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UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

JOSEPH F. FRANKL, Regional Director of Region 20 of the National Labor Relations Board, for and on behalf of the NATIONAL LABOR RELATIONS BOARD, Petitioner, vs. MANAS HOSPITALITY LLC d/b/a HOLIDAY INN EXPRESS CALIFORNIA, Respondent.	Civil No. 2:16-cv-2782-GHW REPLY TO RESPONDENT'S MEMORANDUM OF POINTS AND AUTHORITIES IN RESPONSE TO PETITION FOR INJUNCTION UNDER SECTION 10(j) OF THE NATIONAL LABOR RELATIONS ACT, AS AMENDED DATE: Jan. 12, 2017 TIME: 8:30 AM JUDGE: Hon. George H. Wu CRTRM: TBD (Visiting)

I. INTRODUCTION

Contrary to Respondent's assertions, the Petitioner is neither asking this Court to second-guess Respondent's bargaining proposals, nor is the petitioned-for relief premature. Respondent's unlawful conduct, including coercive support for a decertification petition and failure to bargain in good faith, is frustrating the bargaining process and eroding support for the Union. This Section 10(j) Petition seeks only the interim relief needed to preserve the Board's remedial authority by safeguarding the collective-bargaining process during the pendency of the

underlying unfair-labor-practice case, thus preventing irreparable harm until an appropriate Board order can issue.

II. PETITIONER HAS MET ITS EVIDENTIARY BURDEN REGARDING RESPONDENT'S SECTION 8(A)(1) VIOLATIONS

Petitioner has met its evidentiary burden with respect to Respondent's coercive support for the decertification petition circulated in May 2016. This unlawful support went well beyond mere instigation, as Respondent would style it. Petitioner's evidence shows that: (a) managers Gutierrez and Nazeem both directly instructed new employees not to join or support the union; (b) Gutierrez in at least two instances instructed employees to sign the petition and immediately summoned the petition's circulators to obtain the coerced signatures; and (c) Gutierrez, with Human Resources Manager Sanjita Nand's assistance, tricked at least one employee into signing the petition by exploiting that employee's lack of proficiency in English. Respondent challenges Petitioner's evidence, producing declarations from these alleged bad actors denying any unlawful conduct, and picks a few pages from the transcript in the underlying administrative hearing to impeach the testimony of Suhad Salman, a former employee with no stake in the outcome of the proceeding, who testified through an interpreter.

But, as Respondent points out, it is for the Administrative Law Judge and ultimately the Board to make credibility determinations based on a full presentation of the evidence in the underlying administrative proceeding. This is why the initial evidentiary showing required for a likelihood of success on the merits in a Section 10(j) proceeding is a lower standard—to prevail, Petitioner must produce "some evidence" in support of the unfair-labor-practice charge "together with an arguable legal theory." *Small v. Avanti Health Systems, LLC*, 661 F.3d 1180, 1187 (9th Cir. 2011) (quoting *Frankl ex rel. NLRB v. HTH Corp. (Frankl I)*, 650 F.3d 1334, 1356 (9th Cir. 2011); *see Frankl ex rel. NLRB v. HTH Corp. ("Frankl II")*, 693 F.3d 1051, 1065

(9th Cir. 2012) (citations omitted) ("A conflict in the evidence does not preclude the Regional Director from making the requisite showing for a section 10(j) injunction."); see also *Scott ex rel. NLRB v. Stephen Dunn & Assocs.*, 241 F.3d 652, 662 (9th Cir. 2001), abrogated on other grounds as recognized by *Frankl I*, 650 F.3d at 1355 (holding that despite conflicting evidence from witness statements, Regional Director had made "minimal showing" required by Section 10(j)).[1] Petitioner has met its burden by producing evidence showing a course of conduct by Respondent's managers aimed at coercing vulnerable employees—new employees, two of whom had limited or no English proficiency—into supporting a decertification petition.

