UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

INDEPENDENCE RESIDENCES, INC.,

Respondent,

and

Case No. 29-CA-30566

WORKERS UNITED, SERVICE EMPLOYEES INTERNATIONAL UNION,

Charging Party.

RESPONDENT INDEPENDENCE RESIDENCES, INC.'S BRIEF IN SUPPORT OF ITS EXCEPTIONS TO THE DECISION AND ORDER OF THE ADMINISTRATIVE LAW JUDGE

BOND, SCHOENECK & KING, PLLC
Attorneys for Respondent
Independence Residences, Inc.
330 Madison Avenue, 39th Floor
New York, New York 10017
Telephone: (646) 253-2300
Facsimile: (646) 253-2301

Of Counsel:
Louis P. DiLorenzo, Esq.
Subhash Viswanathan, Esq.

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PRELIMINARY STATEMENT

On April 24, 2003, the Union of Needletrades, Industrial, and Textile Employees, AFL-CIO ("UNITE!") filed a petition with the National Labor Relations Board ("NLRB" or the "Board") to represent a unit of employees employed by Independence Residences, Inc. ("IRI" or the "Company" or "Respondent"). On May 9, 2003, UNITE! and IRI entered into a Stipulated Election Agreement, providing for a mail ballot election to be held between June 2, 2003 and June 16, 2003.

On or about May 23, 2003, IRI filed a motion to the NLRB to vacate the Stipulated Election Agreement and stay the election pending a determination as to whether New York Labor Law Section 211-a ("NYLL § 211-a") is pre-empted by the National Labor Relations Act ("NLRA" or the "Act"), an issue which was (and still is) awaiting resolution in the case of Healthcare Association of New York, et al. v. Pataki, et al., 03-CV-0413 (N.D.N.Y. 2003). NYLL § 211-a prohibits private employers that receive state funds from using those state funds to train managers, hire attorneys or consultants, and hire employees for the purpose of encouraging or discouraging union organization, or for the purpose of encouraging or discouraging an employee from participating in a union organizing drive. IRI argued in that motion that approximately 98% of its revenue is derived from monies received from New York State, and that the existence of NYLL § 211-a constituted an impermissible restriction on its free speech rights granted under Section 8(c) of the NLRA.

IRI's motion was denied. The mail ballot election was held, and the employees voted for UNITE! to be their bargaining representative by a 68 to 32 margin. IRI filed six election objections, five of which pertained directly to the adverse effect that

NYLL § 211-a had on IRI's ability to communicate freely with its employees. The Regional Director directed a hearing on all of IRI's election objections pertaining to the effect that NYLL § 211-a had on the election, and recommended that the one election objection unrelated to NYLL § 211-a be overruled. A hearing was held in November and December of 2003.

On June 7, 2004, the Administrative Law Judge ("ALJ") issued a decision recommending dismissal of IRI's election objections in their entirety. IRI subsequently filed exceptions to the ALJ's recommended decision. On August 27, 2010, approximately six years after IRI filed its election objections and more than seven years after the representation election, the NLRB issued a 3-2 decision affirming the ALJ's recommendation, with Members Schaumber and Hayes dissenting. Accordingly, pursuant to that NLRB decision, UNITE! was certified as the bargaining representative of IRI's employees as of August 27, 2010.

On November 30, 2010, the Associate General Counsel for Workers United, SEIU ("Workers United") sent a letter to IRI's then counsel, Frederick Braid, Esq., stating that "Workers United is UNITE's successor union" and asking IRI to negotiate a collective bargaining agreement covering IRI's employees. In the letter, Workers United also requested that IRI provide some information to enable Workers United to prepare for bargaining. As the ALJ noted in his decision, the letter from Workers United was printed on "Workers United/An SEIU Affiliate" letterhead and provided an address different from what was previously known to be UNITE!'s address in New York City. (ALJ Decision, p. 18, fn. 27).

On December 21, 2010, IRI's new counsel sent a reply letter to Workers United, declining to provide the requested information and declining to bargain for three reasons. First, the letter indicated that the split decision from the NLRB upon which the certification was based was inconsistent with established law and the core principles of the NLRA, and that the certification was therefore invalid. Second, the letter indicated that it would be inappropriate to recognize and negotiate with Workers United because Workers United was not the labor organization that filed the representation petition and was not the labor organization that had been certified as the representative of IRI's employees. Third, the letter indicated that only a small percentage of IRI's current workforce had the opportunity to participate in the 2003 election.

Workers United did not respond to Respondent's December 21, 2010 letter. On or about May 20, 2011, three days prior to the hearing, IRI received a facsimile from UNITE HERE!, forwarding another letter dated January 12, 2011, which "disclaim[ed] any interest in representing the employees of [IRI] and recogniz[ed] Workers United, SEIU as the successor of UNITE! for the purposes of representing the employees of IRI . . .." (JX-1). This letter was printed on UNITE HERE! letterhead and provided a contact address in Washington, D.C.

On January 4, 2011, Workers United filed an unfair labor practice charge against IRI, alleging that the Company violated Sections 8(a)(1) and 8(a)(5) of the NLRA by refusing to bargain in good faith and refusing to provide Workers United with information necessary for collective bargaining. IRI submitted a letter to NLRB Region 29 essentially stating the same reasons for its decision not to bargain with or provide

information to Workers United that it had previously communicated to Workers United in its December 21, 2010 letter.

On February 28, 2011, NLRB Region 29 issued a complaint with respect to Workers United's unfair labor practice charge. On March 11, 2011, IRI served its answer to the complaint, asserting the following affirmative defenses: (1) it was justified in declining to negotiate with and provide information to Workers United because Workers United was not the certified representative of IRI's employees and was not the successor of UNITE; (2) the certification of UNITE! as the bargaining representative of IRI's employees on August 27, 2010 was invalid because it occurred more than seven years after the representation election, which resulted in the disenfranchisement of the vast majority of the current employees in the proposed bargaining unit; and (3) the representation election and the certification of UNITE! as the bargaining representative were invalid because NYLL § 211-a infringed upon IRI's rights under Section 8(c) of the NLRA to fully and freely express its views and opinions regarding unionization, which tainted the results of the election.

A hearing was held on May 23, 2011 before the same ALJ who presided over the election objections hearing in 2003. On August 24, 2011, the ALJ issued a decision. In his decision, the ALJ determined that Workers United is the successor of UNITE! for purposes of representation of IRI's employees. (ALJ Decision, p. 32, lines 30-32). The ALJ also determined that the extensive turnover in the bargaining unit between the June 2003 election and the August 2010 certification of UNITE! as the bargaining representative did not constitute a valid defense to IRI's refusal to bargain and refusal to provide requested information. (ALJ Decision, p. 32, lines 14-15). In

addition, although the ALJ did not explicitly address IRI's affirmative defense that the certification of UNITE! was invalid because the existence of NYLL § 211-a interfered with IRI's right to communicate freely with its employees prior to the representation election, the ALJ implicitly rejected that affirmative defense by finding that IRI violated Sections 8(a)(1) and 8(a)(5) of the NLRA and issuing an order requiring that IRI bargain with Workers United and provide Workers United with the information it requested in its November 30, 2010 letter. (ALJ Decision, p. 34, lines 29-37).

IRI now files this brief in support of its exceptions to the ALJ's decision. Specifically, IRI submits that the ALJ's decision should be reversed for the following reasons: (1) the ALJ's conclusion that Workers United is the successor of UNITE! for purposes of representation of IRI's employees is incorrect; (2) the ALJ improperly failed to recognize that a bargaining order is inappropriate in light of the extensive turnover in the bargaining unit between the election and certification; and (3) the ALJ's implicit rejection of IRI's affirmative defense that the existence of NYLL § 211-a rendered the certification of UNITE! invalid was in error. For these reasons, which will be explained more fully below, IRI respectfully requests that the NLRB reverse the ALJ's decision, and issue an order dismissing Workers United's unfair labor practice charge in its entirety.

ARGUMENT

POINT ONE

THE ALJ'S CONCLUSION THAT WORKERS UNITED IS THE SUCCESSOR OF UNITE! FOR PURPOSES OF REPRESENTING IRI'S EMPLOYEES IS INCORRECT.

The right of employees to elect a collective bargaining representative of their own choosing is among the most fundamental rights afforded employees under the NLRA. This right is so paramount, that sections 8(a)(2) and 9(a) of the Act prohibit an employer from recognizing any representative other than that which is supported by the majority of the employees. Despite these most basic precepts of traditional labor law, the ALJ held that IRI has an obligation to negotiate with Workers United, notwithstanding the fact that Workers United is not the labor organization that was elected and is a significantly different labor organization from the one that engaged in organizing efforts prior to the 2003 election.

