



United States Government

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April 5, 2019

Roxanne Rothschild, Executive Secretary
Office of the Executive Secretary
National Labor Relations Board
1099 14th Street, N.W.
Washington, D.C. 20570-0001

Re: Arbah Hotel Corp. d/b/a
Meadowlands View Hotel
Cases: 22-CA-197658 et. al

Dear Ms. Rothschild:

Please consider this letter brief as Counsel for the General Counsel's Answering Brief to Respondent Arbah Hotel Corp. d/b/a Meadowlands View Hotel's (Respondent) Exceptions to Administrative Law Judge Lauren Esposito's Decision ("ALJD") in the above-referenced case.¹ Counsel for the General Counsel relies upon the Statement of the Case and the Findings of Fact as set forth in the ALJD and the record of the hearing in this matter. The issues raised by Respondent

¹ In this letter brief, the transcript of the hearing will be referred to as (Tr.) and references to the General Counsel's Exhibits entered into evidence in the hearing will be referred to as (GC). References to the Respondent's Exhibits entered into evidence in the hearing will be referred to as (RS). References to the ALJD will be designated by the page number. (i.e. ALJD page).

in its exceptions have been thoroughly dealt with in the ALJD, support of which is found in the record. Counsel for the General Counsel will therefore address issues raised by Respondent in a limited manner and rely primarily upon the Judge's Findings of Fact and Conclusions of Law. For the reasons outlined below, there is substantial support in the record for ALJ Esposito's findings and conclusions and Respondent's Exceptions must be rejected.

I. **The ALJ properly found that employee, Marie Dufort (Dufort) was discharged on April 7, 2017 in retaliation of her support for and activities on behalf of the New York Hotel and Motel Trades Council, AFL-CIO (Union) in violation of Section 8(a)(3) and (1) of the National Labor Relations Act (Act).**

Exception A: Respondent asserts that it did not violate the Act by terminating Dufort because she was not engaged in protected concerted activity and that the ALJ Esposito improperly concluded that Dufort was discharged for engaging in protected concerted activity in violation of Section 8(a)(1) of the Act. Respondent's Exception is factually and legally off base and must be rejected.

To be clear, the General Counsel did not plead, and the issue of whether Dufort was terminated because she engaged in protected concerted activity in violation of Section 8(a)(1) of the Act, was not before ALJ Esposito. As an initial matter, Section 8(a)(1) prohibits an Employer from interfering, restraining, or coercing employees in the exercise of the rights guaranteed in Section 7 of the Act. This is a broad prohibition on any Employers interference, and an Employer violates this section whenever it commits any other unfair labor practice. As Respondent is in no doubt aware of, whenever a violation of Section 8(a)(3) is committed a violation of Section 8(a)(1) is also found. As such, it is considered a derivative violation of Section 8(a)(1).

The issue before ALJ Esposito was whether Respondent violated Section 8(a)(3) of the Act by terminating Dufort because of her support for, and activities on behalf of, the Union. In this regard, ALJ correctly found that Dufort engaged in union activity prior to her April 7, 2017 discharge. The evidence reflects that Dufort complained to Union Representative Sadie Stern after supervisor Paola (last name unknown) called Dufort at home after work on February 8, 2017 to come in the next day, on her day off, to work an extra shift. *Tr. 46, 106-108, 172, 290-291, 326-328* When Dufort got to work on February 9, 2017, the shift was no longer available.

Tr. 191, 286-287, 290, 36-329. The Union filed a grievance over this matter and Dufort participated in several grievance meetings regarding the issue. *Tr.* 172-174, 289, 291, 293. Dufort's complaints to the Union and participation in the grievance meetings constituted protected union activity. *NLRB v. City Disposal Systems, Inc.* 465 US 822, 836 (1984); *Brad Snodgrass, Inc.*, 338 NLRB 917, 923 (2003). *Tr.* 52, 87-88, 191, 285-287, 326-329, 534. Respondent's knowledge of Dufort's union activity was clearly established through Respondent's General Manager Mark Wysocki (Wysocki), Managers Desiree Ruiz (Ruiz), Paola and Raisa Perez (Perez) who participated in grievance meetings and received communications from the Union concerning Dufort's grievances. *Tr.* 173-174, 193-194, 293. The un rebutted record evidence establishes that animus against the Union generally, and Dufort's specific union activity, indeed exists. To that end, Supervisor Jessica (last name unknown) admitted to Dufort that Wysocki "asked [her] to follow [Dufort] wherever [she] goes because [Dufort] complained to the Union". *Tr.* 304-308. Additional evidence of animus is found in Wysocki's statement to Dufort that he did not want the Union involved because "when the Union comes, things get ugly." *Tr.* 50, 296. Wysocki also told Union shop steward, Mercedes Suarez (Suarez), that he intended to fire Dufort not only because she refused to sign the March 17, 2017 discipline notices and also because she called the Union. *Tr.* 169. This occurred a mere two days after he told Suarez that he would not discharge Dufort. *Tr.* 161-162, 164-169, 201 301-308.² Lastly, the timing of Dufort's discharge is another strong indication that the discharge was unlawfully motivated. ALJ Esposito notes that Dufort's refusal to sign the disciplinary notices, and her contact with the Union, were the sole relevant intervening events between Wysocki's statement