"On a motion for a 10(j) injunction, it is not the duty of the district court 'to resolve the factual disputes or the legal issues involved. Those are for the Board." *Norelli v. Fremont-Rideout Health Group*, 632 F. Supp. 2d 993, 997 (E.D. Cal. 2009) (*quoting Kennedy v. Teamsters Local*, 443 F.2d 627, 630 (9th Cir. 1971)). To the extent, however, that the Court finds it necessary to assess the relative credibility of the evidence presented, Respondent's evidence does not withstand scrutiny. For example, according to Sanjita Nand's Declaration (Resp. Exh. 4 at 2; ECF No. 13-2 at 18), the only document she and Elsa Gutierrez provided to employee Silvia Arteaga Figueroa on May 9, 2016, was a training document in English regarding Human Rights. But this training document, Respondent's Exhibit 7, is suspect. First, the subject of the document—human rights—has nothing to do with the housekeeping-related training Figueroa avers she received. (Translation of Figueroa Affidavit (May 24, 2016), Exh. 9(c) at 1, P00150) Even on its face, the document raises red flags: the initial date shown on this document is February 21, 2016, which appears to have been changed to April 21, 2016, and then

[1] In the unlikely event that the Administrative Law Judge credits Respondent's witnesses and finds against the Petitioner with respect to any of the alleged Section 8(a)(1) violations, the Court's continuing oversight of the proposed injunction enable it to adjust the interim relief appropriately.

crossed out and changed again to May 9, 2016—coincidentally the date on the decertification petition that Figueroa signed (Pet. Exh. 9(e), Affidavit of Vanessa Abel (July 6, 2016) at 6; P00161). Moreover, this May 9, 2016, date was not on the document when Respondent provided it to the Union in June 2016—proving that the document was altered after the fact. (Pet. Exh. 9(h), Affidavit of Roxanna Tapia (Oct. 18, 2016) at 5, 8; P00179, P00182) It seems far more likely that Figueroa signed the proffered document, initially dated in February 2016, when she was hired that month. (Translation of Figueroa Affidavit (May 24, 2016), Exh. 9(c) at 1, P00149)

Similarly, the purported handwriting exemplar from Elsa Gutierrez (Resp. Exh. 6) is not credible. Rather than produce a document in Gutierrez's handwriting that predates the note attached to employee Vanessa Abel's affidavit, Respondent has provided a present exemplar, created after Gutierrez had the opportunity to view the note in question. This exemplar only proves that Gutierrez has the ability to write numbers in a style that differs from the style in the note attached to Abel's affidavit. Presumably, Respondent has access to many records with Gutierrez's handwriting on them that were not prepared after Gutierrez had the opportunity to observe the evidence against her, but it declined to produce such an exemplar.

In short, Petitioner has produced sufficient evidence to show that it is likely to prevail on the merits with respect to the Respondent's coercive support for a decertification campaign in violation of Section 8(a)(1) of the Act. Respondent should not be permitted to thwart the Board's access to needed interim relief simply by making assertions to the contrary propped up by questionable documentary evidence.

III. THE TOTALITY OF RESPONDENT'S CONDUCT SHOWS UNLAWFUL SURFACE BARGAINING

The theory in this case is not, as Respondent suggests, that it violated Section 8(a)(5) of the Act by failing to agree to positions advanced by the Union. Rather, Petitioner contends that the evidence as a whole shows that Respondent from the start did not bargain in good-faith because its intent was to frustrate the bargaining process, buying itself time to encourage and coerce employees to decertify the Union. Respondent's support for a decertification campaign shortly after signing a settlement in which it agreed not to engage in that specific type of unlawful conduct is part of the relevant evidence showing that intent.

Contrary to Respondent's assertion, the entire course of bargaining is properly before the Board, irrespective of the Section 10(b) statute of limitations, because the Board considers the entire course of bargaining in determining good faith. *See Regency Service Carts*, 345 NLRB 671, 675 (2005) (relying in part on employer's delay to providing relevant information, which "continued into the 10(b) period" in finding failure to bargain in good faith); *Beglinger-Massie Oldsmobile-Cadillac* 177 NLRB 161, 166 n.22 (1969) ("[Section 10(b)] does not preclude consideration of Respondent's prior conduct for the purpose of assessing the true character of later events within the limitations period. The collective impact of long delay in complying with the duty to bargain, found in part from evidence outside the six-month period, would be a proper basis for a finding by the N.L.R.B. that bargaining was not conducted in good faith.") (internal citations omitted) (*citing NLRB v. Fitzgerald Mills Corp.*, 313 F.2d 260, 264 (2d Cir. 1963)). Thus, although the Board would not find an independent violation based on conduct occurring outside of the 10(b) period, it is appropriate to rely on evidence from outside the 10(b) period in establishing surface bargaining, including Respondent's initial delay in opening negotiations, its

conduct during the December 8, 2015, bargaining session, and its January 2016 rejection of Union proposals without making timely counterproposals.