Based on the evidence presented at the hearing, it is clear that IRI did not have clear and unequivocal knowledge that Workers United was the Section 9(a) representative of its employees. Furthermore, the evidence presented at the hearing established a lack of continuity between the labor organization that was elected by IRI's employees in 2003 and Workers United. The ALJ failed to accord this evidence proper weight, and incorrectly concluded that Workers United is the successor of UNITE! for purposes of representation of IRI's employees.

A. Factual Background Relevant to the Successorship Issue

1. Leadership and Structure of UNITE!

At all relevant times, Bruce Raynor served as President and Edgar Romney served as Secretary Treasurer of UNITE!. (Tr. 34:8-9, 49:11-50:3). UNITE!'s leadership also included: (a) Wilma Neal, Director of UNITE!'s Disability Services Council ("DSC"); and (b) Robert Jordan and Richard Rumelt, Vice-Presidents of UNITE!, members of the General Executive Board, and Co-Managers of UNITE!'s Disability Services and Allied Workers ("DSAW") Joint Board. (Ex. GC-3, p.2; Ex. R-1-4, 6, 7; Tr. 70:16-17, 141:16-18, 172:23-173:1, 209:13-23).[1]

DSC evolved in the early to mid 2000s and its purpose was to organize and represent workers in the MRDD (Mentally Retarded Developmentally Disabled) industry. (Tr. 70:1-7). DSC maintained its own website, organized its own members, and distributed literature specific to UNITE!, which:

- Described its representation of 1,500 caregivers in the MRDD industry;
- Showcased its MRDD membership; and
- Described its focused efforts to organize, represent, and lobby on behalf of and secure better wages and conditions of employment for MRDD direct care staff workers.

(R-5(a)-(c)).

In addition, UNITE! maintained other intermediate entities, referred to as "Joint Boards." (GC-2). Organized by industry and/or geography, Joint Boards were responsible for organizing employees in their respective jurisdictions, negotiating collective bargaining agreements, addressing grievances, and setting dues. (Tr. 38:6-

[1] References to the hearing transcript are indicated by the number in parenthesis (page: line). References to the General Counsel's exhibits are indicated "GC-__"; references to the Respondent's exhibits are indicated "R-__"; and references to Joint exhibits are indicated "JX-__".

40:17, 44:16-45:1,12-24, 113:17-24, 123:13-17, 141:25-142:7, 155:16-19, 158:6-8). Joint Boards also were asked to vote on whether to stay with or disaffiliate from their parent union. (Tr. 47:5-17). As the ALJ found, the DSAW consisted of six local unions, which represented employees in the MRDD industry. (ALJ Decision, p. 6, lines 27-29; Tr. 70:1-7). As the ALJ also found, IRI employees would have been assigned to the DSAW if UNITE! had been certified in 2003. (ALJ Decision, p. 12, lines 30-33; Tr. 78:6-10, 87:3-17, 129:2-4).

2. Unionization of IRI Employees

In 2003, Ms. Neal, as the Director of UNITE!'s DSC, spearheaded the organizing campaign of IRI employees. (R-1-4, 6, 7; Tr. 107:14 -14, 170:2-10). The organizing literature IRI employees received from UNITE! promised that IRI employees would:

- Be represented by the UNITE! Disability Services Council;
- Benefit from UNITE! Disability Services Council's Political Action Committee, which "ha[s] lobbied every year for better wages for MRDD [Mentally Retarded Developmentally Disabled] direct care staff . . .;"
- Join forces with 1,500 other UNITE! Disability Services Council members; and
- Be afforded top-level union officials with experience negotiating labor contracts in the MRDD industry.

(R-5(a)-(c)). The ALJ described some of this organizing literature in detail in his decision. (ALJ Decision, pp. 9-12).

In June 2003, presumably based on the promises made to them by Ms. Neal and the organizing literature distributed by DSC, a majority of employees who cast ballots voted in favor of being represented by UNITE!. (Tr. 28:5-9). On August 27,

2010, UNITE! was certified as the exclusive bargaining representative of IRI employees. (GC-1).

3. The Merger of UNITE! and HERE

In July 2004, UNITE! merged with the Hotel Employees Restaurant Employees ("HERE") to form UNITE HERE! (GC-4). In or about 2006, the DSAW Joint Board merged with a HERE Joint Board, and changed its name to the Airport, Racetrack & Allied Workers Joint Board ("ARAW"). (Tr. 71:12-72:7).

Despite the name change, Mr. Rumelt continued to serve as a Vice-President and Co-Manager of the ARAW Joint Board with Stephen Papageorge, Sr., a former HERE Vice-President. (GC-5, p.6-7, 10; Tr. 72:8-17, 125:9-21, 168:19-21, 169:1-5). ARAW included Locals 37, 117, 189, 919, and 1904, three of which represented MRDD workers. (Ex. GC-5, p.10, Tr. 80:2-4).

4. The Disaffiliation from UNITE HERE!

On or about March 21, 2009, several Joint Boards of UNITE HERE! voted on whether to disaffiliate from their parent. (Tr. 47:5-17, 48:7-12). Pursuant to UNITE!'s constitution, "[a]ll decisions made at a meeting of the joint board shall be final and binding upon the joint board, its affiliated local unions and their members." (GC-2, p.28). As the ALJ found, the ARAW Joint Board (which was formerly the DSAW Joint Board that was critical to the organizing of IRI's employees), voted against disaffiliation from UNITE HERE! (ALJ Decision, p. 14, lines 19-24). Accordingly, all of ARAW's affiliated locals remained with UNITE HERE!, including the three MRDD-related locals that were formerly part of the DSAW Joint Board. (Tr. 73:2-4, 101:8-17,106:15-16, 189:16-19; R-2). On or about March 21, 2009, the Joint Boards that voted to disaffiliate

from UNITE HERE! formed Workers United and signed an affiliation agreement with the Service Employees International Union ("SEIU") to become a "conference" within it. (Tr. 48:7-12, 57:17-23, 68:18-69:8; GC 8, 9). UNITE HERE! is still in existence. (Tr. 58:24-25).

As a result of the disaffiliation, the parties distributed their assets and members among themselves pursuant to a confidential settlement agreement. (Tr. 58:9-23, 130:1-18). Part of the settlement provided that the bargaining unit of IRI employees was allocated to Workers United, notwithstanding the fact that the component of UNITE! that organized those employees and marketed itself as experts in representing employees in the MRDD industry remained part of UNITE HERE!. (Tr. 138:24-139-:6,150:22-151). There is no evidence that IRI employees were consulted by Workers United or UNITE HERE! with respect to this decision.

Although certain high-level leaders, such as Messrs. Raynor and Romney continued in leadership positions at Workers United, none of the individuals who were part of the leadership of the DSC or the DSAW Joint Board (for example, Ms. Neal or Messrs. Rumelt or Jordan) continued in leadership positions with Workers United. (Tr. 105:8-12, 106:15-16). Accordingly, the individuals who led the organizing of IRI's employees and had direct contact with IRI's employees prior to the representation election remained with UNITE HERE!.

5. Workers United

Workers United is "an International Union of manufacturing, distribution, laundry, hospitality, food services, gaming and retail workers . . .." (GC-8, p.ii; Tr. 53:2-10). Unlike UNITE!, Workers United does not maintain a disability services joint board

or a disability services council. (GC-6; Tr. 81:20-82:6). Consistent with Mr. Romney's testimony, Workers United's affiliation agreement with SEIU makes no specific mention of representing workers in the MRDD industry. (Tr. 137:6-8). Rather, Mr. Romney testified that MRDD workers, such as the IRI employees who voted to be represented by UNITE!, would now fall under the jurisdiction of "property services or hospitality" joint boards of Workers United, even though IRI's employees clearly are not engaged in the property services or hospitality industries. (Tr. 136:18-22; GC-9, p.1).

Upon being asked whether any portion of the affiliation agreement addresses health care or disability services employees, Mr. Romney acknowledged that the agreement did not address employees in those industries. (Tr. 137: 6-8). Notably, Workers United's Spring 2009 Directory lacks any staff dedicated to the representation of MRDD workers. (GC-6). As Mr. Romney, Manager of Workers United's New York Metropolitan Area Joint Board, testified, IRI would be assigned to his jurisdiction, despite the fact that his expertise is in the garment industry and the fact that he had no direct interaction or knowledge of IRI, its employees, or the MRDD industry prior to 2010. (Tr. 66:20-23, 91:9-20, 116:12-15, 163:2-16).

