

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

**SPRAIN BROOK MANOR REHAB, LLC,
PINNACLE DIETARY INC., BUDGET SERVICES,
INC., AND COMMERCIAL BUILDING
MAINTENANCE CORP.**

Respondents

and

**1199 SEIU UNITED HEALTHCARE WORKERS
EAST**

Charging party

and

**LOCAL 713, INTERNATIONAL BROTHERHOOD
OF TRADE UNIONS**

Party to the contract

Case 02-CA-089480

Case 02-CA-142506

**LOCAL 713, INTERNATIONAL BROTHERHOOD
OF TRADE UNIONS**

Respondent

and

**1199 SEIU UNITED HEALTHCARE WORKERS
EAST**

Charging party

Case 02-CB-095670

Case 02-CB-146895

**GENERAL COUNSEL'S LIMITED EXCEPTIONS TO THE
APRIL 29, 2016 DECISION OF ADMINISTRATIVE LAW JUDGE KENNETH W. CHU**

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The General Counsel, by its undersigned Counsel (“General Counsel”), pursuant to § 102.46 of the National Labor Relations Board’s Rules and Regulations, submits the following exceptions to the Decision and Recommended Order (the “ALJD”) of Administrative Law Judge Kenneth W. Chu (the “ALJ”) dated April 29, 2016, in the above-captioned consolidated cases.¹ While the ALJ correctly found that Respondents committed each of the unfair labor practices alleged in the complaint, General Counsel submits these exceptions for the limited purpose of correcting certain errors, omissions, and internal inconsistencies.

Exceptions to Decision

Exception 1. The ALJ erred in stating on page 4, “The charge was subsequently amended on November 26 [2012] and alleged violations of the Act to include Respondents Sprain Brook Manor Rehab, LLC (Sprain Brook), Pinnacle Dietary, Inc. (Pinnacle), nonparty Confidence Management Systems (Confidence), and Commercial Building Maintenance, Corp. (CBM), acting either as joint employers or as a successor (Case 02-CA-089480) (GC Exh. 1y)” insofar as the November 26, 2012 Amended Charge (GC Exh. 1y) was amended to include as a Respondent, *inter alia*, Budget Services, Inc., not Commercial Building Maintenance, Corp. (CBM). (ALJD, p. 4).

Exception 2. The ALJ erred in stating on page 5, “The General Counsel represented that through the testimony of witnesses given during the hearing, the Regional Director determined that there were meritorious allegations against Budget” insofar as this statement omits General Counsel’s representation that this conclusion was also based on documentary evidence produced pursuant to subpoena, not just testimony. (ALJD, p.5). *See* Tr., 229 (statement by General

¹ References to the ALJD will follow the format, “ALJD, p. ___.” References to the Transcript of the hearing in this case will follow the format, “Tr., ___:___ [page number:line number].” References to General Counsel Exhibits will follow the format, “GC Exh. ___.”

Counsel that “evidence has come to light in testimony we heard yesterday and in documents and subpoena production that I received yesterday that now has caused the Regional Director to make a determination that we would like to make a motion to add Budget to the complaint”).

Exception 3. The ALJ erred in stating on page 6 that the “controlling pleading” in the case was the second amended complaint, insofar as the controlling pleading should be the Third Amended Complaint. (ALJD, p.6). As the ALJD states in footnote 9, the ALJ granted General Counsel’s subsequent motion to consolidate two additional cases, and the controlling pleading is the Third Amended Complaint, received into evidence as General Counsel’s Exhibit 2G. (ALJD, p. 6).

Exception 4. The ALJ erred in stating on page 63 that “The complaint alleges that Alvin Nicholson and Vernon Warren were discharged by Respondents Sprain Brook and Pinnacle acting in concert as joint employers,” insofar as the Complaint alleges that Nicholson and Warren were discharged by Respondents Sprain Brook, Pinnacle, and Budget, as joint employers. (GC Exh. 2G, ¶ 14(a) and ¶14(c)). This error may have been caused by the ALJ’s reference to the Second Amended Complaint, rather than the Third Amended Complaint, as the controlling pleading in the case, as described in Exception 3, above.

Exceptions to Conclusions of Law

Exception 5. The ALJ erred on page 72 by omitting the Unit description from the following paragraph: “The Union 1199 SEIU is, and at all material times, has been the exclusive joint bargaining representative for the following appropriate unit:” (ALJD, p. 72). The following unit description should be added following this paragraph:

All full-time and regular part-time and per-diem non-professional employees including licensed practical nurses, certified nurses aides, geriatric techs/activity aides, housekeeping employees, laundry employees/assistants, dietary aides, and cooks employed by the employer

at its facility located at 77 Jackson Avenue, Scarsdale, New York, but excluding all other employees, including office clerical employees, managers and guards, professional employees and supervisors as defined by the Act.

Exception 6. The ALJ erred on pages 72-74 by neglecting to include among its Conclusions of Law that Respondent Sprain Brook violated Section 8(a)(3) and (1) of the Act when it subcontracted the work of the unit employees to Pinnacle, Budget, CBM, and nonparty Confidence, in conformity with the ALJD’s conclusion, “I find that Respondent Sprain Brook violated Section 8(a)(3) and (1) of the Act by subcontracting the dietary aide, nursing and housekeeping unit work.” (ALJD, p. 62).