Respondent's discussion of the major issues dividing the parties also misdirects the Court's attention away from the appropriate standard in a surface bargaining case, which requires an evaluation of the entire course of bargaining, including any unlawful conduct that occurs away from the bargaining table that has a nexus with the negotiations. *Mid Continent Concrete*, 336 NLRB 258, 261 (2001), enfd. 308 F3d 859 (8th Cir. 2002) (*citing Litton Systems*, 300 NRLB 324 (1990). Here, Respondent's relevant course of conduct includes coercing employees into supporting a decertification campaign after agreeing not to do so, requesting a six-month delay in bargaining, rejecting the Union's key economic proposals without making timely counter-offers, adhering to proposals on seniority and union security that are predictably untenable for the Union,[2] making regressive proposals without reasonable explanation, rejecting a union security proposal on philosophical grounds, and refusing to bargain over wages until Respondent operated the hotel for a year.[3]

On this last point, wages, Respondent argues that it asked to freeze wages, rather than refusing to discuss them. This squarely contradicts Union President Chris Rak's affidavit, in which he avers that Respondent's negotiator, Scott Wilson, specifically refused to discuss wages

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[2] Although the Board does not assess the reasonableness of proposals per se, its consideration of the entire course of conduct includes an evaluation of whether Respondent's bargaining proposals, considered together, evidence intent not to reach agreement. *Regency Service Carts*, 345 NLRB at 671 n. 2; Reichhold Chemicals, 288 NLRB 69 (1988).

[3] Respondent asserts, without factual support, that the Union suspended bargaining after the May 11, 2016 session. Although the Union did not seek additional bargaining sessions during that period because it had learned of Respondent's support for the decertification campaign (Rak Affidavit (Sep. 6, 2016), Pet. Exh. 9(a) at 8, P00045) it never affirmatively suspended bargaining, and Respondent has not shown that it attempted to bargain and was rebuffed.

until after July 31, 2016.[4] Respondent was well aware that wages were a key issue for the employees, because Rak said as much during the parties' initial meeting in July 2015. But even though Respondent had some room to negotiate on economic issues—which was clear from its agreeing to cover healthcare increases in 2016 and 2017—it refused to discuss the Union's key economic issue for months; only after a year of bargaining and days after the instant Petition was filed did Respondent finally offer a proposal on wages. Moreover, even though Respondent made its proposal just two weeks before the next incremental increase in the California minimum wage was due to take effect, its proposed wage rates for many employees are below that $10.50 minimum. This proposal is emblematic of Respondent's course of bargaining, a pattern of presenting superficial movement while maintaining positions that are designed to undermine the Union and frustrate bargaining.

In short, looking at Respondent's entire course of bargaining, and particularly in light of Respondent's longstanding refusal to discuss wages and its egregious coercive support for a decertification campaign, the Board is likely to find that Respondent engaged in unlawful surface bargaining.

IV. THE INJUNCTION IS NEEDED TO PREVENT IRREPARABLE HARM

The purpose of the injunction sought here is to protect the collective bargaining process from the present and impending deleterious effects of Respondent's conduct, and to keep that conduct from making any eventual Board order a nullity. Respondent asserts that the effects of

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[4] Respondent's acknowledgement that its first proposal on wages came in December 2016 is hard to square with its assertion that it did not refuse to bargain over wages; one must walk a fine line indeed to find bargaining in the absence of any proposals. *Cf. NLRB v. Yutanga Barge Lines*, 315 F2d 524, 530 (9th Cir. 1963) ("The measure of an employer's duty in bargaining is to 'participate actively in the deliberations so as to indicate a present intention to find a basis for agreement . . .'; to make 'sincere effort . . . to reach a common ground.'") (*quoting NLRB v. Montgomery Ward & Co.*, 133 F.2d 676, 686 (9th Cir. 1943).