B. The ALJ's Analysis of the Continuity/Successorship Issue was Flawed

1. The ALJ Incorrectly Determined that There Was No Confusion Regarding the Bargaining Representative of IRI's Employees

"Section 9(a) of the Act creates a mandatory obligation on the employer's part to deal *exclusively* with the bargaining representative whom the employees have chosen, exacting, as the Supreme Court held in Medo Photo-Supply Corporation v. NLRB, 321 U.S. 678, 684, 'the negative duty to treat with no other.'" Sherwood Ford, Inc., 188 NLRB 131, 133 (1971) (italics in original). Where confusion exists as to which

union is the certified bargaining representative, an employer cannot be found to have violated its duties to furnish information or bargain. Newell Porcelain Co., 307 NLRB 877 (1992), enf'd United Elec. Workers v. NLRB, 986 F.2d 70 (4th Cir. 1993). Confusion can result when the certified representative delegates its responsibilities to another labor organization, which is prohibited. Goad Co., 333 NLRB 677, 679-680 (2001). As matter of law, only employees within the proposed bargaining unit have the statutory power to confer Section 9(a) status on a chosen representative. Continental Linen Services, Inc., 2010 NLRB LEXIS 347, *33 (Sept. 15, 2010).

The ALJ incorrectly determined that "there was no confusion here concerning the representative of Respondent's employees, and there was no attempt to transfer representational responsibilities and that Respondent had no right to refuse to recognize and bargaining with Workers United." (ALJ Decision, p. 25, lines 16-19). The evidence in the record clearly establishes that there was significant confusion regarding the identity of the certified representative of IRI's employees, and that there was an attempt to transfer representational responsibilities to a labor organization that was not certified as the bargaining representative of IRI's employees.

More than seven years after the 2003 representation election, UNITE! (the labor organization that filed the representation petition) was certified as the bargaining representative of IRI employees. (GC-1). Eight months after being certified, however, a union appearing to be UNITE!'s namesake, UNITE HERE!, disclaimed all interest in representing IRI employees. (JX-1). This disclaimer further stated that UNITE HERE! recognized a new union, Workers United, as the certified representative of IRI's employees. (JX-1). To further complicate matters, prior to the Company receiving this

disclaimer, Workers United, which is an affiliate of a different international union, namely SEIU, informed the Company that it was UNITE!'s successor and requested that the Company furnish information and bargain with it. (GC-1). This letter was sent to IRI on letterhead that listed a different address from the one that was known to be UNITE!'s address at the time of the representation election. (ALJ Decision, p. 18, fn. 27).

Despite Workers United's self-serving assertion that it was UNITE!'s successor, IRI had more than sufficient reason to doubt Workers United's self-proclaimed status as the certified representative. First, UNITE! had ceased to exist since July 2004 when it merged with HERE and became UNITE HERE!.[2] (GC-4). Second, IRI employees never voted to elect Workers United to represent them, and it is undisputed that Workers United and UNITE HERE! did not consult IRI's employees to determine whether they wanted to be represented by Workers United or preferred to be represented by UNITE HERE!. Third, it is further undisputed that the Joint Board that would have been responsible for negotiating collective bargaining agreements on behalf of IRI's employees and engaging in other representational duties specifically rejected the option of affiliating with Workers United, and that the Joint Board and all of its local unions that represented employees in the MRDD industry continued their affiliation with UNITE HERE!. (Tr. 73:2-4, 101:8-17,106:15-16, 189:16-19; R-2). Fourth, not only did this same Joint Board vote to remain affiliated with UNITE HERE!, UNITE HERE! has now disclaimed all interest in representing IRI's employees. (Tr. 58:24-25).

In light of these undisputed facts, the ALJ's determination that there was no confusion regarding the identity of the certified representative of IRI's employees is

[2] To IRI's knowledge, UNITE!'s certification was never amended to include Workers United as the Section 9(a) representative of IRI's employees.

incorrect and should be reversed. IRI could not possibly have had clear and unequivocal knowledge that Workers United was the certified representative of IRI's employees at the time Workers United made a request to bargain and requested information in preparation for bargaining. Considering the fact that an employer can only deal with the certified representative of its employees, IRI was under no duty to bargain with Workers United or provide requested information to Workers United. Sherwood Ford, Inc., 188 NLRB 131 at 133; Goad Co., 333 NLRB at 679-680; Continental Linen Services, Inc., 2010 NLRB LEXIS at *27.

Moreover, as the party asserting that a Section 9(a) relationship exists, the General Counsel bore the burden of proving by a preponderance of the evidence that such a relationship exists. Continental Linen Services, Inc., 2010 NLRB LEXIS at *27 (dismissing Section 8(a)(5) and Section 8(a)(1) allegations and finding that the General Counsel failed to establish by a preponderance of evidence that the Charging Party, Workers United, ever became the certified representative of employees who were previously represented by UNITE HERE!); Goad Co., 333 NLRB at 679-680. The ALJ incorrectly placed the burden of proof on IRI to demonstrate a lack of continuity between UNITE! and Workers United, rather than requiring the General Counsel to prove that a Section 9(a) relationship exists between Workers United and IRI's employees. (ALJ Decision, p. 30, lines 7-9).

For these reasons, the NLRB should find that the Company lawfully fulfilled its "duty to treat with no other," reverse the ALJ's decision, and dismiss the complaint against IRI in its entirety.

2. The ALJ's Determination That Workers United is the Successor of UNITE! For Purposes of Representation of IRI's Employees is Incorrect

The purpose of the continuity requirement is to ensure that "no one can substitute an entirely different representative in disregard of the established mechanisms for making such a change." Western Commercial Transport, 288 NLRB 214, 217 (1988). As such, an employer is not required to bargain with a union that has undergone organizational changes that are "sufficiently dramatic to alter the union's identity." Garlock Equipment Co., 288 NLRB 247, 248 (1988) (finding that changes "[w]rought by affiliation have shifted the effective locus of control from a small independent organization to a large division of an international union").

An employer can demonstrate that a question concerning representation exists by proving that the changes resulted in a lack of substantial continuity of representation ***for the affected bargaining unit***.[3] Chas. S. Winner, Inc., 289 NLRB 62, 69 (1988) (emphasis added) (finding insufficient continuity where unit representatives from former independent local would have been "fully replaced" by Teamsters officials). Where, as here, changes in union leadership, contract negotiations, or the certified union's assets and facilities "implicates the employees' right to select a bargaining representative, and to protect the employees' interests, the situation may require that the Board exercise its authority to conduct a representation election." Western Commercial Transport, 288 NLRB 214, 217-218 (1988) (citing NLRB v. Financial Institution Employees, 475 U.S. 192, 202 (1986)).

[3] As indicated above, the ALJ erred in imposing this burden of proof on IRI in light of the significant confusion that existed regarding the identity of the certified representative of IRI's employees. However, even assuming, purely for the sake of argument, that the burden of proof was properly placed on IRI to demonstrate a lack of substantial continuity of representation for the employees in the affected bargaining unit, the ALJ incorrectly determined that IRI failed to meet this burden of proof. (ALJ Decision, p. 30, lines 7-9).

When assessing continuity of union leadership, the Board considers more than just whether the union officers remain the same. Instead, the Board looks to whether "other representatives of the union . . . who fill positions of responsibility and trust," including divisional officers, stewards, and other unit members responsible for handling day-to-day issues of contract administration" have remained. Service America, 307 NLRB 57, 60 (1992); Chas. S. Winner, Inc., 289 NLRB 62, 69 (1988) (no substantial continuity where unit representatives from former independent local would have been "fully replaced" by Teamsters officials). The Board also considers whether officials from the new union have had any previous connection with the unit employees. Western Commercial Transport, 288 NLRB 214, 217 (1988).

Emphasizing that no single factor is dispositive, the Board eschews the use of a "strict checklist," and instead focuses its analysis upon "the totality of circumstances in order to give paramount effect to employees' desires." Sullivan Brothers Printers, Inc., 317 NLRB 561, 563, enf'd, 99 F.3d 1217 (1st Cir. 1996). As the Court held in Seattle-First Nat'l Bank v. NLRB, 892 F.2d 792, 799 (1989):

> It is tempting to find a guiding principle to the effect that if an independent becomes a self-contained local by affiliation with an international, continuity is preserved, but . . . to ask only whether the old independent has become its own local oversimplifies the analysis.

Id.

Here, the ALJ applied a strict checklist of factors – the requirement of initiation fees or transfer fees, the similarity in the dues structure, the continuity of leadership, similarity of constitutions, etc. – while improperly ignoring the fundamental question of whether the identity of the labor organization that IRI's employees elected in

June 2003 has been altered by the fact that the DSC and DSAW no longer exist within Workers United. (ALJ Decision, pp. 23-24). Based on the "totality of circumstances" from ***the vantage point of IRI's employees***, it is indisputable that the labor organization these employees elected in June of 2003 is extremely different from the labor organization that now claims to represent them.

For example, the organizing literature that IRI employees received from UNITE! promised that IRI employees would:

- Be represented by UNITE!'s Disability Services Council;
- Benefit from the Disability Services Council's Political Action Committee, which "ha[s] lobbied every year for better wages for MRDD [Mentally Retarded Developmentally Disabled] direct care staff . . .;"
- Join forces with 1,500 other UNITE! DSC members; and
- Be afforded top-level union officials with experience negotiating labor contracts in the MRDD industry.

