

**UNITED STATES GOVERNMENT
BEFORE THE NATIONAL LABOR RELATIONS BOARD**

GRAPETREE SHORES, INC. D/B/A
DIVI CARINA BAY RESORT

and

VIRGIN ISLANDS WORKERS UNION

Cases 24-CA-10700
24-RC-8566

**GENERAL COUNSEL'S ANSWERING BRIEF TO
RESPONDENT'S EXCEPTIONS TO THE
ADMINISTRATIVE LAW JUDGE'S DECISION**

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Comes now Counsel for the General Counsel and respectfully submits to the Board this Answering Brief to Respondents' Exceptions to the Administrative Law Judge's Decision.

The General Counsel hereby requests that Respondent's exceptions be denied and that the Administrative Law Judge's decision in this case issued on February 8, 2008 be affirmed. In support of this position, Counsel for General Counsel (CGC) offers the following:

I. PROCEDURAL STATEMENT

On June 1, 2007, Virgin Islands Workers Union (hereinafter "Union") filed a petition in case 24-RC-8566 seeking the representation of certain employees employed by Grape Tree Shores, Inc. d/b/a Divi Carina Bay Resort (hereinafter "Respondent"). On June 7, 2007, the parties stipulated to an election, which took place on July 13, 2007.

On July 13, 2007, a tally of ballots issued showing that seven challenged ballots affected the results of the election. On July 16, 2007, the Union filed objections to the election and on July 20, 2007, the Respondent filed its own set of objections.

After an administrative investigation on the matter, the Regional Director for the 24th Region of the National Labor Relations Board, issued a Report and Recommendation on Challenged Ballots, Objections and Notice of Hearing, followed by a Supplemental Report on Challenged Ballots and Objections, by which she: a) resolved five of the seven challenged ballots; b) directed that the remaining two challenges be sent to a hearing because they raised substantial and material issues of law and fact; c) overruled two of the Union's four objections; and d) ordered that the remaining two objections, as well as all of Respondents objections, be resolved based on the evidence presented in a hearing.

The Regional Director issued a Complaint on September 26, 2007 against Respondent in case 24-CA-10700 based on a charge filed by the Union. Since the Union's objections are related to the unfair labor practices alleged in the Complaint, the Regional Director ordered that the Complaint be consolidated with the challenges and objections. The hearing on these matters was held before the Honorable Administrative Law Judge Paul Bogas on November 6, 2007 in St. Croix, United States Virgin Islands.

On February 8, 2008, Judge Bogas issued his decision in this case. On March 21, 2008, the Respondent filed Exceptions to the Administrative Law Judge Bogas' decision.

II. ISSUE

Respondent's General Manager, Richard Patrick Henry, admitted that within 48 hours prior to the Board election, he informed the unit employees that they would receive certain new benefits. In his decision, Judge Bogas determined, among other issues, that

Henry's conduct constituted a violation of Section 8(a)(1) of the Act. Among the Respondent's Exceptions to the Administrative Law Judge's Decision, 20 exceptions are related to the Judge Bogus' finding that Henry's conduct constituted a violation of Section 8(a)(1) of the Act. CGC's position is that all exceptions to Judge Bogas' finding that Henry's conduct constituted a violation of Section 8(a)(1) of the Act should be denied. CGC does not take any position regarding any other exceptions raised by Respondent not related to Bogas' finding of a violation to section 8(a)(1) as these exceptions are not related to the unfair labor practices alleged in the Complaint, but rather pertain to challenged ballots and objections to the Board election filed by the Union and the Respondent.

III. FACTS

As set forth in Judge Bogas' decision, Respondent operates a resort hotel and casino on the island of St. Croix, U.S. Virgin Islands. Respondent employs from 140 to 150 employees of which approximately 110 are unit employees.¹ Respondent's General Manager, Richard Patrick Henry, has been a hotel manager since 1978 and has managed around 10 to 15 hotels nationwide.

According to General Manager Henry, the Respondent receives unspecified tax incentives from the Virgin Islands government since 1996 in exchange for granting its employees certain employment benefits (tr. 22).² The benefits allegedly required by the Virgin Islands Government included a 401(k) plan, vacation time, sick days and a health insurance plan (tr. 24).

¹ The petitioned unit is composed of all the Respondent's full time and regular part time production and maintenance employees, including food and beverage, kitchen, housekeeping, maintenance, front desk, communications, bell and guest services, gift shop, activities and grounds employees.

Regarding the 401(k) plan, Henry initially claimed that all of the unit employees have a 401(k) plan in accordance with its agreement with the Virgin Islands government (tr. 16). However, Henry later clarified that, although the plan is available to them, the Respondent did not make any monetary contributions to the plan (tr. 17-18). Thus, Henry conceded that only one past employee actually contributed to the 401(k) plan (tr. 16).

