

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

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

-- and --

VIRGIN ISLANDS WORKERS UNION

Case Nos. 24-CA-10700
24-RC-8566

**EMPLOYER'S REPLY BRIEF IN RESPONSE TO THE GENERAL COUNSEL'S
ANSWERING BRIEF**

Employer Grapetree Shores, Inc. d/b/a Divi Carina Bay Resort ("Divi"), pursuant to Section 102.46 of the National Labor Relations Board's ("NLRB" or "Board") Rules and Regulations and the NLRB's April 15, 2008 letter, files this reply brief in response to the General Counsel's answering brief ("G.C. Br.") to Divi's exceptions to the Administrative Law Judge's ("ALJ") decision.¹

INTRODUCTION

The General Counsel (like the ALJ) does not dispute a host of dispositive facts in its answering brief, including that:

- Divi commenced the process for re-newing its entitlement to valuable tax benefits from the Virgin Islands' Economic Development Commission ("EDC") in 2005, long before the Virgin Island Workers Union ("VIWU") commenced its organizing campaign.

¹ The General Counsel's answering brief only addresses the validity of the ALJ's holding that Divi made unlawful pre-election announcements in violation of Section 8(a)(1) of the NLRA. (G.C. Br., at 3). Accordingly, Divi's reply brief focuses solely upon the General Counsel's arguments relating to this issue. It is important to note, however, that the Virgin Islands Workers Union apparently was unable to come up with any principled basis to dispute Divi's arguments as to why Felicia Dixon's ballot should not be opened or counted and why Divi's election objections should be sustained based on Ms. Edward's improper conduct.

- most, if not all, of the enhanced employee benefits at issue were proposed by the EDC for purposes of renewing Divi's entitlement to valuable tax benefits.
- the new EDC contract containing the enhanced employee benefits did not become legally-binding until it was approved by the Virgin Islands Governor.
- Divi had no control or influence over whether and when the Virgin Islands Governor would approve the new EDC contract.
- the Governor approved the EDC contract three days before the representation election and Divi notified its employees of this fact the following day.
- Divi did not violate the NLRA by negotiating and finalizing the new EDC contract containing the enhanced employee benefits. Thus, the creation/ implementation of the enhanced benefits did not violate the NLRA.

As the record before the ALJ shows, this clearly is not the typical case where the employer unilaterally creates/implements new employee benefits in direct response to the union's organizing campaign. The General Counsel does not allege otherwise. Nevertheless, the General Counsel (and the ALJ) assert that Divi violated the NLRA simply and solely by *announcing* the Virgin Islands Governor's approval of the new EDC contract to its employees prior to the July 13, 2007 representation election. As discussed more fully below, this assertion misconstrues both the record and the law.

ARGUMENT

I. THERE IS NO PRESUMPTION THAT DIVI'S PRE-ELECTION ANNOUNCEMENT VIOLATED THE NLRA, NOR DOES DIVI HAVE THE BURDEN OF OTHERWISE ESTABLISHING AN ADEQUATE BUSINESS JUSTIFICATION FOR THE TIMING OF ITS ANNOUNCEMENT

In parroting the ALJ's faulty legal analysis, the General Counsel asserts that Divi's pre-election announcement was unlawful because (i) the announcement's timing presumptively violated the NLRA and, accordingly (ii) Divi was required to otherwise establish (but did not

establish) that it had an adequate business justification for the timing of its announcement. (G.C. Br., at 6-7). For a number of reasons, this assertion is wholly without merit.

First, the fatal flaw in the General Counsel's (and the ALJ's) position is that it fails to recognize the distinction between (i) cases where the employer creates/grants new benefits *and* makes announcements about such benefits *after* the union arrives on the scene. In this situation, the creation/grant of new benefits and the announcement of such benefits are intertwined as part of a direct response to the union's organizing campaign; and (ii) cases where the employer creates/grants new benefits *before* the union's organizing campaign but makes an announcement relating to these benefits prior to the representation election. Under the second scenario, courts and the Board have not presumed that the pre-election announcement violates the NLRA, nor have they required the employer to otherwise establish an adequate business justification for the announcement's timing. See, e.g., Raley's, Inc. v. NLRB, 703 F.2d 410 (9th Cir. 1983); NLRB v. Tommy's Spanish Foods, Inc., 463 F.2d 116 (9th Cir. 1972); Emery Worldwide, 309 NLRB 185 (1992); Weather Shield of Connecticut, 300 NLRB 93 (1990); American Sunroof Corp., 248 NLRB 748 (1980), enf'd, 667 F.2d 20 (6th Cir. 1981).²