(R-5(a)-(c)).

What Workers United actually has to offer IRI employees is starkly different:

- There is no "Council" or "Joint Board" dedicated to employees in the MRDD industry, and therefore, IRI would be the only MRDD bargaining unit within Workers United; (GC-6; Tr. 81:20-82:6);
- There appears to be no lobbyists dedicated to getting better wages for employees who work in the MRDD industry; (GC-6; Tr. 81:20-82:6, 137:6-8); and
- None of Workers United's top union officials have any significant experience, let alone familiarity, with IRI, its employees, or negotiating labor contracts in the MRDD industry.[4] (Tr. 66:20-23, 91:9-20, 116:12-15, 163:2-16).

[4] As a matter of fact, the Workers United Directory, Spring 2009, does not list any staff dedicated to the representation of MRDD workers. (GC-6).

Despite some continuity among individuals in certain leadership position, key officials from UNITE! and UNITE HERE! who dealt or would have dealt directly with IRI employees, such as Ms. Neal, and Messrs. Jordan, Rumelt, and Papageorge, have no affiliation whatsoever with Workers United. (Tr. 34:8-9, 49:11-50:3, 105:8-12, 106:15-16). Rather, Mr. Romney testified that IRI would be assigned to his Joint Board, despite the fact that his expertise is in the garment industry and the fact that he had no direct interaction with IRI's employees and no experience in the MRDD industry. (Tr. 66:20-23, 89:20-91:5, 91:9-20, 116:12-15, 163:2-16) ("I am not familiar with that, how [ARAW] actually conducted their approval processes in terms of ratification votes . . . [g]iven the nature of that industry, which I think is historically different than what we've been dealing with . . .").

In addition to the loss of those key union officials who organized IRI employees and the fact that their promises to IRI employees as stated in the organizing literature will obviously go unfulfilled (for example, a unified force of 1,500 other members and a strong lobbying committee), there has also been a loss of certain key assets and facilities. As a result of the mergers, certain funds were combined, and it is unclear to what extent these resources have been diluted since HERE had fewer resources than UNITE! (Tr. 58:9-23, 130:1-18). In addition, although UNITE HERE! owned a bank and a building in New York City, Workers United now owns the bank but no longer has any ownership interest in the building. (Tr. 58:11-23).

Notably, what has remained the same through all of UNITE!'s variations is that the Joint Board maintains significant authority and responsibility for the bargaining units assigned to it. Indeed, it serves as the primary representative of UNITE!, UNITE

HERE!, and Workers United's members. As Mr. Romney testified, Joint Boards are responsible for organizing employees in its jurisdiction, negotiating collective bargaining agreements for the units assigned to it, addressing employee grievances, and setting dues. (Tr. 38:6-40:17, 44:16-45:1,12-24, 113:17-24, 123:13-17, 141:25-142:7, 155:16-19, 158:6-8). Under the Constitution, Joint Boards even have the authority to vote on whether to stay or disaffiliate from its parent union and have that decision be binding on its locals and members. (Tr. 47:5-17). Thus, the relevant inquiry here for purposes of the continuity analysis is whether the Joint Board that was part of UNITE! and would have been responsible for the unit of IRI employees remains part of Workers United. The answer to that inquiry is clearly "no."

The ALJ improperly ignored this relevant inquiry while focusing principally on an application of continuity factors that have no bearing on whether Workers United bears any resemblance to the labor organization that IRI's employees elected in June of 2003. In light of the substitution of an MRDD-focused Joint Board with which the IRI employees would have been affiliated, for a garment-based Joint Board, with which they now would be affiliated, it is undeniable that these changes have substantially altered the identity of the union that the IRI employees elected to represent them.

Apparently aware of the fact that the evidence demonstrated Workers United's lack of knowledge and experience in representing employees in the MRDD industry, the ALJ improperly placed undue significance on the fact that Workers United became affiliated with SEIU, which does have some experience in representing employees in the MRDD industry. (ALJ Decision, p. 28, lines 36-41). This reliance on Workers United's affiliation with SEIU is clearly inappropriate and irrelevant to the issue

of whether Workers United is the successor of UNITE!. There was absolutely no evidence presented during the hearing that any SEIU officials will have any representational responsibilities with respect to IRI's employees. In fact, the only evidence presented at the hearing was that the representational responsibilities for the IRI bargaining unit will be assigned to Mr. Romney's Joint Board, which has no experience in representing employees in the MRDD industry. (Tr. 66:20-23, 89:20-91:5, 91:9-20, 116:12-15, 163:2-16). The ALJ specifically found that Mr. Romney's Joint Board would be assigned representational responsibilities for the IRI bargaining unit, and also specifically found that "[t]here is no evidence that either Romney or anyone else associated with this joint board had any experience negotiating contracts covering employees engaged in the MRDD industry." (ALJ Decision, p. 17, lines 20-27). The ALJ also specifically found that Workers United's affiliation with SEIU "had virtually no effect on the structure or operations of Workers United." (ALJ Decision, p. 17, line 5).

Moreover, SEIU was in existence at the time of the 2003 election, was not the labor organization that filed the petition to represent IRI's employees, and was not the labor organization that was certified. Neither the General Counsel nor Workers United has contended at any point during this proceeding (nor can they reasonably contend) that SEIU is the successor of UNITE! for purposes of representing IRI's employees. Accordingly, it is irrelevant whether SEIU has experience representing employees in the MRDD industry.

The ALJ also improperly relied on his examination of various SEIU and employer web sites to confirm his irrelevant conclusion that SEIU has experience

representing employees in the MRDD industry. (ALJ Decision, p. 29, lines 5-28). The content of those web sites was not placed into the record by any party at the hearing, and there has been no authentication or verification of any of the information contained on those web sites. The SEIU web sites are, presumably, used at least in part to advertise SEIU's services to employees who are not represented by SEIU, and may very well contain some exaggerations typical of such advertisements. It is notable that the ALJ's reliance upon the SEIU's own advertising materials to support his conclusion that SEIU has significant experience in representing employees in the MRDD industry is similar to IRI employees' reliance upon UNITE! DSC's advertising materials to support their belief that they were electing a labor organization that had significant experience in representing employees in the MRDD industry. As explained above, however, the labor organization that is now claiming to represent IRI's employees clearly does not have that experience.

For these reasons as well, the Board should reverse the ALJ's decision, and dismiss the complaint against IRI in its entirety.

POINT TWO

THE ALJ IMPROPERLY FAILED TO RECOGNIZE THAT A BARGAINING ORDER IS INAPPROPRIATE IN LIGHT OF THE EXTENSIVE TURNOVER IN THE BARGAINING UNIT BETWEEN THE ELECTION AND CERTIFICATION.

Equity weighs against issuance of a bargaining order in situations where there has been such an inordinate delay that the composition of the bargaining unit has changed substantially and there is no way of knowing if the union still enjoys majority

support. See, e.g., NLRB v. Connecticut Foundry Co., 688 F.2d 871, 881 (2d Cir. 1982); NLRB v. Nixon Gear, Inc., 649 F.2d 906, 914 (2d Cir. 1981).

The proposed bargaining unit, as described in the Stipulated Election Agreement, included "all full-time and regular part-time and Relief employees in the classifications of Direct Care Workers, Residential Habilitation Specialists, Day Habilitation Workers, Medical Care Workers, and Maintenance" at IRI's Jamaica Avenue office and its eleven other facilities in existence at the time the Stipulated Election Agreement was signed. (GC-1). At the time of election, there were 151 employees who were in positions covered by the proposed bargaining unit description. (Tr. 198:24-25).

Cliff Emmerich, IRI's Director of Human Resources, testified during the hearing that the Company has opened some new facilities since the time of the election and has consolidated two of the facilities that existed at the time of the election into one facility. (Tr. 200:3-5, 201:7-9). Mr. Emmerich testified that IRI currently employs approximately 234 employees in positions covered by the proposed bargaining unit description. (Tr. 196:1-3). Mr. Emmerich also testified that there are approximately 40 more employees in hourly positions that did not exist at the time of the election. (Tr. 196:11-13). There has also been substantial turnover in the bargaining unit since the time of the election. In fact, approximately, 87% of the current employees in the proposed bargaining unit were not employed at the time of the election, and therefore, did not have an opportunity to determine whether or not they wished to be represented by a labor organization. Moreover, the small percentage of current employees who did

have the opportunity to vote elected UNITE! – not Workers United – to be their bargaining representative.

The ALJ incorrectly concluded that the substantial changes in the composition of the bargaining unit from the date of the election to the date of UNITE!'s certification as the bargaining representative did not constitute a valid defense to the issuance of a bargaining order. Although the Second Circuit Court of Appeals' decisions in the Connecticut Foundry and Nixon Gear involved slightly different procedural and factual circumstances, the underlying principle is the same. Equity weighs against issuance of a bargaining order where the Board's inordinate delay in certifying a bargaining representative has resulted in significant doubt as to whether the labor organization enjoys majority support.