According to Henry, the Respondent's tax benefits were set to expire in 2006, so it re-applied with the Virgin Islands Government Economic Development Commission in 2005 (tr. 23). Although Henry claimed that the application process was made during a public hearing in February 2006 before the Commission, Henry admitted that the hearing was not held in St. Croix, but rather in St. John, which is another island of the Virgin Islands (tr. 24-25).

Henry testified that the Virgin Islands Government was requiring, among other benefits, that Respondent make a two percent contribution to the 401(k) plan (tr. 18, 27). Henry claims that after several negotiations over the language of the agreement, on July 11, 2007, he received the final agreement signed by the Governor of the Virgin Islands (tr.38).

On Wednesday, July 11, 2007, Henry held two meetings with unit employees (tr. 18). Henry's testimony as to what transpired during and after the meetings is undisputed. Approximately 25 to 30 employees attended each meeting (tr. 18). Both meetings, one held in the morning and the other in the afternoon, lasted around an hour (tr. 19). The primary purpose of the meetings, according the Henry was to encourage employees to

² Record references are as follows: "R" refers to Respondent's exhibits and "tr" refers to the transcript of the hearing.

vote during the upcoming Friday, July 13, 2007 election (tr. 19). However, Henry admitted that among the issues he discussed during both meetings, he told the employees that, due to the aforementioned agreement with the Virgin Islands Government, they would receive certain benefits (tr. 18). Among those benefits, Henry admitted that he told employees they would receive a new 401(k) plan, a \$10,000 life insurance policy, an educational reimbursement of up to a hundred percent based on the grades they receive, increased payments to their insurance plan, and improvements to their health insurance plan (tr. 19, 38-39).

Since not all employees attended the July 11 meetings, Henry admitted that in the succeeding days he met with several employees on an individual basis to inform them of the above mentioned benefits (tr. 20, 40-41). In this regard, employee Bernicedeen Bryan corroborated that Henry met with employees on an individual basis to talk to them about these new benefits (tr. 52-53). Bryan further corroborated that on July 12, the day before the election, Henry met with her during working hours to remind her of the upcoming election (tr. 52). Henry further told Bryan that he had just obtained a 401(k) plan for the employees and, presumably, the other aforementioned new benefits (tr.53). Bryan testified that to this date she has yet to receive a 401(k) plan from Respondent (tr. 53-54).

IV. FACTUAL AND LEGAL ANALYSIS

The Respondent's position is that the benefits announced by Henry had no relation to the Union's organizing campaign. Respondent argues that it had been negotiating with the local government over the agreement, which encompassed the new benefits, since early 2006. Thus, the Respondent claims that the new benefits were

planned prior to the union campaign and that it was by pure coincidence that the agreement was approved by the Governor of the Virgin Islands just three days before the July 13 election. However, the ALJ correctly found that the Respondent's defense is flawed.

The Board held in Mercy Hospital, 338 NLRB 545 (2002), that even if benefit changes are developed independently of an organizing campaign, "an employer cannot time the announcement of the benefit in order to discourage Union support, and the Board may separately scrutinize the timing of the benefit announcement to determine its lawfulness." See also Capitol EMI Music, 311 NLRB 997 fn. 4, 1012 (1993), *enfd.* 23 F.3d 399 (4th Cir. 1994); Southgate Village, 319 NLRB 116 (1995). Furthermore, although new benefits may have been planned prior to the union campaign and is part of the past practice, an employer cannot time the announcement of benefits in order to influence employee support for the union during the election. Southgate Village, *supra*.

The burden is on the employer to overcome the presumption that the timing of the announcement of the benefits was intended to influence the employees to vote against the union. Mercy Hospital, *supra*. Accordingly, "[t]he Board will infer that an announcement or grant of benefits during the critical period is coercive, but the employer may rebut the inference by establishing an explanation other than the pending election for the timing of the announcement or bestowal of the benefit." STAR, Inc., 337 NLRB 962, 962 (2002). See American Red Cross, 324 NLRB 166 (1997), Comcast Cablevision, 313 NLRB 220 (1993) and Speco Corp., 298 NLRB 439 (1990).

In the present case, the ALJ correctly determined that the Respondent failed to meet its burden to establish a justified business reason for the timing of the

announcement of new benefits to unit employees within two days of the election. The only reason offered by Respondent was that Henry felt it was important for the employees to understand and be informed of all the new benefits that they would receive (tr. 38-39).