For example, in Raley's, the Ninth Circuit Court of Appeals was presented "with the bald question [of] whether an employer can violate section 8(a)(1) by announcing and explaining lawfully granted benefits in order to influence an election." 703 F.2d at 415. The court held that there is no NLRA violation in this situation, even assuming that the employer timed the announcement to influence the election's outcome. Id. at 414. In support of its holding, the

² Divi cited a number of the aforementioned cases in its opening brief. Notably, the General Counsel made no attempt to dispute the applicability of these cases.

Ninth Circuit correctly observed that when the Board deems pre-election announcements to violate the NLRA, it generally does so when the "the grant [of new benefits] and the announcement *occurred together in the pre-election period.*" Id. at 415 (emphasis added). The Ninth Circuit further noted that where (as here) the creation/grant of new benefits pre-dates the union's organizing campaign, a subsequent pre-election announcement relating to these benefits constitutes protected employer speech under Section 8(c) of the NLRA. Id. (citing Tommy's Spanish Foods, Inc. and quoting Tommy's holding that "[s]ince it is uncontradicted that the [employer's] initial effort in the matter of increasing insurance [benefits] predated the Union's appearance on the scene . . . [the employer's] announcement of the contemplated insurance increase was permitted under Section 8(c)."). Consequently, the Raley's court did not apply any presumptions or require the employer to otherwise establish an adequate business justification for the timing of its pre-election announcement.

Similarly, in American Sunroof Corp., 248 NLRB 748 (1980), the employer announced a new employee pension plan one day before the union election. The ALJ held that the employer violated the NLRA because it should have waited to announce the new pension plan until after the election. In reversing the ALJ, the Board held that the employer's pre-election announcement was lawful, regardless of the announcement's timing, because it was "undisputed that the adoption of the pension plan was unrelated to the union campaign . . . [and was] conceived prior to the [union organizing] campaign[.]" Id.

Likewise, in Emery Worldwide, 309 NLRB 185 (1992), the Board reversed an ALJ's decision and held that the employer lawfully announced – one day before a representation

election – that employees would receive a bonus pursuant to a company-wide bonus competition.

In support of its decision, the Board stated that the ALJ improperly focused solely upon the timing of the employer's announcement, particularly insofar that (i) the bonus competition itself was lawfully implemented and was established before the union arrived on the scene; (ii) the employer did not become aware of its employees' eligibility to receive the bonus until immediately prior to the election; and (iii) the employer had no control over whether and when the employees would receive the bonus as part of the competition. Id. at 185-86.

The facts and analyses of the aforementioned cases – which did not presume an NLRA violation or require the employer to establish an adequate business justification for its pre-election announcement -- are fully applicable here. Divi began the process to create/implement the enhanced benefits at issue prior to the VIWU's organizing campaign; Divi did not have any control over when the Virgin Islands Governor approved the new EDC contract containing the enhanced benefits; and Divi immediately notified its employees that the Governor approved the new EDC contract. Given these facts, the ALJ clearly erred in presuming an NLRA violation and requiring Divi to otherwise justify the timing of its pre-election announcement.

Second, the cases cited by the General Counsel wholly support the distinction recognized by the Ninth Circuit in Raley's and do not support the position advocated by the General Counsel and the ALJ. (G.C. Br., at 6). Indeed, unlike here, the General Counsel's cases involve situations where the employer announced new employee benefits *and* created/granted these benefits *after* the union arrived on the scene. It is only under these circumstances that it is appropriate to

presume that a pre-election announcement violates the NLRA and require the employer to otherwise provide an adequate justification for the announcement's timing.