For this reason, the Board should determine that the remedy and order imposed by the ALJ are inequitable, and should vacate that remedy and order in their entirety.

POINT THREE

THE ALJ'S IMPLICIT REJECTION OF IRI'S AFFIRMATIVE DEFENSE THAT THE EXISTENCE OF NYLL § 211-a RENDERED THE CERTIFICATION OF UNITE! INVALID WAS IN ERROR.

The ALJ did not explicitly address IRI's affirmative defense that the certification of UNITE! was invalid because the existence of NYLL § 211-a interfered with IRI's right to communicate freely with its employees prior to the representation election. However, the ALJ implicitly rejected that affirmative defense by finding that IRI violated Sections 8(a)(1) and 8(a)(5) of the NLRA and issuing an order requiring that IRI

bargain with Workers United and provide Workers United with the information it requested in its November 30, 2010 letter. (ALJ Decision, p. 34, lines 29-37).

IRI continues to maintain that the ALJ's initial recommended decision in 2004 that IRI's election objections should be overruled and the decision of the three-member Board majority on August 27, 2010 overruling IRI's election objections are incorrect. IRI now urges the Board to re-examine the well-reasoned opinion of the two-member dissent in the August 27, 2010 decision, and requests that the Board invalidate UNITE!'s certification on the ground that NYLL § 211-a unreasonably interfered with IRI's free speech rights granted under Section 8(c) of the NLRA.

A. Factual Background Relevant to the NYLL § 211-a Issue

1. NYLL § 211-a

NYLL § 211-a was enacted in 2002, shortly before the petition was filed by UNITE! to represent IRI's employees. The relevant provisions of NYLL § 211-a are as follows:

> 1. . . . that the use of state funds and property to encourage or discourage employees from union organization constitutes a misuse of the public funds and a misapplication of scarce public resources . . . .
>
> 2. Notwithstanding any other provision of law, no monies appropriated by the state for any purpose shall be used or made available to employers to:
>
> a. train managers, supervisors or other administrative personnel regarding methods to encourage or discourage union organization, or to encourage or discourage an employee from participating in a union organizing drive;
>
> b. hire or pay attorneys, consultants or other contractors to encourage or

> discourage union organization, or to encourage or discourage an employee from participating in a union organizing drive; or
>
> c. hire employees or pay the salary and other compensation of employees whose principal job duties are to encourage or discourage union organization, or to encourage or discourage an employee from participating in a union organizing drive.
>
> 3. Any employer that uses funds appropriated by the state . . . shall maintain . . . financial records, audited as to their validity and accuracy, sufficient to show that state funds were not used to pay for such activities [and] shall make such financial records available to the state entity that provided such funds and the attorney general within ten business days [upon] request . . . .

N.Y. Lab. Law § 211-a (McKinney 2009).

New York Labor Law Section 211-a(4) authorizes the Attorney General to enjoin violations of NYLL § 211-a and provides also for return of the unlawfully expended funds to the State, a penalty up to $1,000, and, for an employer found to have knowingly violated NYLL § 211-a or to have violated the statute within the preceding two years, up to three times the amount of money spent in violation of NYLL § 211-a. The applicable definition of "employer" includes "manager, superintendent, foreman, supervisor or any other person employed acting in such capacity." N.Y. Lab. Law § 2(6) and (8-a) (McKinney 2009). Furthermore, violations of New York Labor Law are also punishable by criminal prosecution and imprisonment. N.Y. Lab Law §§ 213, 214 (McKinney 2009).

2. IRI's Revenue Received from New York State

IRI is a private, not for profit employer that provides support services to individuals with developmental disabilities that include, for example, mental retardation, visual impairments, and communication and behavioral disorders. (T. 174).[5] IRI accomplishes this through its residential services, which provide for twenty-four hour, seven-day-a-week care in a community residential setting, as well as through day services, family support services and other related services. (T. 174, 178).

IRI's activities are regulated by what was known at the time of the election as the Office of Mental Retardation and Development Disabilities ("OMRDD"), a New York State agency that sets operating standards which it enforces through periodic audits of records and on-site visits. (T. 183). OMRDD is now known as the Office for People with Developmental Disabilities ("OPWDD"), but will be referred to as OMRDD in this Brief, because that was the name of the office at the time of the representation election.

OMRDD is responsible for all of IRI's public funding (T. 186), which includes federal and state monies (T. 199-202) and comprised more than 99% of IRI's total budget for the two years preceding the election for which there were audited financial statements (R 23; CP 1), with the remainder comprised of private donations, some of which are restricted in their use by the instructions of the donor. (T. 203-04, 226). In addition to using public money to fund its services, public funds also facilitate the purchase of property, such as a residence for its consumers, through public

[5] Throughout Point Three of this Brief, all references to the record are to the hearing transcript of the 2003 election objections hearing and the exhibits introduced at that hearing. No additional evidence was introduced at the May 23, 2011 unfair labor practice hearing regarding the adverse effect that NYLL § 211-a had on IRI's free speech rights prior to the representation election because the issue had already been litigated at the 2003 election objections hearing.

financing in which the mortgage is held by the State. (T. 205). Although public funding comes from both New York State and the Federal Government, in the view of the Attorney General of the State of New York, all such public monies that pass through the State and on to IRI are covered by NYLL § 211-a, including those funds that originate from the Federal Government. (CP 19, p. 3; R 3, Tab D, ¶ 5 and Exhibit A; R 3, Tab I, p. 18, n.18).

3. The Pre-Election Period

On April 15, 2003, UNITE! "went public" (T. 157:6) with its organizing campaign. (T. 157, 322). There were 11 organizers (T. 156, 325) working full-time in a "blitz" of predominantly unannounced home visits to the personal homes of IRI employees. During the blitz period, which lasted from April 16 to 22, UNITE!'s 11 organizers concentrated their efforts on making systematic, documented house calls to IRI employees, advocating unionization and attempting to get authorization cards signed. (T. 157, 326; R26, R27). Allison Duwe, one of the organizers, testified that she visited 35-50 different IRI employees during the blitz period, and of those, some were visited as many as five times. (T. 332, 1083-84). In addition, the organizers paired-up during the blitz period, visiting about four homes each day. (T. 333). After April 22, three organizers kept up UNITE!'s efforts and continued making house calls. (T. 333). UNITE! again increased the number of organizers at IRI just before the mail ballots were sent out by the NLRB on June 2, 2003. (T. 334).

On April 24, 2003, IRI received a copy of a representation petition filed by UNITE! with NLRB Region 29 on that day. (T. 279, 323; GC 1). On May 9, 2003, a Stipulated Election Agreement was signed between IRI and UNITE!. (R 2, Tab 2,

Exhibit C; GC 1). On or about May 23, 2003, IRI petitioned the Regional Director to vacate the Stipulated Election Agreement. (R 2, Tab 1). Following the denial of its petition by the Regional Director, on May 30, 2003, IRI filed a request for review with the Board. (R 2, Tab 4). The Board denied IRI's request for review. (R 2, Tab 8). However, the Board instructed IRI to raise its issues in the post-election objection process.

On May 19, 2003, IRI Executive Director Ray DeNatale distributed a memorandum to his managers and supervisors regarding permissible and impermissible conduct during UNITE!'s organizing activity and advising that IRI's conduct was also regulated by NYLL § 211-a, which required that IRI maintain a neutral posture that neither encouraged nor discouraged union organizing activity. (T. 207; R 22). When Mr. DeNatale addressed managers regarding the election at one or two operations meetings regularly conducted by Director of Residential Services, Hannah Nelson, for the Program Managers to discuss the ongoing operations of their residential facilities, he stressed that IRI had to conduct "business as usual" and remain neutral throughout the election process. (T. 1353-54, 1381-82, 1487, 1620). In fact, the written materials distributed by IRI during the campaign period (R 9) represent the forced neutrality in their responsive form, their use of facts as opposed to opinion, and their complete lack of direction as to whether employees should "Vote Yes" or "Vote No." IRI's complete lack of advocacy for a specific point of view is in marked contrast to UNITE!'s "blitz" and to what could have been communicated if IRI were free from the restraints of NYLL § 211-a. (R 14).

