

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

In the Matter of:

REGENCY GRANDE NURSING & REHABILITATION
CENTER,

Respondent,

and

Case No. 22-CA-26231

SEIU 1199 NEW JERSEY HEALTH CARE UNION

Charging Party

EXCEPTIONS BRIEF IN COMPLIANCE PROCEEDING

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INTRODUCTION

This memorandum is sent in support of the position of the Respondent, Regency Grande Nursing and Rehabilitation Center (“Regency”), and it argues that the Back pay Specification in this case should not grant the amounts asserted by the General Counsel (“GC”) and found by the ALJ.

STATEMENT OF THE CASE AND ARGUMENT

The Board’s order in this case required reimbursement for dues *only* to employees who had not voluntarily joined Local 300S before January 2004. (ALJD page 7 at line 23-25) It is thus incumbent on the GC to establish eligibility for dues reimbursement by showing that employees that it seeks reimbursement for, at the least, did not sign 300 membership cards before January 2004.

The Board’s compliance officer in this case introduced no collected evidence such as affidavits, or even employee statements, that reflected on such eligibility and no employee testified at the hearing concerning whether they had signed membership cards

for 300 before January, 2004. The GC seems to believe, and the ALJ to accept, that because there was an underlying finding that there was no *majority* support for 300¹, that *that finding* alone meant that *nobody*, even those that did not testify, had signed for Local 300. Moreover, the GC seems to feel, the finding also somehow absolved the GC of the Board order's requirement that reimbursement be only granted to eligible employees (who had been *shown, by the GC*, to have not signed with 300 before January 2004).

The ALJ accepts the GC's argument that lack of eligibility for reimbursement is Regency's burden to prove. Thus, although there is no proof concerning whether a group of employees, *who had not testified below*, signed cards before January 2004, *all* those employees are presumed entitled to reimbursement. The ALJ then cites *Freeman Decorating* (ALJD page 7 line 40 et seq, *see also fn 14*) for support of this proposition.

In fact, the startlingly different language in *that* order makes clear that Regency had no reason to believe that it had any burden of such proof in *this* case. In that case, of course, the Board stated "...to the extent that such payments are not *shown by the Respondent Employers* to have been noncoercive." [*emphasis supplied*]. In this case the Board stated that "...reimbursement does not extend to those employees who voluntarily joined and became members of Local 300S prior to January 8, 2004". In the former, the

¹ Arbitrator Nadelbach, of course, found that there was such a majority, and Regency recognized 300 pursuant to the directive to do so in the Arbitrator's award.

burden of proof has clearly shifted, in the latter it clearly has not. The ALJ notes, correctly, that as “...a general matter, the General Counsel ultimately bears the burden of proof in a compliance case”. (ALJD page 7 line 11-12)

Why would Regency, then, call witnesses in this case, particularly if the Compliance Officer did no apparent investigation, and submitted no evidence, concerning whether employees had voluntarily joined or signed for 300S?² (ALJD page 8 line 36-45)

In any event, if the Board actually meant to shift the burden of proof, it should have done so explicitly. If it wants to do so now, this case must be remanded to permit Regency to carry its newly found burden.

Of course, it is no secret that employees testified in the underlying proceeding that they hadn't signed membership cards with 300. (There was no showing, in the underlying case, that these employees had not signed *check off authorizations*, however.) The total number of these employees in the back pay specification was 53³. But their testimony was

² This is not requiring the GC to “...prove the negative...” (ALJD page 7 line 35) Rather, *as it did in the underlying case*, the GC would have to prove that the employees did not sign cards for 300S.