For example, in Southgate Village, 319 NLRB 916 (1995) (cited at p. 6 of G.C. Br.), the Board held that the timing of the employer's pre-election announcement violated the NLRA because there was "no question" that the employer "was fully aware of the union campaign among employees" at the time it decided to create/implement the wage increases at issue. Id. at 925. Similarly, in Mercy Hospital, 338 NLRB 545 (2002) (cited at p. 6 of G.C. Br.), the record showed that although the employer informally considered raising employee wages prior to the union organizing campaign, "[i]t was only after [the employer] was well aware of [the union's] standing to file a representation election that its plan for wage adjustments crystallized." Id. at 549; see also Capitol EMI Music, 311 NLRB 997, 1010-12 (1993) (cited at p. 6 of G.C. Br.) (record before ALJ showed that employer's announcement of new benefits *and* its decision to create/grant new benefits both occurred after union arrived on scene). In short, the General Counsel's cases support the inapposite principle that an employer's pre-election announcement may presumptively violate the NLRA *if* the announcement relating to new benefits and the creation/implementation of those benefits are intertwined (i.e., both occurred after the union arrived on the scene). That clearly is not the case here.

* * *

In sum, well before the VIWU's organizing campaign, Divi unquestionably commenced a process resulting in the creation of enhanced benefits for its employees. Thus, the creation/implementation of the enhanced benefits was lawful and obviously could not have been done to

undermine the VIWU. Under these facts, (i) Divi's pre-election announcement relating to the enhanced employee benefits – an announcement that was made immediately after the Governor of the Virgin Islands approved the new EDC contract – did not presumptively violate the NLRA; and (ii) Divi should not have been required to otherwise establish an adequate business justification for its pre-election announcement. For these reasons, in addition to the reasons set forth in Divi's opening brief, the Board should overrule the ALJ's decision that Divi's pre-election announcement violated the NLRA.

II. EVEN ASSUMING, ARGUENDO, THAT DIVI WAS REQUIRED TO ESTABLISH AN ADEQUATE BUSINESS JUSTIFICATION FOR THE TIMING OF ITS PRE-ELECTION ANNOUNCEMENT, DIVI SATISFIED THIS REQUIREMENT

Even assuming, arguendo, that Divi was required to establish an adequate business justification for the timing of its pre-election announcement, the General Counsel wrongly asserts that Divi failed to satisfy this requirement. (G.C. Br., at 6-8). Divi's opening brief notes, and the General Counsel does not dispute, that the record before the ALJ confirms that (i) Divi commenced the process for securing a new EDC contract well before the VIWU's organizing campaign; (ii) the EDC contract did not become legally-binding until the Virgin Islands Governor approved it; (iii) Divi had no control over whether and when the Governor would approve the new EDC contract; and (iv) the Governor did not approve the new EDC contract until July 10, 2007, less than three days prior to the representation election.

These indisputable facts are more than sufficient to establish an adequate business justification for the timing of Divi's pre-election announcement. See Emery Worldwide, 309 NLRB at 185-86, 193 (concluding that employer had legitimate justification for announcing

employee bonus one day prior to representation election where employer did not learn about employees' entitlement to the bonus until two days before the election); Weather Shield, 300 NLRB at 98 (noting that employer satisfied any potential burden of providing legitimate reason for announcing benefits information on election eve by showing that the pension plan at issue was "developed long before the onset of the union campaign.") (Stephens, concurring).

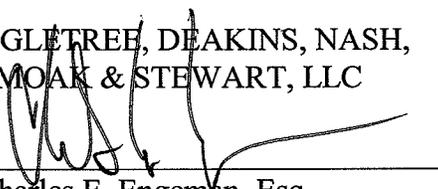
CONCLUSION

For all of the foregoing reasons, in addition to the reasons set forth in Divi's opening brief, Divi's exceptions to the ALJ's decision should be upheld.

Dated: April 28, 2008

Respectfully submitted,

OGLETREE, DEAKINS, NASH,
SMOAK & STEWART, LLC



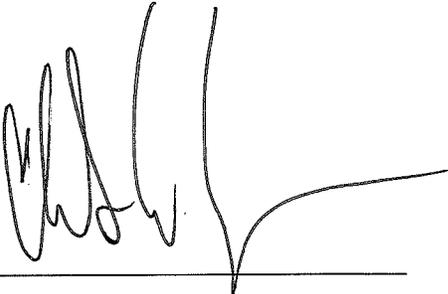
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CERTIFICATE OF SERVICE

I do hereby certify that on this 28th day of April 2008, a true and correct copy of the foregoing document was served by electronic filing with the Office of the Executive Secretary and have advised the following by telephone of the filing and have placed one (1) copy of the same with USPS Express Mail, postage prepaid, addressed to:

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A handwritten signature in black ink, appearing to read 'Charlesworth Nicholas', is written over a horizontal line. The signature is stylized and cursive.

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