On May 28, 2003, only a few days prior to the NLRB's mailing of the ballots to the unit, Mr. DeNatale scheduled the only staff meeting for all employees that IRI had during the pre-election period, at their request. (T. 260, 1663). At this meeting, Mr. DeNatale addressed the staff regarding the upcoming election at IRI, and told them that IRI had to comply with NYLL § 211-a, which prohibited IRI from taking a position on UNITE!'s organizing activity. He emphasized the importance of voting, and urged everyone, whatever their view, to vote and be heard because it was their choice. (T 1064, 417, 823, 1233). He also explained that if the union were voted in, IRI would have to negotiate a contract, the terms of which could not be predicted. (CP 6; T. 675, 676, 748-49, 917:9-15). In response to union adherent Mary Lynch's taunting Mr. DeNatale to "promise us that you're going to listen to us. Promise us that we're going to get better wages. Promise us that you're going to meet with us frequently" (T. 1439:15-18), Mr. DeNatale responded, "Ms. Lynch, I cannot make any promises of that nature due to the 211 law." (T. 1439:20-21). Mr. DeNatale struggled to explain to the employees that even though he wanted to respond to their request for a meeting, he was restricted by NYLL § 211-a in what he could say (T. 1663) and could not speak freely about his views concerning the union. (T. 808, 821).

At no time during the May 28, 2003 meeting did Mr. DeNatale advocate for or against, encourage or discourage UNITE! or unionization. The information distributed to the employees in the pre-election period never advocated that they "Vote No" regarding union representation. (R 9). The communications were much more neutral than those of other employers in organizing campaigns (R 14) as they did not express the employer's position, but simply urged employees to "Vote." Although they

may have provided information about aspects of unionization that other employers also typically address during organizing activity, they were distinctive for their lack of forceful advocacy of a pro-employer, anti-union position.

Former union organizer and union official, Steve Beyer, testified that in his view, IRI's communications were "[w]eak, vanilla, certainly doesn't seem to give the voter any direction as to what the employer's position is to union representation." (T 87:18-20). The single, most consistent theme running through IRI's communications was simply to vote and be heard: "The decision is yours and that of your colleagues together." (R 9, p. 6, ¶ 4); "The choice is yours, make the right decision." (R 9, p. 7, ¶ 2); "The choice will be yours, consider all the facts." (R 9, p. 8); "The choice in the NLRB mail ballot election will be made by you and all of those voting." (R 9, p. 9, ¶1); "As we have told you before, you are free to vote as you see fit." (R 9, p. 9 ¶ 4); "It is important for everyone to vote. Make sure that your voice is heard. Vote." (R 9, p. 10, ¶ 4); "Union?" (R 9, p. 15); "No matter how you feel about the union you must vote to be heard." (R 9, p.16); "The choice is yours." (R 9, p.17); "Cast your vote now!" (R 9, p. 23); "You must vote if you want to have a voice in this important matter!" (R 9, p. 24, ¶ 1); and "Vote and mail your ballot." (R 9, p. 24).

Considering the fact that employees in the proposed bargaining unit received an extremely one-sided view of the potential advantages of unionization and IRI was precluded from communicating in stronger terms the potential disadvantages of unionization, it is not surprising that employees voted by a 68 to 32 margin to be represented by UNITE!.

B. NYLL § 211-a Unreasonably Interfered with the Election

1. NYLL § 211-a is Preempted by the NLRA

Although no federal court has at this point conclusively decided that the NLRA preempts NYLL § 211-a, there is no question that NYLL § 211-a is preempted. In Chamber of Commerce v. Brown, 128 S.Ct 2408 (2008), the U.S. Supreme Court held that a California statute that is very similar to NYLL § 211-a was preempted by the NLRA. In Brown, the Supreme Court determined that a statute restricting the use of state funds so that they cannot be spent to encourage or discourage union organization infringes upon an employer's free speech rights granted under Section 8(c) of the NLRA to communicate its views on unionization to employees. Id., 128 S.Ct. at 2416. Accordingly, the Board assumed (without deciding) that NYLL § 211-a is preempted by the NLRA in its August 27, 2010 decision.

This assumption that NYLL § 211-a is preempted by the NLRA, standing alone, should have resulted in a conclusion that the election results were invalid, because the mere existence of this unlawful restriction on IRI's right to freely communicate its views on unionization to its employees interfered with the election. The two-member dissenting opinion articulated the correct standard that should be applied in this situation as follows:

> If the instant situation is analogous to any election objection context, it would be cases in which there has been a determination that an unlawful restriction has been imposed on a union's or employee's right to distribute or access information relevant to a decision on unionization. In those circumstances, with very few exceptions, the Board holds that the unlawful conduct is "a fortiori, conduct which interferes with the exercise of a free and untrammeled choice in the election," Dal-Tex Optical Co., 137 NLRB 1782, 1786-1787 (1962), and will set aside the election unless it is

> "virtually impossible to conclude" the unlawful conduct could have affected the election results. Safeway, Inc., 338 NLRB 525, 526 fn. 3 (2002) (footnote omitted). And in making that determination, the Board, as our colleagues concede, applies an objective test that considers only whether the restriction has a reasonable tendency to restrain activities protected by the Act; the Board does not look further to determine whether the restriction actually did so.

Independence Residences, Inc., 355 NLRB No. 153 (dissenting opinion, p. 14). The dissent, applying this standard, correctly concluded that the unlawful restrictions of NYLL § 211-a "had a reasonable tendency to, and actually did, inhibit" IRI's free expression of its message, and that the election results should be set aside. Id., 355 NLRB No. 153 (dissenting opinion, pp. 14-15).

The dissenting opinion is correct, and this opinion should now be adopted by the Board. It is impossible for the Board to assess the actual impact of NYLL § 211-a on IRI's pre-election activity and to speculate regarding what impact it had on IRI's employees. It is clear that IRI was unable to respond to UNITE!'s organizing activity in the manner that it would have in the absence of NYLL § 211-a. The issue in this matter is not whether IRI was neutral in the opinion of the Board, but whether IRI was constrained by NYLL § 211-a in its ability to lawfully respond to UNITE!'s organizing activity in accordance with its rights under the NLRA. The undisputed fact that NYLL § 211-a was in the consciousness of IRI and permeated its pre-election strategy warrants a finding that the election should have been set aside and renders the certification of UNITE! invalid.

2. NYLL § 211-a Upset the Laboratory Conditions in the 2003 Election

Although IRI respectfully submits that a finding of preemption automatically should have resulted in the Board setting aside the election, it is equally

clear that the election should have been set aside even if the Board had applied a less demanding standard than the one urged by the dissent. In General Shoe Corp., 77 NLRB 124, 127 (1948), the Board established the "laboratory conditions" standard to insure a fair and impartial election is conducted that reflects the "uninhibited desires of the employees." Under General Shoe, an election may be set aside even if activity does not rise to the level of an unfair labor practice. As stated by the Board in P.D. Gwaltney, Jr., and Company, Inc., 74 NLRB 371, 373 (1947), and relied upon in General Shoe:

> when we are asked to invalidate elections held under our auspices, our only consideration derives from the Act which calls for freedom of choice by employees as to a collective bargaining representative. Elements, regardless of their source, which in the experienced judgment of the Board make impossible impartial tests, are sufficient grounds for the invalidation of an election.

Id.

Further, in the Board's longstanding view, "[a]n election can serve its true purpose only if the surrounding conditions enable employees to register a free and untrammeled choice for or against a bargaining representative." General Shoe, 77 NLRB at 126. So critically important is the element of untrammeled freedom of choice that the Board will set aside an election whenever it feels that the circumstances surrounding it have impeded it, even though it may be "virtually impossible to ascertain the full effects [of the particular circumstances] upon the employees' free exercise of the right to select a collective bargaining representative." Continental Oil Company, 58 NLRB 169, 172 (1944).

NYLL § 211-a trammeled upon the free choice of employees by preventing them from receiving all available election information through the robust exchange that Section 8(c) of the NLRA envisions in order for them to be well informed in exercising their rights under Section 7 of the NLRA. As the following exchange during the examination of Mr. DeNatale concerning some of IRI's pre-election communications graphically depicts, NYLL § 211-a placed IRI in an untenable position with respect to the organizing campaign (emphasis added):

> 00240
> 8 Q Are you saying that if there was a communication that
> 9 put forward highly derogative facts, very negative facts about
> 10 the union, that's the only thing that is in the communication,
> 11 that the facts are accurate, is that neutral or not neutral?
> 12 A There could be context -- there could be situations
> 13 where people could view that as neutral and also in opposition.
> 14 Q And explain to me what makes those contexts? How do
> 15 you decide? How do you determine whether it's neutral or not?
> 16 A Well you basically provide information that says that
> 17 each individual that may be a part of the proposed unit reviews
> 18 all of those facts and other facts and then makes an informed
> 19 decision based on those facts.
> 20 Q So, if I understand you correctly, you can say
> 21 anything accurate about the union that you want as long as you
> 22 don't say you should vote no? Is that your understanding of
> 23 neutrality?
> 24 ***A I think IRI s position as to what neutrality is, was,***
> 25 ***or could be has in fact been modified over time with other***
> 00241
> 1 ***different advice***. In some people's eyes, certain things you
> 2 might have provided might have been perceived as non-neutral.
> 3 In other people's eyes, it might have been provided and seen as
> 4 in opposition, and ***that is the precise quagmire that I sought***
> 5 ***legal advice to help me through why we are here today. So, I***
> 6 ***don't know if I can answer that question with any degree of***
> 7 ***certainty***.
> 8 Q Will you please look at Respondent's 9, Page 5.
> 9 MR. BRAID: Excuse me, can I just get my copy back
> 10 from the witness.
> 11 Q (Continuing) Do you see Page 5 Notice to IRI
> 12 Employees?