³ Agrisoni, Aguado, Amstrong, Artigas, Augustine, Ayala, Balbuena, Camacho, Carmona, Castro, Conklin, Cullen, Estudillo (Cristal), Fauste, Ferreira, Figueroa (Manuala), Finlayson, Franco, Garnder, Gatling, Gibbons, Gonzalez (Mauricio), Groman, Harvey, Hickenbottom (Kerry), Kaur (Amarjeet), McCord, Meikle, Mella, Mohamed, Montanez, Montenegro, Muneton, Noel, Oulds (Maria), Palomba, Pasion, Phelan, Roberts, Rohde, Romero, Sanchez (Jose), Secola, Shann, Smith, Tavera, Terry, Thomas,

not introduced in *this* hearing, and on *this* record, for *this* ALJ to assess in making her decision in this case.

Moreover, 58 employees in the back pay specification, that were apparently employed at the time, *did not* even testify in the underlying proceeding⁴.

While the GC may argue, and the ALJ has in this case accepted, (ALJD page 6 line 38-40) that evidence concerning those that testified in the underlying proceeding is “on the record” (though not on *this* record), it is beyond question that there is no evidence whatsoever presented by the GC, and the Compliance Officer, to show that the others claimed in the specification had not voluntarily joined 300 or signed a 300 card before January, 2004.

Valentin, Walker, Walling, Waysome, Zaretskie.

The amount in issue for this group is approximately **\$32,000**.

⁴ Betancourth, Bojkovic, Bojkovic (Ilira), Buitrago, Canepa, Castro-Richards, Celentano, Cornier, Correa, Crosby, Cuellar, Easton, Enriquez, Figueroa (Elizabeth), Foster, Fudrial, Garcia, Garcia (Raul), Gonzalez (Jose), Hall, Hidalgo, Jackson, Jasso, Kaur (Kulwinder), Lasaga, Martinez, Masini, Massari, McClanahan, Mendez (Ruth), Mendez (Sol), Miraflores, Moncaleano, Moraga, Montoya, Munoz, Newell, Ortiz, Ospina, Oyola, Parks, Pafez, Pedraza-Rodrigu, Portilla, Richards, Rojas, Rosario, Ruiz, Sadick, Saldarriaga, Sanchez, Siepierski, Silveira, Studivant, Toxqui, Tuballes, Witto, Zelada.

The amount in issue for this group is approximately **\$22,000**.

The letter sent to amplify the answer in this case, dated October 28, 2008 (ALJD page 2 line 39 *et seq.*), conceded that the GC did not have to offer evidence that employees who *first* came to work at Regency *after* the '04 date did not sign with 300 *before* they came to work. It did not, however, thereby concede Regency's liability *to pay* any money. (It noted the amount "due", with word "due" in quotes.) At the hearing, this position was reiterated in a stipulation. (ALJD page 9 line 25-26)

Accordingly, there are three groups of employees in the Back Pay Specification; A) employees who came to work after the January 8, 2004 "trigger" date⁵, B) employees that actually testified that they had not signed with 300 *in the underlying* case and C) employees that a claim is being made for but which there is no evidence about their eligibility for reimbursement at all.

A) Board remedial law

Board orders are always subject to claims of changed circumstances (*We Can* 315 NLRB 170, 176 fn 27) and that they not be "unduly burdensome" (*Lear Siegler* 295 NLRB 857, 861) The orders can be modified at compliance, even after a court

⁵ The parties stipulated that employee Oulds and Carreon, and Lino and Nino Navvaro, Rosita Fitzpatrick and Rosita Romera, and Fanny Marie Ruandes and Fanny Marie Zapata, are each the same person.

enforcement order⁶, to reflect these changed circumstances and to avoid their being unduly burdensome. (*We Can, supra*) This standard applies to dues reimbursement as well. (*Lummas Corp.* 125 NLRB 1161). (*see also* Board order in *Elmhurst*, cited in the underlying case for the imposition of the post January '04 order, attached hereto, at bottom of page 4) The ALJ does not regard the Board's attached order as "precedential". (ALJD page 10 line 28)

B) Application of the law to the facts

Regency urges that the Board find that there is no liability to the first two categories of employees because of these remedial principles and factors and that there is no liability for the second and third category of employees because the GC has not shown eligibility for them.