its support for the decertification campaign are too remote, or possibly mooted, because the decertification petition was held in abeyance. But the decertification petition is not the harm. Rather, it is a symptom of the loss of Union support Respondent's unlawful conduct has engendered. This incremental loss of support has its own inertia: as employees turn away from the union its bargaining position weakens, causing the employer to harden its positions, which further weakens the union in employees' estimation, leading to greater disaffection. *See, e.g.*, *Asseo v. Pan American Grain Co., Inc.*, 805 F.2d 23, 27 (1st Cir. 1986) ("Employee interest in a union can wane quickly as working conditions remain apparently unaffected by the union or collective bargaining") (citations omitted). The interim relief sought here—an affirmative order to bargain in good faith during the pendency of the unfair-labor-practice proceeding, and posting and reading of the Court's order—can break this cycle of disaffection and stabilize the collective-bargaining process.

Respondent also suggests that interim relief is unnecessary because the Administrative Law Judge will likely make a decision within sixty days after the hearing on this Petition. Respondent's timeline is, however, optimistic: parties ordinarily file briefs within a period set by the Administrative Law Judge but not more than thirty-five days after the close of the hearing, with the ALJ ordinarily issuing a written decision several weeks later. NLRB Rules & Regulations § 102.42. But even if Respondent's estimate is accurate, it ignores the likelihood that one or more parties in the proceeding will appeal the ALJ's decision to the Board by filing exceptions.[5] NLRB Rules & Regulations § 102.46. Certainly, where a § 10(j) injunction is entered, the unfair-labor-practice case is "heard expeditiously and . . . given priority by the

[5] The filing of exceptions, which can occur any time within twenty-eight days of the issuance of the ALJ decision, triggers a briefing process lasting not less than an additional twenty-eight days. NLRB Rules & Regulations § 102.46.

Board in its successive steps . . . over all other cases except cases of like character and cases under section 10(1) and (m) of the Act." NLRB Rules & Regulations § 102.94. However, it is likely that several months will pass after the issuance of the ALJ decision before the Board can issue its decision. Indeed, this is the reason Section 10(j) was enacted. *See Frankl v. Adams & Associates, Inc.*, 74 F. Supp. 3d 1318, 1322 (E.D. Cal. 2015) (discussing the Board's processes and the purpose behind Section 10(j)). Thus, the impending close of the hearing before the Administrative Law Judge does not obviate the need for interim relief.

V. THE BALANCE OF HARDSHIPS TIPS STRONGLY IN FAVOR OF GRANTING THE INJUNCTION

Respondent's assertion that there are no hardships to be weighed in this matter is half-right: Respondent has not and indeed could not identify any hardship it would face if the interim injunction is granted. If Respondent is complying with the law and bargaining in good faith, as it contends, then the injunction, if granted, would only require it to continue doing what it already is. On the other hand, the potential hardship to the Board if the injunction is not granted is profound: potentially irreparable harm to the collective-bargaining process, including the possible dissolution of the Union, resulting in an ineffectual Board Order. Respondent did not identify any hardship posed by the requirement to read the Court's Order to employees, but this too imposes a negligible burden on the employer. Because of the option to have the reading performed by a Board agent instead of by Respondent's representative, the hardship imposed is akin to holding an extra staff meeting. In short, the balance of hardships tips strongly in favor of granting the injunction.

VI. CONCLUSION

Respondent's assertions to the contrary should not distract from the fact that the Petitioner has made its threshold showing that injunctive relief is just and proper in this case; Respondent's coercive support for a decertification campaign, in itself a violation, is part of a course of conduct intended to frustrate bargaining and avoid reaching agreement. Respondent has raised no compelling hardship that might preclude the granting of the petitioned-for injunction, which is needed to prevent irreparable harm to the collective-bargaining process.

Dated this 3d day of January, 2017.

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