13 A Yes.
14 Q In your opinion, is that a neutral document?
15 A It becomes questionable, but I would say the answer
16 to that question is yes because of the words do you want to be
17 represented by union that violates the law. It puts the
18 question back to the reader to make that interpretation.
19 Q So as I understand what you re saying, as long as it
20 is a statement of fact that is accurate and then the
21 communication poses questions rather than providing an answer,
22 it is going to be neutral, is that your understanding?
23 A No. I think I answered that before when I said the
24 answer to that question would require me to know the intent of
25 211-A, what the word neutral means in 211-A.
00242
1 Q Excuse me. I am not asking you to interpret 211-A.
2 I'm asking you that you testified your agency in this election
3 campaign took a certain course of conduct.
4 A That's correct.
5 Q And you testified that the course of conduct was to
6 be neutral. Is that correct?
7 A Yes.
8 Q. So I am asking you under the policy that you
9 established and you implemented, is this meaning on Page 5 of
10 Respondent's 9, is that neutral or not?
11 A As I said, I believe Respondent's 9, to use your
12 term, in general is neutral.
13 Q Well that was not my question. Please answer my
14 question. Is Page 5 of Respondent's 9 neutral or not according
15 to the policy you implemented?
16 A **I cannot answer the question as to whether something**
17 **is black and white in a situation where there are many greys.**
18 **I can't answer that question.**
19 Q So you don't know whether in fact the agency followed
20 your policy of being neutral or not. You can't answer that
21 question, can you?
22 A **In my conscience, I can answer that question that we**
23 **have done our very, very best to follow a course of neutrality**
24 **in an ocean of uncertainty as to what that means**.
25 Q But you are incapable of telling me whether Page 5 of
00243
1 Respondent's 9 met your policy criteria. Is that correct?
2 A I am incapable in determining whether or not that
3 particular document was defined as neutral or not.
4 Q By your policy; not by anybody else; your policy.
5 That's the question.
6 A **We believe in different points of time during our**

7 **response to the campaign, that we have acted in good faith and**
8 **acted neutral. If you look at the rest of the document, you**
9 **will see that there might have been other advice that we had**
10 **gotten that would have suggested that we could have been even**
11 **more neutral in some cases and possibly we'll modify our**
12 **language in the future; but on the whole, I believe we have**
13 **acted neutral.**

This exchange highlights serious problems that interfered with IRI's pre-election activities. First, IRI struggled to achieve the "neutrality" commanded by NYLL § 211-a, which clearly compromised its rights under the Act. Second, even those efforts were hampered by the absence of any statutory definitions or explanatory implementing regulations, which caused changes in its views about its obligations that tended to make its communications more neutral as time went on. Even the presentation of factual information, in the absence of any official indication to the contrary, could be viewed as "discouraging" unionization if it were unfavorable to the union. It was unclear to IRI whether neutrality was going to be determined from the eyes and ears of the communicator and his or her intention, the recipient of the message, or the Attorney General of the State of New York.

The evidence established that IRI attempted to comply with NYLL § 211-a, that its views concerning compliance changed over time, and that its compliance efforts were particularly challenging due to the lack of definitions and other guidance. (T. 240-43, 286). Mr. DeNatale advised his supervisors in writing about NYLL § 211-a and their obligation to comply with its neutrality requirements (T. 207; R 22), and he also told them in operations meetings to "conduct business as usual" and to remain neutral during the pre-election period. (T. 1353-54, 1381-82, 1487, 1620). IRI also did not use its supervisors to resist UNITE!'s organizing activity, also in compliance with NYLL §

211-a. The testimony of managers Hannah Nelson and Todd Gallishaw not only corroborates Mr. DeNatale's testimony, but also demonstrates how the imposition of NYLL § 211-a's restrictions made them disinterested in the outcome of the election:

Gallishaw **(emphasis added):**

01369
22 Q And you gave your answer, right? You sort of figured out
23 who in your house did and didn't [support UNITE!]?
24 A I couldn't say. My house didn't talk to me about it. I
25 didn't ask them about it.
01370
1 Q So what did you say?
2 A. "I couldn't tell you". That was my answer.
3 Q That was your answer? Did you ever find out?
4 A ***Didn't ever care***.
5 Q You didn't care? Did it --
6 MS. PIEPGRASS: No further questions.
* * *

01381
24 Q Was there -- did IRI put out literature during the election
25 campaign that explained to the employees facts IRI thought was
01382
1 important about the Union or about the election campaign?
2 A I think the literature contained everything about IRI.
3 Q So is it your memory that the literature contained nothing
4 about the Union?
5 A I think it just explained IRI's position. I'm not -- see,
6 I don't know how to say this. I really didn't have any interest
7 in what was going on with the Union because I had no problem
8 with it. I couldn't control it.

Nelson:
01516
16 Q Did it interest you whether the Union was going to win the
17 election or not?
18 A No.

The failure to train and use supervisors to resist union organizing efforts is a significant concession by an employer, dictated in this case by NYLL § 211-a, that unquestionably disturbs laboratory conditions by removing from the entire process the

individuals with whom the eligible voters are in contact with most. It is an unnatural interference with an employer's operations and dramatically and adversely affects an employer's ability to communicate ***effectively*** with its employees. As the testimony of both Mr. Gallishaw and Ms. Nelson indicates, *supra*, it had the effect of completely desensitizing the most important employer advocates in such activity, causing managers and supervisors to become completely disinterested in the organizing activity because they could have no impact on it. Such evident lack of concern inevitably conveys neutrality towards, if not acquiescence in, the union's organizing activity.

In sharp contrast, UNITE!'s paid organizers were sitting in the living rooms of IRI's employees in multiple one-on-one and two-on-one meetings, having as many as five such meetings with some employees. While employer visits to homes are not permitted during organizing activity, the counterbalance to that is that the employer presumably has access to its employees for 40 hours during a normal full-time workweek, during which time it can communicate freely its views about unionization. Randell Warehouse of Arizona, Inc., 328 NLRB 1034, 1037 (1999). NYLL § 211-a destroys this balance and coercively favors unionization by eliminating effective opposition to organizing activity, thereby upsetting laboratory conditions.

The damage to an employer's communications when it is prevented from educating, training, and using its supervisors in a union organizing campaign to communicate the employer's viewpoint is devastating. As Mr. Beyer, a former union organizer and chairperson of HERE's International Union Organizing Committee (T. 62), as well as the past-President of his 14,000 member local, testified, the biggest obstacle he faced as an organizer was "active management, communicating their feelings about

union representation to the employees" (T. 79) "[t]hrough their supervisors, through outside consultants." (T. 80). Mr. Beyer, based upon his own experience of about 17 years as a union organizer and official (T. 60-61), concurred (T. 81) with the observance made in Roger C. Hartley's article *Non-Legislative Labor Law Reform and Pre-Recognition Neutrality Agreements: The Newest Civil Rights Movement*, 22 BERKELRY J. EMP. & LAB. L. 369, 379 (2001), (R 7) which stated:

> [u]nion leaders regard employer anti-union speech as a leading cause of union organizing failure, particularly when orchestrated by labor management consultants . . . . A considerable body of industrial relations research supports the causal role of employer opposition in union election losses.

Mr. Beyer also analyzed the written communications used by IRI during the campaign and characterized them as "[w]eak, vanilla, certainly doesn't seem to give the voter any direction as to what the employer's position is to union representation." (T. 87:18-20). Mr. Beyer explained that such neutral communications were detrimental because it is critically important for both parties in an election to let the voter know what their position is. In fact, Mr. Beyer's testified to his belief that management has an obligation, even a duty, to ensure that the voters get information, and particularly get the employer's position on whether it favors or opposes the union, or what the employer generally thinks about union representation. (T. 87-88). In Mr. Beyer's expert opinion, IRI's earnest attempts to maintain neutrality because of the restrictions of NYLL § 211-a even made some of its communications to the employees confusing. (T. 91).

Mr. Beyer testified that IRI's response, in the absence of NYLL § 211-a, could have been much different, and that in fact he would have capitalized on themes of trust and credibility, which are paramount in an election campaign (T. 91) in response to

UNITE!'s misrepresentations. Mr. Beyer gave a specific example of how he would have attacked a particular union flier (R10) by targeting the union's credibility, something that IRI certainly could not and did not do. Mr. Beyer testified that "I would make employees aware that the union has, at best, word-smithed here, has hidden what they're really trying to convey. I certainly wouldn't be this generic. It's almost confusing." (T. 91:6-9).

