

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

AMERICAN MEDICAL RESPONSE WEST,

Respondent,

and

UNITED EMERGENCY MEDICAL
SERVICE WORKERS, AFSCME LOCAL
4911, AFL-CIO,

Charging Party.

Case Nos. 32-CA-147259
32-CA-149437

**RESPONDENT AMERICAN MEDICAL RESPONSE WEST'S
ANSWERING BRIEF TO THE CHARGING PARTY'S CROSS-EXCEPTIONS
TO THE ADMINISTRATIVE LAW JUDGE'S DECISION**

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Pursuant to Section 102.46(d) of the National Labor Relations Board's Rules and Regulations, Respondent American Medical Response West ("AMR" or "the Company") submits this Answering Brief to the Cross-Exceptions filed by the Charging Party, the United Emergency Medical Service Workers, AFSCME Local 4911, AFL-CIO ("the Union"), to the Administrative Law Judge's Decision ("Decision") issued by the Honorable Eleanor Laws ("ALJ") on December 17, 2015.

I. INTRODUCTION

The Union's cross-exceptions to the ALJ's Decision are meritless. First, the Union argues that the ALJ should have retroactively applied the National Labor Relations Board's decision in *Piedmont Gardens*, 362 NLRB No. 139 (2015) to this case. The Board, however, has already determined that *Piedmont Gardens* **does not** apply retroactively. Second, the Union urges the Board to impose unprecedented, extraordinary remedies in this case – without any justification or evidentiary support – even asking for some extraordinary remedies to be made “standard” by the Board. **None** of these remedies is warranted in this case. Indeed, tellingly, the Union offers no explanation for why in *this case* the Board should depart from its long-held, traditional remedies. It should not.

Accordingly, the Union's cross-exceptions should be denied in their entirety.

II. THE UNION'S REQUEST THAT THE BOARD RETROACTIVELY APPLY *PIEDMONT GARDENS* TO THIS CASE IS MERITLESS

The Union's vague argument that the ALJ should have retroactively applied the Board's decision in *Piedmont Gardens*, 362 NLRB No. 139 (June 26, 2015) to the facts of this case is simply frivolous.

First, the Board has already conclusively addressed the retroactive/prospective application of the rule regarding witness statements first announced in its *Piedmont Gardens*

decision, and it determined that the rule **does not** apply retroactively. Specifically, the Board held: “[I]n the present case and all other cases where the employer’s refusal to provide requested witness statements occurred before the date of this decision [June 26, 2015], the Board shall apply *Anheuser-Busch* [237 NLRB 982 (1978)] in evaluating the lawfulness of the employer’s conduct.” *Id.*, slip op. at 7-8.

Here, it is undisputed that the alleged violations of the Act occurred prior to June 26, 2015 and that *Anheuser-Busch* therefore controls. Indeed, even Counsel for the General Counsel conceded that *Piedmont Gardens* does not apply to this case, including (a) at the hearing before the ALJ (*see* Tr. 14:15-20), (b) in Counsel’s post-hearing brief to the ALJ (*see* CGC’s Post-Hearing Brief to ALJ at p. 21, fn. 7), and (c) in Counsel’s brief in support of limited exceptions to the ALJ’s Decision (*see* CGC’s Brief in Support of Limited Exceptions at pp. 3-4).¹

Second, even assuming *arguendo* that the Board had not already conclusively determined the prospective / retroactive application of the rule from *Piedmont Gardens* (and it has), the Union waived any argument that *Piedmont Gardens* should apply to this case. The Union did not raise this argument to the ALJ. Instead, the Union raises the argument for the very first time in its cross-exceptions to the Board. However, “[a] contention raised for the first time in exceptions to the Board is ordinarily untimely raised and, thus, deemed waived.” *Yorkaire, Inc.*, 297 NLRB 401, 401 (1989), *enfd.* 922 F.2d 832 (3d Cir. 1990); *Ez Park, Inc.*, 360 NLRB No. 84, slip op. at 1 (2014) (argument raised for first time in exceptions was untimely raised and waived); *Dish Network Serv. Corp.*, 339 NLRB 1126, 1128 (2003) (same).

¹ Citations to the transcript of the underlying hearing before the ALJ held on October 14, 2015, are referenced as “Tr.” Citations to the ALJ’s Decision are referenced as “Decision _.”

Accordingly, the Union's cross-exception to the Board regarding the application of *Piedmont Gardens* should be denied.