As Judge Bogas found, Henry's explanation is not a compelling reason for announcing the benefits merely 48 hours before the election. Henry admitted that the agreement signed by the Governor did not require him to make any announcement to the employees regarding the new benefits (tr. 38-39). Furthermore, although the agreement was signed by the Governor on July 10, 2007, the document clearly states that the tax incentives granted to the Respondent "... are to commence at the option of the Applicant..." (R-3, page 2). Thus, Henry did not explain the importance of immediately informing the unit employees about the new benefits when such were not implemented until well after the election. Henry admitted that by the date of the present hearing the Respondent had yet to implement most of the new benefits, including the contributions to the 401(k) plan, the life insurance and personal sick days (tr. 58). Henry's admission to this fact only adds to Respondent's lack of a legitimate business justification for its timing of the announcement of the new benefits (tr. 58).

In Comcast Cablevision, *supra.*, the Board found that Comcast violated Section 8(a)(1) of the Act by announcing a new deposit program one week prior to the election. The Board determined that Comcast had failed to furnish a sufficient justification for the timing of the announcement of the new benefit in light of the fact that the benefit could not be effective until nearly two months after the announcement. Under the

circumstances of the present case, it is reasonable to conclude that the Respondent could have waited until after the election to make said announcement.

The Respondent claimed that the employees could have been aware that it was negotiating new benefits with the Virgin Islands Government since the application process of the tax incentives was made during a public hearing in 2006. However, Respondent failed to present any direct evidence to establish that the employees had knowledge of said hearing, held on another island, or of any subsequent negotiations on the matter. Thus, the employees were presumably unaware of the alleged negotiations between Respondent and the Virgin Island Government.

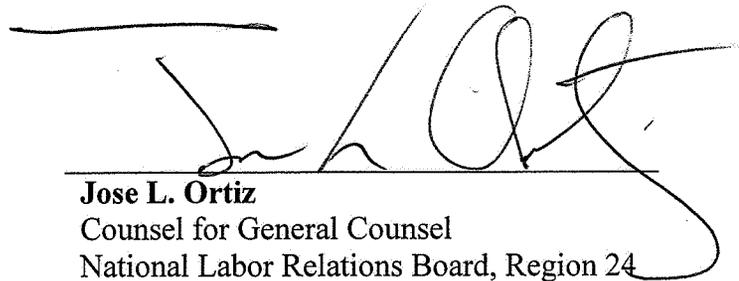
Having failed to establish a business justification, Respondent violated Section 8(a)(1) of the Act when, within only 48 hours of the Board election, General Manager Henry told unit employees that they would receive a new 401K plan, a \$10,000 life insurance policy, an educational reimbursement of up to a hundred percent based on the grades they receive, increased payments to their insurance plan, and improvements to their health insurance plan.³ Furthermore, the fact that Henry met with the unit employees to encourage them to vote at the election, followed by his announcement that they would receive new benefits, clearly supports the conclusion that his sole intention was to influence employee support for Respondent during the election.

³ Paragraph 6(b) of the consolidated Complaint alleges that Respondent "...restrained and coerced employees...by announcing the implementation of a 401(k) plan just prior to the Board scheduled election." During the hearing, General Manager Henry admitted that, in addition to the 401(k) plan, he announced to unit employees that they would receive additional benefits, including a \$10,000 life insurance policy, an educational reimbursement of up to a hundred percent based on the grades they receive, increased payments to their insurance plan, and improvements to their health insurance plan (tr. 19, 38-39). Although these additional benefits that Henry admitted informing the unit employees is not specifically alleged in the consolidated Complaint, "[i]t is well settled that the Board may find and remedy a violation even in the absence of a specified allegation in the complaint if the issue is closely connected to the subject matter of the complaint and has been fully litigated." Pergament United Sales, 296 NLRB 333, 334 (1989), *enfd.* 920 F.2d 130 (2d Cir. 1990) as cited by Hi-Tech Cable Corp., 318 NLRB 280 (1995).

V. CONCLUSION

For the foregoing reasons, Counsel for the General Counsel respectfully requests that Respondents' Exceptions to the Administrative Law Judge's Decision be denied.

Dated at San Juan, Puerto Rico this 11th day of April 2008.



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CERTIFICATE OF SERVICE

I hereby certify that the "**GENERAL COUNSEL'S ANSWERING BRIEF TO RESPONDENT'S EXCEPTIONS TO THE ADMINISTRATIVE LAW JUDGE'S DECISION**" was served upon the following:

By Regular Mail:

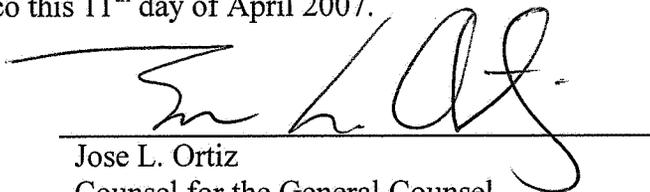
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