Jim Robinson, 300S' former president, testified *without contradiction* that a "cross" claim by Regency pursuant to the indemnification provisions of the underlying contract would now bankrupt the union. Accordingly, Regency would not get back the dues that it pays out to the employees if it "sues" 300.

⁶ Thus the ALJ's footnote 21 is legally wrong. Moreover, while Regency argued below that a reimbursement order should not issue in the case, there was no litigation that intervening circumstances made the order "unduly burdensome" and unjust.

In an opposition filed to Regency's motion for reconsideration in the underlying case, the GC asserted that "...for Respondent to argue that it is being penalized in that it must reimburse the dues which Local 300S gets to keep is sheer nonsense and [sic] affront to the Board's intelligence. As Respondent well knows, the contract that it signed with 300S *contains a clause indemnifying Respondent* in connection with any claims of liability arising out of Respondent's deductions of dues and fees. (GCX 26)". (*see attached copied from underlying record*). Thus the GC agrees that Regency's payment of these monies without its receiving reimbursement would be a penalty. Moreover, circumstances were such that Regency would likely recover these payments from the Union that actually benefitted from them.

Regency, admittedly, had no benefit whatsoever from these dues. This changed circumstance, that indemnification is now impossible, must be considered in this compliance phase of the proceeding. In *Lummus* the violating union, was a *named* Respondent, and *it* had the dues that *it* received, ordered returned. However, *it* had the benefit of the dues and committed the violation by signing an obviously illegal contract provision. Of course, in this case, these dues were sent to 300 and the employer derived no benefit whatsoever from them. Moreover, these dues were deducted by Regency from employee pay checks pursuant to, admittedly, *voluntarily employee* signed check off authorizations. Regency had every reason to believe, as the GC noted, that it would recover whatever payments that it made from 300S, who was the beneficiary of these monies. With the testimony that such indemnification will not occur, since the union

would be bankrupted, a changed circumstance exists.

The ALJ, however, regards “...any purported right of subrogation held by Respondent [as] irrelevant to any issue in this case...” (ALJD page 9 line 35)

It must be stressed that there is no finding in the underlying case that Regency coerced employees to ever sign cards for 300. Nor is there any dispute that arbitrator Nadelbach *found* 300 majority status and directed bargaining by Regency and 300. Finally, there is no finding that the employees did not voluntarily instruct Regency to deduct their union dues from their paychecks for transmittal to the Union. Accordingly, the Board’s rationale for a reimbursement order is not as forceful as in *Lummus*. (“Finally, we believe that a mere cease and desist order will have little impact in an industry *where illegal hiring practices are wide-spread*. The reimbursement remedy more properly effectuates the purposes of the Act because it provides *not only a deterrent to future violations* but an incentive to future compliance.” 125 N.L.R.B. 1161 (N.L.R.B. 1959)) *see also Comment Note: Power of NLRB under 10(c) ...to order reimbursement of union ...dues* 6 L. Ed. 2d 1274.

While, under *ILGWU*, (cited by the ALJ at page 8 line 24), such technical violations result in a ULP finding, and do not require scienter, the *remedy* for such violations must be, it is respectfully submitted, differently looked upon. While there is

“strict liability” for recognitions in lack of majority cases, it does not follow that there is “strict remedy” imposed in such cases. In this case Regency *came forward*, after all, with an arbitration award directing it to bargain with 300S.