² Respondent argues that Dufort was discharged for dishonesty and for orchestrating a cover-up of the fact that she never changed the comforter as directed. ALJ Esposito, however, properly rejected this defense as a pretext to mask Respondent's unlawful reason for terminating Dufort.

to Suarez that Dufort would not be discharged. *Tr. 169-170*. Based on the above, substantial record evidence supports ALJ Esposito's finding that Dufort's Union activities were a motivating factor in her discharge in violation of Section 8(a)(3) of the Act. *Wright Line*, 251 NLRB 1083 (1980), *enfd.* 662 F. 2d 899 (1st Cir. 1981); *Adams & Associates, Inc.* 363 NLRB No. 193, slip op. at 6 (2016), *enfd.* 871 F.3d 358 (5th Cir. 2017). Accordingly, there is ample record evidence to support ALJ Esposito's findings that Respondent terminated Dufort because of her union activities. Therefore, Respondent's Exception A must be denied.

II. ALJ Esposito properly found that the Respondent unilaterally denied access to Union Business Agent George Padilla (Padilla) in violation of Section 8(a)(5) and (1) of the Act.

Exception B: Respondent asserts that it was justified in denying Union Representative Padilla access to

the Respondent's premises on August 23, 2017.

ALJ Esposito correctly found that Respondent violated Section 8(a)(5) of the Act when it unilaterally denied Padilla access to Respondent's premises.

First, Respondent maintains that the January 27, 2017 settlement agreement (the Agreement) gives Respondent permission to deny Padilla access. Specifically, Respondent asserts that pursuant to the Agreement a meeting had to take place by February 15, 2017 before Padilla could access Respondent's premises. However, ALJ Esposito thoroughly examined the Agreement and correctly found that the language did not create a condition precedent to Padilla accessing Respondent's premises. *ALJD 10-13, 27-31; GC 12*. Instead, ALJ Esposito properly concluded that the Agreement's language allowed for, but did not require, a meeting between the parties prior to Padilla returning to Respondent's premises. ALJ Esposito properly found that the Agreement still clearly provided that Respondent could not bar or deny any Union representative access to its premises. Clearly, this language covered Padilla. Based on all of the above, ALJ Esposito properly found that Respondent violated Section 8(a)(5) of the Act by denying Padilla access to the premises. *ALJD 29*.

Secondly, Respondent asserts that Padilla acted in a belligerent and disruptive manner at the hotel, justifying its refusal to grant him access.

The case law is well-settled, even where the Employer can provide instances of abuse that warrants changing the union access practice, the Employer is still required to bargain with

the Union over possible solutions to any problems with union access, given that access is a mandatory subject of bargaining. *Frontier Hotel & Casino*, 323 NLRB 815, 817 (1997). Enf. Granted and denied in part on other grounds 118 F.3d 795 (D.C. Cir. 1997).

Here, instead of providing the Union with notice and an opportunity to bargain over Padilla's access, by letter dated August 24, 2017, to the Union, Respondent not only denies Padilla access to its premises, Respondent threatens to call the police if he ever appears. *Tr.* 77, 433-434, 444, 562-563. This is so, even though the parties met for contract negotiations, with Padilla present, the previous day. *ALJD* 27; *Tr.* 77-78, 440, 444, 680; *GC* 13, 31. There isn't a scintilla of evidence in the record showing that Respondent either requested bargaining or otherwise attempted to bargain regarding Padilla.

The Board has found that there are instances when a union representative's conduct would make good faith bargaining impossible. For example, in *Fitzsimmons Mfg. Co.*, 251 NLRB 375 at 379 (1980), enf'd. 670 F.2d 663(1982) the union representative threatened to punch Respondent's personnel director in the mouth and to "knock him on his ass" if he continued to speak on an issue in front of the bargaining committee that the union representative deemed confidential between them. When the Respondent's personnel director proceeded in raising the issue, the union representative physically attacked him and challenged the personnel director to come outside. However, in *Victoria Packaging Corp.*, 332 NLRB 597, 599-600 (2000) the Board found a denial of access violation despite significant representative misconduct short of unprovoked or severe threats of violence. In that case, the Union representative yelled, "I'm going to get you and your...company" at the owner after he was directed not to talk to employees on work time.