Exception 7. The ALJ erred on pages 72-74 by neglecting to include among its Conclusions of Law a finding that Sprain Brook and Budget, as joint employers, violated Section 8(a)(5) and (1) of the Act by altering the nursing unit employees’ terms and conditions of employment, in conformity with the ALJD’s conclusion, “I find that Respondents Sprain Brook and Budget violated Section 8(5) and (1) of the Act as joint employers made unilateral changes without first providing notice and an opportunity to bargain with 1199 SEIU over the in the [sic] terms and conditions of employment of the nursing . . . staff” (ALJD, p. 58), and in conformity with the Order provision requiring Sprain Brook and Budget, as joint employers, to cease and desist from “Altering the unit employees’ terms and conditions of employment without first notifying 1199 SEIU and bargaining to agreement or impasse regarding such changes in the wages, hours, and working conditions of the unit employees.” (ALJD, p. 83).

Exception 8. The ALJ erred on page 74 by neglecting to include Budget as one of the joint employers responsible for unlawfully discharging Vernon Warren and Alvin Nicholson, in conformity with the ALJD’s conclusion, “I find that Respondents Sprain Brook, Pinnacle, and

Budget were joint employers during all relevant period of time regarding the dietary aides and cooks unit employees.” (ALJD, p. 46). (*See also* Exception 4, above).

Exceptions to Recommended Orders

Sprain Brook, as a successor to Predecessor Sprain Brook Manor Nursing Home, LLC

Exception 9. The ALJ erred on page 77, ¶A, by failing to include the language “its officers, agents, successors, and assigns.”

Exception 10. The ALJ erred on page 78, ¶A.1(a), in identifying the unit as the three separate units (dietary, housekeeping, and nursing) alleged to have existed after Sprain Brook unlawfully subcontracted and thereby fragmented the unit, and failing to define the Unit as the wall-to-wall non-professional unit which the Board certified in June 2006, as described on page 7 of the ALJD. Thus, the ALJD erred in failing to prohibit Sprain Brook from refusing to bargain collectively with 1199 SEIU as the exclusive collective-bargaining representative of the following certified, wall-to-wall unit:

All full-time and regular part-time and per-diem non-professional employees including licensed practical nurses, certified nurses aides, geriatric techs/activity aides, housekeeping employees, laundry employees/assistants, dietary aides, and cooks employed by the employer at its facility located at 77 Jackson Avenue, Scarsdale, New York, but excluding all other employees, including office clerical employees, managers and guards, professional employees and supervisors as defined by the Act.

Exception 11. The ALJ erred on page 78, ¶ A.1(e), by neglecting to restrain the employer from subcontracting for a retaliatory motive, not just from subcontracting without giving the Union and an opportunity to bargain.

Exception 12. The ALJ erred on page 79, ¶A.2(d), by neglecting to define the “unit” for which Sprain Brook is required to recognize and bargain with the Union. That unit should be the

wall-to-wall, non-professional unit which the Board certified in June 2006, as described on page 7 of the ALJD. Thus, the ALJD should have added the following unit:

All full-time and regular part-time and per-diem non-professional employees including licensed practical nurses, certified nurses aides, geriatric techs/activity aides, housekeeping employees, laundry employees/assistants, dietary aides, and cooks employed by the employer at its facility located at 77 Jackson Avenue, Scarsdale, New York, but excluding all other employees, including office clerical employees, managers and guards, professional employees and supervisors as defined by the Act.

Exception 13. The ALJ erred on page 79 by neglecting to identify by name the three individual discriminatees, Alvin Nicholson, Vernon Warren, and Clarisse Nogueira, and require Sprain Brook to reinstate those employees, make them whole, and remove references to their discharges from its files. As discussed in Exception 4 and 8 above, the ALJD correctly found Sprain Brook and Pinnacle, as joint employers, jointly and severally liable for the discharges of Nicholson and Warren (ALJD, p. 46).² However, in conformity with the Order requirement that Sprain Brook rescind all subcontracts and reinstate all unit employees (ALJD, p. 79), Sprain Brook alone has an obligation to reinstate Nicholson and Warren. Further, Sprain Brook is the only Respondent alleged and found to be responsible for the unlawful discharge of Nogueira (ALJD, p. 67), and accordingly should be ordered to reinstate Nogueira, make her whole, and remove references to the unlawful discharge from its files.

Exception 14. The ALJ erred on page 80 by failing to order Sprain Brook to conduct a notice *reading* in conformity with his statement in the Remedy discussion that he would “require the attached notice to [be] read publicly by the Respondent’s representative or by a Board agent in the presence of the Respondent’s representative.” (ALJD, p. 77).

² However, as described in Exceptions 4 and 8, the ALJD should have included Budget as a third joint employer jointly and severally liable for these two discharges.