III. THERE IS NO FACTUAL OR LEGAL BASIS FOR THE EXTRAORDINARY REMEDIES THE UNION SEEKS

The Union's cross-exceptions request that the Board order a laundry list of remedies that grossly exceed the Board's traditional remedies. The extraordinary remedies include (a) *permanent* posting of a notice to employees, (b) posting times lasting more than the Board's traditional 60-day period, (c) individual mailings to all employees, (d) the Board "craft[ing] a letter to send with any mailings," (e) reading of the Notice in group meetings, and (f) affirmative statements of any violation found to be included in the Notice.² These requested remedies are entirely unwarranted in this case and are unsupported by Board precedent.

First, the Union's requests for extraordinary remedies should be rejected because the Union offers no evidence of any egregious or outrageous violations of the National Labor Relations Act that would even potentially warrant remedies beyond the Board's traditional remedies recommended by the ALJ. The Board "reserves extraordinary remedies for cases involving unfair labor practices that are 'so numerous, pervasive, and outrageous' that 'special' remedies are necessary to 'dissipate fully the coercive effects of the unfair labor practices found.'" *Federated Logistics & Operations v. NLRB*, 400 F.3d 920, 935 (D.C. Cir. 2005) (finding General Counsel failed to justify need for extraordinary remedies); *see also Hickmott Foods*, 242 NLRB 1357 (1979) (requiring egregious or widespread misconduct).

² The Company notes that none of these novel and/or extraordinary remedies were sought in the Complaint. The General Counsel does not seek these remedies *at all*. The Union made no requests for these remedies to the ALJ. Instead, the Union requests them for the very first time in its cross-exceptions to the Board.

None of these circumstances are present in this case. There is no evidence of “egregious” or “outrageous” violations of the Act. Indeed, the ALJ found that AMR *lawfully* sought to protect confidential witness information in connection with a witness who reported the presence of deadly, concealed weapons in the workplace (a loaded 9mm Glock semi-automatic pistol with ten rounds of ammunition in an employee’s backpack at AMR’s facility), but found a technical violation of the Act because, in the ALJ’s view, AMR did not adequately bargain with the Union regarding potential accommodations. Decision at p. 12. Further, while the ALJ found AMR did not provide sufficient information to the Union with respect to the investigation of Tracy Perkin, the ALJ did not dispute that AMR was seeking to protect its employees who raised concerns to the Company’s attention regarding Perkin’s sexual harassment of a young, female employee. See Decision at pp. 9-11. An employer seeking to protect witnesses and confidentiality interests in such limited circumstances can hardly be found to have committed an “egregious” or “outrageous” violation of the Act. Accordingly, there are no grounds whatsoever for the Union’s request for extraordinary remedies to be applied in this case.

Second, the Union *does not even attempt* to articulate why traditional Board remedies are insufficient to cure the purported harm involved in this case. Such failure is fatal to the Union’s request. See *Pacific Bell Telephone Co.*, 362 NLRB No. 105, slip op. at 1, fn. 3 (2015) (“The Union has also requested a number of special remedies. We decline to order any of the requested remedies, as the Union has not provided any reasons why the Board’s traditional remedies are not sufficient to remedy the unfair labor practices found.”); *Chinese Daily News*, 346 NLRB 906, 909 (2006) (denying remedies when charging party and General Counsel did not offer any evidence to show that the Board’s traditional remedies were insufficient); *First Legal Support Services, LLC*, 342 NLRB 350, 350 n. 6 (2004) (“[W]here extraordinary remedies, such as

mailing the notice to employees, are requested, ‘it must be demonstrated, as a precondition for granting them, why traditional remedies will not sufficiently ameliorate the effect of the unfair labor practices found.’”).

Third, in light of the record and the alleged violations involved in this case, the Union’s requested remedies would violate the core principle that the Act is remedial, **not punitive**.

Republic Steel Corp. v. NLRB, 311 U.S. 7, 11-12 (1940). The Union has not articulated what purported remedial purpose could possibly be served by the Union’s unprecedented demand for remedies, as applied to this case. The Union’s request is purely punitive.

In sum, it is beyond clear that the Union’s proposed novel and extraordinary remedies are entirely unwarranted in this case. The Union does not even purport to make a showing here as to why such remedies would be warranted. Accordingly, the remedies the Union seeks are entirely improper and unwarranted, and the Union’s cross-exceptions should be denied.

IV. CONCLUSION

For the foregoing reasons, the Company respectfully submits that the Union’s cross-exceptions should be denied in their entirety.

Dated this 11th day of February, 2016.

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CERTIFICATE OF SERVICE

Attorneys for Respondent hereby certify that a copy of Respondent's Answering Brief was electronically filed on February 11, 2016 using the National Labor Relations Board's E-Filing System, and was served via electronic mail on the following counsel and representatives:

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