In our situation, Padilla's conduct is far less egregious from the union conduct found in *Fitzsimmons Mfg. Co.* and is also not as serious as the conduct found in *Victoria Packaging Corp.*, where the Board found a denial of access violation. To that end, Padilla's merely used Spanish-language profanity, engaged in a heated discussion with management and bargaining unit employees, and contacted management personnel on their cell phones after hours. *Tr. 541-543, 545-546, 567-587, 671-673; GC 15; RS 4.* This is nowhere near the conduct of making death threats or physically attacking an Employer representative. Padilla's conduct in no way would make good faith bargaining an impossibility.

Finally, Respondent, raises for the first time in its Exceptions, that Padilla failed to give notice consistent with the CBA when he visited Respondent's premises. ALJ Esposito properly rejected this argument and substantial evidence supports her conclusion. In this regard, record evidence establishes, through Union and Respondent witnesses, that despite specific contractual language requiring advanced notice of Union officials' visits, the parties' longstanding past practice was for Respondent to allow Union access to its premises without providing advanced notice to management. *Tr. 76, 92-94, 100-102, 104-105, 556-567.* ALJ Esposito also properly noted that parole evidence is admissible to establish the existence of a past practice inconsistent with the terms of the expired contract. *Church Square Supermarket, 356 NLRB 1357, 1359 (2011).* Based on the above, Respondent's Exception B must be rejected.

III. ALJ Esposito properly found that the Respondent refused to bargain in good faith and unilaterally failed to remit health insurance coverage payments to the UNITE HERE Health Fund, in violation of Section 8(a)(5) and (1) of the Act.

Exception C: Respondent takes issue with ALJ Esposito's finding that it refused to bargain with the Union by refusing to remit health insurance coverage payments to the UNITE HERE Health Fund, which resulted in the cancelation of health insurance coverage for the bargaining unit employees in violation of the parties' CBA and the Act.

Respondent argues that the ALJD ignores the fact that the Respondent's Hotel had the right to obtain and unilaterally implement alternate health insurance coverage in accordance with the parties' February 12, 2012 side letter agreement (side letter) RS 2. Respondent argues that in paragraph 3 of the side letter, the Union waived its right to bargain regarding the implementation of an alternative health plan. Therefore, Respondent acted within its rights in implementing a healthcare plan with superior coverage for its employees.

Respondent couldn't be more mistaken, and its Exception C must be rejected. The case law is well settled that a waiver of the Union's legal rights is not lightly inferred and must be clear and unmistakable. *Weyerhaeuser NR Co.*, 366 NLRB No. 169, slip op. at 3 (2018) citing *Metropolitan Edison Co. V. NLRB*, 460 US 693, 708 (1983). The party asserting that such a waiver exists bears the burden to establish that the parties unequivocally and specifically expressed their mutual intention to permit unilateral action with respect to a term, notwithstanding the statutory duty to bargain that would otherwise apply. *Weyerhaeuser NR Co.*, 366 NLRB No. 169, slip op. at 3 (2018).

In the instant matter, Respondent has clearly not met its burden. Here, the record evidence supports ALJ Esposito's findings that the Union did not waive its right to bargain. In

this regard, paragraph 3 of the side letter does not by its terms permit the Respondent to unilaterally implement alternative health care, but instead imposes specific limitations on Respondent's prerogative to change health insurance plans. ALJ Esposito also correctly found that the parties' agreement to submit any alternative health insurance coverage disputes to arbitration signaled that implementing alternative health coverage was bargainable and not a matter that had been expressly waived by the Union in the side letter. *ALJD 38-40*. Again, the General Counsel is compelled to note that the facts relied on by the ALJ in reaching her conclusion are drawn directly from relevant testimonial and documentary evidence presented during the trial of the instant matter. *ALJD 36-41; Tr. 146-147, 457-459, 525-526, 609*.

Based upon all the foregoing, it is respectfully submitted that Respondent's exceptions A-C to the ALJD are without merit and must be denied in their entirety. It is further submitted that the Administrative Law Judge Lauren Esposito's decision should be affirmed, and her recommended Order be adopted by the Board.

Respectfully submitted,

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

ARBAH HOTEL CORPORATION d/b/a
MEADOWLANDS VIEW HOTEL

and

Case 22-CA-197658
22-CA-203130
22-CA-205317
22-CA-205422
22-CA-209158
22-CA-212705

NEW YORK HOTEL AND MOTEL TRADES
COUNCIL, AFL-CIO

CERTIFICATION OF SERVICE

This is to certify that copies of the Counsel for the General Counsel's Answering Letter Brief have been served this date as follows:

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