Sprain Brook, Pinnacle, and Budget, as joint employers

Exception 15. The ALJ erred on pages 80-82 by neglecting to identify by name the two individual discriminatees, Alvin Nicholson and Vernon Warren, whom the ALJ correctly found had been unlawfully discharged by Sprain Brook and Pinnacle, as joint employers (ALJD, p. 46),³ However, the ALJD erred in failing to identify those two individuals by name and require Sprain Brook, Pinnacle, and Budget, as joint employers, to make those employees whole and remove references to the unlawful discharges from their files.

Sprain Brook and Budget, as joint employers

Exception 16. The ALJD erred on pages 82-84 by neglecting to order Sprain Brook and Budget, as joint employers, to compensate the unit employees for any adverse income tax consequences of receiving their backpay in one lump sum. *Don Chavas, LLC d/b/a Tortillas Don Chavas*, 361 NLRB No. 10 (2014).

Budget, as a successor to CBM

Exception 17. The ALJ erred on pages 84-87 by neglecting to hold Sprain Brook jointly and severally liable with Budget in the Order, in conformity with the ALJD's conclusion that Budget and Sprain Brook were joint employers of the housekeeping and maintenance employees starting in October 2014. (ALJD, p. 48-49).

Local 713

Exception 18. The ALJ erred on page 88, ¶ F.2(a), by neglecting to define the "unit" or "units" for which Local 713 is prohibited from accepting assistance and recognition. Thus, the ALJ should have added the following unit following this paragraph:

³ However, as described in Exceptions 4 and 8, the ALJD should have included Budget as a third joint employer jointly and severally liable for these two discharges.

All full-time and regular part-time and per-diem non-professional employees including licensed practical nurses, certified nurses aides, geriatric techs/activity aides, housekeeping employees, laundry employees/assistants, dietary aides, and cooks employed by the employer at its facility located at 77 Jackson Avenue, Scarsdale, New York, but excluding all other employees, including office clerical employees, managers and guards, professional employees and supervisors as defined by the Act.

All Orders

Exception 19. The ALJ erred on pages 80, 82, 84, 86, and 88 by failing to include the following footnote accompanying the Notice provisions of the recommended Orders, which was correctly included on page 89: “If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ‘Posted by Order of the National Labor Relations Board’ shall read ‘Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.’”

Exception 20. The ALJ erred on pages 77-89 by failing to include language in the recommended Orders regarding Respondents’ obligations to file a report with the Social Security Administration allocating the backpay to the appropriate calendar quarters, as set forth in *Don Chavas, LLC d/b/a Tortillas Don Chavas*, 361 NLRB No. 10 (2014), as correctly described in the Remedy portion of the ALJD. (ALJD, p. 75).

Exception 21. The ALJ erred on pages 81, ¶ B.2(c); 84, ¶ C.2(c); 86, ¶ D.2(c); and 87, ¶ E.2(a) by affirmatively ordering Budget, Pinnacle, and CBM to recognize and bargain with 1199 as the representative of various “units” of employees, which is inconsistent with the ALJD’s order that Sprain Brook rescind its subcontracts and reinstate all employees in a single, wall-to-wall unit employed solely by Sprain Brook. Thus, the affirmative bargaining obligation should run only to Sprain Brook (as it correctly does on page 79, ¶ A.2(d)), and the affirmative bargaining obligation language in the other recommended Orders is cumulative and inapplicable.

Exceptions to Recommended Notices

Appendix A (Sprain Brook)

Exception 22. The ALJ erred in Appendix A by failing to restrain the employer from subcontracting for a retaliatory motive, not just from subcontracting without giving the Union and an opportunity to bargain.

Exception 23. The ALJ erred in Appendix A by failing to specify, by name, that Sprain Brook will offer reinstatement to Clarisse Nogueira, Alvin Nicholson and Vernon Warren.

Appendix D (Budget)

Exception 24. The ALJ erred in Appendix D by neglecting to hold Sprain Brook jointly and severally liable for all remedies specified in this Notice, in conformity with the ALJD's conclusion that Budget and Sprain Brook were joint employers of the housekeeping and maintenance employees starting in October 2014. (ALJD, p. 48-49).

Exception 25. The ALJ erred in Appendix D by failing to include a "We Will" paragraph regarding rescission of, and a make whole remedy for, unlawful unilateral changes.

Appendices B, C, D, and E

Exception 26. The ALJ erred in Appendices B, C, D, and E by including language reflecting that Budget, Pinnacle, and CBM will recognize and bargain with 1199 as the representative of various "units" of employees, which is inconsistent with the ALJD's order that Sprain Brook rescind its subcontracts and reinstate all employees in a single, wall-to-wall unit employed solely by Sprain Brook. Thus, the notice language, "We will recognize and, on request, bargain with 1199 as the collective-bargaining representative of our employees in the unit described above concerned wages, hours, and other terms and conditions of employment" is cumulative and inapplicable in all Notices save for Appendix A, pertaining to Sprain Brook.

Dated at New York, New York,
May 26, 2016

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on the date indicated below I served copies of the foregoing **General Counsel's Exceptions to the Decision of the Administrative Law Judge**, via the means set forth below:

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Subscribed and sworn to by me
This 26th day of May, 2016

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