

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

REGENCY HERITAGE NURSING AND  
REHABILITATION CENTER

AND

Case 22-CA-074343

1199 SEIU, UNITED HEALTHCARE WORKERS  
EAST, NEW JERSEY REGION

**RESPONDENT'S EXCEPTIONS REPLY BRIEF**

Morris Tuchman  
*Counsel for Respondent*  
134 Lexington Avenue  
New York, N.Y. 10016  
TEL. 212-213-8899  
morris@tuchman.us

## **INTRODUCTION**

This memorandum is written in reply to that filed by the General Counsel (“GC”) which was due on October 1, 2013. It is filed pursuant to Board Rule 102.46(h).

## **ARGUMENT**

Pursuant to the Rule, only material in the answering brief is to be addressed.

### **THE GC’S ASSERTION THAT NO ADVERSE INFERENCE BE DRAWN**

GC’s answering brief at footnote 2 seeks to strike any reference to the argument that an adverse inference should be drawn by the failure of the GC to call Roy Garcia the union vice president. Mr. Garcia is referred to in GC’s case in chief twice, (tr at 21 and at 35), and was the union representative attending the arbitration hearings in the case. As such, he could have testified concerning what was before Arbitrator Scheinman and especially whether the issue of post expiration minimums was submitted to him and/or whether the union argued the issue before him. Such testimony would directly support two defenses raised by Respondents; 10(b) and deferral. Respondent asked that an adverse inference be drawn since Mr. Garcia was in the courtroom and was sequestered *because he was to testify* at the trial. He then, mysteriously, “ran away” after union witness McCalla testified. It is particularly

telling that the GC does not dispute any of the factual assertions raised. Rather he grasps at a hyper technical assertion that Garcia's being in the courtroom and being the one sequestered is not mentioned in the record. Thus when the courtroom was cleared, if the GC argument is validated, someone should have asked for a "roll call" of any persons leaving the courtroom. This, of course, never happens. However, more significant is the fact the GC does not dispute that Garcia was there, sequestered and disappeared. The motion to strike should be denied and an adverse inference drawn that the issue of minimums post expiration *also* came up before Arbitrator Scheinman. This is, in any event, a logical conclusion since Mr. Scheinman's award *specifically* awarded relief to *all* employees and for dates that were *post expiration* and to employees who were hired *post expiration*.

### ***The Triple A Fire case***

At this point, there is no longer any doubt that the *only* case that has been mustered concerning the issues raised on the merits of this case is *Triple A Fire*. There is, therefore, no clearly established body of law on this issue. A review of the case shows that its oblique "holding" concerning post expiration changes in minimum rates is, at best, *dicta*. The case specifically lists the three defenses raised by the respondent and the decision disposes, *only*, of *those three defenses*. It is very evident that the respondent there did *not* make, or raise, any distinction in its defenses between

employees hired before or after contract expiration and particularly whether there was a duty to even bargain before changing the rates of pay to be paid for persons not yet hired. The issue is even more pointed in this case where the minimums would only be applicable *after probation*. Thus a person must be a) hired and b) pass probation before the minimums would affect them. As stated in our brief in chief, however, there would be no duty to discuss these changes before implementing them.

These persons were not part of the bargaining unit when the changes to the minimums for post probationary employees were made. These persons could not vote in any Board conducted election just as retirees, though once employees, could not currently be considered part of a bargaining unit. The Supreme Court, therefore, held that changes in the retiree benefits could be changed *from the agreed upon bargaining unit CBA terms in place*, without bargaining. As the Court noted, there is a duty to bargain *only* over changes to terms of employment for persons who are *in* the bargaining unit. That is why “applicants”, who, as the GC must acknowledge, may eventually become members of the bargaining unit, do not trigger a bargaining obligation until they actually become part of that unit. As in those cases, these changes were made to the minimum post probationary rates for persons who were not in the bargaining unit and who could not vote in a Board conducted election. There was no duty to bargain with the union before making changes to those terms.

## **THE 10(B) PERIOD EXPIRED, THE CASE IS TIME BARRED**

Even the GC acknowledges, at page 11 of the answering brief, that Respondents provided the union with hire dates of the employees. Seeing those dates, there is no explanation why the union cannot be charged with *seeing* that there were “minimum deficiencies” to employees who were hired both before *and after the contract expired*. All it took was a look at what was provided!

The citation to *Broadway Volkswagen* (at page 12 of the answering brief) is particularly inapt. In that case, no employee notified the union of any (upward) changes (for obvious reasons), there was nothing obvious or notorious about the individual wage *increases*, while in this case there was a *years long* running battle about claims that the proper minimums were not being paid. There is, therefore, a proven, utter, lack of due diligence exercised by the union. *See Moeller Bros.* 306 NLRB 191,192-3. *See also Irving Materials* 2012 Lexis 865 (ALJ Amchan) on this point.

Moreover, there is no explanation in this case, why union stewards, who worked at the facility, would be unable to see that employees were not being paid the correct rates. After all, they were the ones who notified the union of the problem years ago.

Accordingly, the charges were not timely filed and are time barred.

## **CONCLUSION**

By virtue of the forgoing the complaint should be dismissed in its entirety.