of its claim that the documents put the Union on notice of the violation. Without this information, the Union could not have known whether Regency Heritage was paying Reyes correctly. ALJD at 24-26.

between the parties. As ordered, Respondent corrected the rate of pay for the employees covered by the award and paid the required back-pay. ALJD at 29. The Board has specifically rejected claims that knowledge of one wage violation creates a due diligence requirement to investigate other wage violations. *Broadway Volkswagen,* 342 NLRB 1244, 1247 (2004). The Union had no reason to believe that Regency Heritage would come up with a new scheme to underpay a new group of workers. In fact, the arbitrator's award ordered Regency Heritage to pay the correct contract rate to "all employees." As clearly explained by the ALJ, it was perfectly reasonable for the Union to believe that Respondent would comply. ALJD at 28-29, *citing Land-O-Suns Dairies, LLC*, 357 NLRB No. 73 (2011).

II. RESPONDENT'S REMAINING ARGUMENTS FAIL TO ESTABLISH THAT THE UNION'S CLAIM IS TIME-BARRED.

Respondent repeatedly asserts that the Union's charge is untimely because "nothing blocked" the Union from discovering the violation outside of the 10(b) period. Exceptions Brief at 18. This claim is legally insignificant and factually incorrect.[4] The ALJ correctly found that Respondent's repeated failure to respond to the Union's information requests related to the bargaining unit "seriously hampered" the Union's efforts to diligently represent its workers. ALJD at 27. A union cannot be found to have failed to exercise due diligence when its ability to monitor changes in the terms and conditions of employment for unit employees was hampered by the employer's delay in providing requested information. *Michael Konig T/A Nursing Center*, 318 NLRB 337, 339 (1995). Furthermore, at the unfair labor practice hearing, Ron McCalla

[4] To the extent that Respondent is attempting to prove that it did not fraudulently conceal evidence of the violation, such arguments are irrelevant as the ALJ did not rely on a theory of fraudulent concealment. Respondent's Exceptions additionally address the continuing violation theory, which was also not relied on by the ALJ.

provided uncontroverted testimony that the requested information was particularly necessary given the Union's difficulty accessing Respondent's facility. Tr. 32, 51.[5]

It is well established that constructive knowledge of an unfair labor practice will be imputed on the charging party only when the conduct at issue is sufficiently "open and obvious." *See, e.g., M&M Automotive Group, Inc*., 342 NLRB No. 128, slip op. at 1244, 1246 (2004); *Comcraft, Inc*., 317 NLRB 550, 550 fn. 3 (1995) (no constructive notice where unlawful conduct is not "readily discoverable" by the Union merely by visiting the facility). Individual employee paychecks are not subject to general observation. *Nursing Center at Vineland,* 318 NLRB 337, 339 (1995). Respondent's claim that the charge is time-barred because the Union could have asked questions to uncover the violation flips the clear and unequivocal notice standard by putting the onus on the Union.

The cases cited by Regency Heritage support the ALJ's decision. In *Broadway Volkswagon,* for the reasons discussed above, the Board rejected the employer's 10(b) defense because the employer failed to present evidence upon which to conclude that the union had a duty to investigate the violation outside of the 10(b) period. 342 NLRB at 1246-47. In *St. George Warehouse,* also cited by Respondent, the Board rejected the employer's 10(b) defense and specifically rejected the employer's claims that the use of agency workers at the facility, the subject of the charge, was so open and obvious as to put the union on constructive notice. 341 NLRB 904, 905 (2004). The other cases cited by Respondent are easily distinguishable. In *United Kiser Services,* the Board held that the charge was time-barred because the employer's use of non-bargaining unit employees should have been obvious when the union's business agent visited the worksite at a time when the majority of the non-union employees were openly

[5] Respondent asserts in its Exceptions Brief that the Union has shop stewards in the facility. Exceptions Brief at 18. There is no record evidence to support this assertion.

working. 355 NLRB No. 55, slip op at 1 (2010). In *Phoenix Transit Systems*, the Board held that a union member's charge against the union was time barred because it was undisputed that, outside of the 10(b) period, the charging party was on notice of facts that reasonably engendered suspicion of the violation. 335 NLRB 1263, fn. 1 (2001).

Finally, Respondent's reliance on its representations at bargaining fail to support its 10(b) defense. At a bargaining session on August 24, 2011, Regency Heritage proposed decreasing the contractual minimum rate. ALJD at 29. As explained by the ALJ, this was a bargaining proposal only and did not suggest that Respondent was not honoring the contractual minimum for employees hired after contract expiration. ALJD at 30-31. Regardless, because August 24, 2011 is within the 10(b) period, any representations made at this meeting are irrelevant to whether the Union's charge is timely. For the same reasons, Respondent's claims that it "never denied" hiring new employees at rates incompatible with the contractual minimums fail to support its 10(b) defense. It is undisputed that all conversations between Regency Heritage and the Union regarding Respondent's compliance with the contractual minimums for employees hired after contract expiration took place within the 10(b) period. ALJD at 28-30.

The ALJ properly concluded that the Union had no reason to believe that Regency Heritage had unilaterally changed the pay rate for employees hired after contract expiration until September of 2011, at the earliest. Unequivocal notice was not provided until November 10, 2011. ALJD 30-31.

CONCLUSION

For the foregoing reasons, along with the reasons cited in Counsel for the General Counsel's answering brief, the ALJ correctly found that the Employer violated Section 8(a)(1) and 8(a)(5) of the Act by failing to pay the required minimum rates to all eligible employees

hired on and after March 1, 2011. The Board is urged to adopt the ALJ's recommendations and remedial order.

Dated: New York, New York
September 24, 2013

Respectfully Submitted,

s/ Katherine H. Hansen
Katherine H. Hansen

GLADSTEIN, REIF & MEGINNISS, LLP
817 Broadway, 6th Floor
New York, New York 10003

Attorneys for Charging Party

CERTIFICATE OF SERVICE

This certifies that on September 24, 2013, the foregoing answering brief was filed electronically with the NLRB and served on the parties via email as follows:

Bert Dice-Goldberg, Esq. Bert.Dice-Goldberg@nlrb.gov
Counsel for the Acting General Counsel

Morris Tuchman, Esq. morris@tuchman.us
Counsel for the Employer

s/ Katherine H. Hansen
Katherine H. Hansen