Moreover, IRI might have distributed an unfair labor practice charge against UNITE! alleging that it "willfully misrepresented a contract agreement to the membership . . . for the express purpose of obtaining a ratification vote." (R 12). The unfair labor practice charge filed with the NLRB also accuses UNITE! of coercing "negotiating committee members . . . with threats of legal action and personal liability if they did not sign the contract." (R 12). The qualitative difference between the response IRI made in the campaign and what it might have done without the constraints of NYLL § 211- a is self-evident. It is also clear that what "might have been" clearly would have been intended to and likely would have discouraged union organizing in contravention of NYLL § 211-a.[6]

Any interference with IRI's ability to lawfully present its views on unionization in the manner it chooses, through the personnel it chooses, was an upset to the laboratory conditions prerequisite to a fair representation election because it deprived the voting employees of information that was intended to enable them to make an informed choice regarding whether or not to unionize. NYLL § 211-a's interference with the content of IRI's communications, the training and use of its supervisors, and its ability to employ counsel and/or consultants to assist it in responding to the union

[6] Although IRI had distributed information about an unfair labor practice charge early in its employee communications, it refrained from doing so thereafter because of its uncertainty as to whether factually true but unfavorable information would be viewed as neutral. (T 239-41, 308-09).

organizing activity in a partisan fashion interfered with its rights and upset laboratory conditions.

The Board majority's finding that IRI "was free to campaign against the Petitioner with its own funds" is erroneous. Independence Residences, Inc., 355 NLRB No. 153 (August 27, 2010), p. 4. The evidence established that more than 99% of IRI's budget consisted of monies subject to NYLL § 211-a's prohibitions at the time of the election. Furthermore, even if there was a small amount of privately donated money that was part of IRI's budget, many of those donations had restrictions associated with them. Finally, even if IRI could have used private donations that did not have restrictions to oppose UNITE! organizing campaign, the accounting and reporting requirements set forth in NYLL § 211-a are so restrictive and difficult to comply with that there nevertheless would have been significant risk to IRI of prosecution under that statute.

The Board majority also appeared to place undue significance on the fact the Mr. DeNatale did not provide specific examples of what actions IRI would have taken in the absence of NYLL § 211-a other than stating that IRI's campaign would have been more "aggressive" and "stronger." Independence Residences, Inc., 355 NLRB No. 153 (August 27, 2010), p. 4. Mr. DeNatale could not provide specific examples of conduct that he had been advised by counsel could potentially violate NYLL § 211-a without waiving IRI's attorney-client privilege, and he chose not to waive IRI's attorney-client privilege during the hearing. (T. 280-283). The ALJ recognized the fact that he was asking questions to Mr. DeNatale that intruded upon the attorney-client privilege, and at one point during the hearing, stated as follows:

> And it seems to me anyway, that it is very hard for me to make a judgment about that without going into details about what advice he got from his attorney before the stipulation and after the stipulation when he decided on how to campaign. I mean the whole issue here is how did he decide to campaign, and whether or not he was affected by the statute. Without knowing what his attorney . . . told him after the election [sic] about what he could or could not do, it is hard for me to assess what happened in terms of the fact, and I recognize that you may not want that information disclosed because of attorney/client privilege, but I tell you that I am troubled about trying to make a decision without that information.

(T. 282).

Mr. DeNatale should not have been put in a position where he was forced to make a choice between disclosing the advice he received from counsel or having the ALJ and the Board draw an adverse inference from his decision not to disclose this privileged information. Furthermore, the mere fact that Mr. DeNatale did not provide specific information regarding what IRI would have done in the absence of NYLL § 211-a is irrelevant, because in the absence of NYLL § 211-a, IRI would have been free to hire a consultant such as Mr. Beyer to assist with the campaign, and Mr. Beyer provided several examples of actions that employers typically take in opposition to union organizing campaigns that IRI did not take.

The Board majority (and especially Chairman Liebman in her concurring opinion) also placed undue significance on the fact that IRI was found by the ALJ to have committed unfair labor practices prior to the election, and did not file exceptions to the ALJ's decision with respect to the unfair labor practice charges. Independence Residences, Inc., 355 NLRB No. 153 (August 27, 2010), pp. 2-3, 17. IRI did not challenge the ALJ's determination regarding the unfair labor practice charges for simple

economic reasons – the determination did not result in any monetary liability, and it would have added significantly to IRI's legal expenses to file exceptions to that determination.[7]

Moreover, even assuming, purely for the sake of argument, that IRI engaged in the conduct that the ALJ found to be unlawful under Section 8(a)(1) of the Act, none of that conduct can even arguably be considered a violation of IRI's obligations under NYLL § 211-a. Thus, this conduct is completely irrelevant to the fundamental issue of whether IRI was constrained by NYLL § 211-a in its ability to hire consultants, use its supervisors, and engage in other more aggressive strategies to communicate with its employees in stronger terms regarding the disadvantages of unionization.[8] The evidence presented at the 2003 hearing conclusively establishes that NYLL § 211-a was in the consciousness of IRI during the entire period of the election campaign, and that IRI's efforts to comply with NYLL § 211-a resulted in an election that was not conducted under ideal laboratory conditions.

For these reasons as well, the election should have been set aside and the certification of UNITE! as the bargaining representative of IRI's employees is invalid.

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[7] The ALJ determined that IRI had violated Section 8(a)(1) of the Act as a result of the following alleged incidents: (1) IRI happened to announce on the date the representation petition was filed that salary adjustments retroactive to October 1, 2002 had been approved, and granted another salary adjustment on May 2, 2003; (2) IRI's Director of Human Resources at the time stated that IRI would have to end its focus group program in which employees and management met to discuss health insurance issues; (3) an IRI Program Manager asked employees if they had spoken with UNITE!; and (4) IRI invited employees to discuss issues with their health benefits and asked what they could do to improve the satisfaction of their staff. Independence Residences, Inc., 355 NLRB No. 153 (August 27, 2010), p. 3. As indicated above, the ALJ's determination that IRI engaged in this conduct and that the conduct violated Section 8(a)(1) of the Act did not result in any monetary liability, and IRI made a simple economic decision not to challenge the determination.

[8] In fact, if IRI had been free to hire a consultant such as Mr. Beyer to assist in its pre-election campaign, it is entirely possible that IRI's supervisors and managers might have been trained by the consultant more thoroughly regarding what they could and could not say and do under the NLRA, which might have actually avoided the unfair labor practice charges that were filed. The existence of NYLL § 211-a precluded IRI from hiring such a consultant.

3. The Board Failed to Take Sufficient Action to Prevent NYLL § 211-a from Interfering with the Election

The Board has recently taken direct action against the State of Arizona for enacting a statute that it believes is preempted by the Act. National Labor Relations Board v. State of Arizona, Civil Action No. 2:11-cv-00913 (complaint filed May 6, 2011). In the complaint against the State of Arizona, the Board alleges that a law requiring a secret ballot vote in union elections is preempted by the Act. The Board has also threatened to file lawsuits against other states that have enacted similar secret ballot laws to the one enacted by the State of Arizona.

The Board failed to take similar action against the State of New York upon its enactment of NYLL § 211-a. Even in the absence of such direct action, the Board still had an opportunity to ensure that NYLL § 211-a did not interfere with the representation election involving IRI's employees by granting IRI's motion for a stay of the election. The Board failed to do this as well. The Board's refusal to vacate the Stipulated Election Agreement and stay the election allowed NYLL § 211-a to interfere with the laboratory conditions and precluded a fair election.

For these reasons as well, the election should have been set aside and the certification of UNITE! as the bargaining representative of IRI's employees is invalid.

CONCLUSION

For all of the reasons stated above, IRI respectfully requests that the ALJ's decision be reversed, and that the complaint be dismissed in its entirety.

Dated: September 21, 2011

BOND, SCHOENECK & KING, PLLC

By: /s/ Louis P. DiLorenzo
Louis P. DiLorenzo, Esq.
Subhash Viswanathan, Esq.
Attorneys for Respondent
Independence Residences, Inc.
330 Madison Avenue, 39th Floor
New York, New York 10017
Telephone: (646) 253-2300
Facsimile: (646) 253-2301

CERTIFICATE OF SERVICE

I, Subhash Viswanathan, certify that I served the foregoing Respondent's Brief in Support of its Exceptions to the Decision and Order of the Administrative Law Judge on Emily Cabrera, counsel for the Acting General Counsel, and Ira Jay Katz, counsel for the Charging Party, by electronic mail on September 21, 2011.

Dated: September 21, 2011

/s/ Subhash Viswanathan
Subhash Viswanathan