Regency never touched, or even saw, the cards given to Arbitrator Nadelbach. The ALJ notes that the Respondent never had access to the cards given to Arbitrator Nadelbach. (ALJD page 8, line 22) Regency could, therefore, not be required preserve them. The ALJ in the underlying case found reasonable 300's discarding the cards because of the expiration of the 10(b) period. Thus, Regency is without evidence of the names of employee signers (all of whom could have been the employees who *did not* testify in the underlying proceeding), through no fault of its own. Proving its (only admitted) affirmative defense (that it would show factually that 68 employees signed cards for 300S), is not held sufficient to rebut the compliance claim for dues reimbursement leveled against Regency. Indeed, the ALJ does not regard the burden as even “shifting back” to the GC after proof of 68 employee signers was provided. Regency is severely, and unfairly, hampered by the unavailability, through no fault of its own, of this crucial evidence. To require payment by Regency when its inability to prove its affirmative defense is thus compromised, is unduly burdensome and unjust.

Contrary to the ALJ (ALJD page 10 line 3-7) “unduly burdensome” does not require that a “threat to...continued viability...” must be shown. It is also “unduly

burdensome”⁷ to assess over \$74,000+ in dues reimbursement *to Regency alone* when circumstances in a case are like this one.

Moreover, the changed circumstances, in that Regency will now be unable to recover from 300 on any claim of indemnification that it makes against 300, makes the remedy, against it alone, unduly burdensome and patently unjust as well. As noted above, the ALJ, however, regards this evidence and issue as irrelevant. (ALJD page 10, line 34-36)

CONCLUSION

Based on the forgoing, the ALJ’s recommendation that Regency be required to pay \$74,792.71 should be reversed.

Dated: New York, New York
June 25, 2009

Yours etc,
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⁷ Forcing a company to accommodate an employee with a 4 day work week where there was a seniority clause that blocked the employee’s being off on Saturdays, was held an “undue hardship” by the Supreme Court. *TWA v. Hardison*, 432 U.S. 63.

CERTIFICATE OF SERVICE

The undersigned certifies that on the 25th day of June, 2009. I electronically mailed a copy of the foregoing **BRIEF IN SUPPORT OF EXCEPTIONS** in Case No. 22-CA-26231 on the parties designated below hereof by electronic mail, to the last known email address of the parties as set forth herein below:

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A handwritten signature in black ink, appearing to read 'MT', with a long horizontal stroke extending to the right.

MORRIS TUCHMAN

A-1494

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

REGENCY GRANDE NURSING AND
REHABILITATION CENTER

and

SEIU 1199 NEW JERSEY HEALTH CARE UNION

Case 22-CA-26231

and

LOCAL 300S, PRODUCTION SERVICE &
SALES DISTRICT COUNCIL, A/W UNITED
FOOD AND COMMERCIAL WORKERS
INTERNATIONAL UNION

GENERAL COUNSEL'S OPPOSITION TO RESPONDENT'S MOTION FOR
RECONSIDERATION

General Counsel opposes Respondent's Motion to the Board for Reconsideration of its Decision and Order which issued in this case on August 30, 2006, reported at 347 NLRB No. 106. Section 102.48(d) (1) The Board's Rules and Regulations provide that extraordinary circumstances must be present for a party to move for reconsideration after issuance of the Board's Decision and Order. No such extraordinary circumstances are present here.

Respondent argues that the Board erred in "overlooking" the fact that there was employee knowledge of recognition by Respondent of Local 300S outside of the 10(b) period before January 8, 2004 when such recognition was openly announced at meetings with bargaining unit employees at Respondent's facility. Respondent cites the testimony of 5 individuals as evidence of such knowledge prior to January 8, 2004. This testimony had already been cited by Respondent to the Board in its earlier Brief and there does not

appear to be any reason to believe that it had been overlooked by the Board. Rather, the testimony cited clearly does not support Respondent's position. In that regard it should be noted that two of the individuals cited for assertedly having knowledge, Neubauer and Van Thuysen, were not even bargaining unit employees. Further, Respondent misconstrues the testimony of Passion, who testified that he heard "in the beginning of 2004" that another union was coming in to represent the employees (Tr. 1252). Additionally, the testimony of Groman does not establish that she had knowledge prior to January 2004 of Respondent's recognition of Local 300S. Further, Rhode also testified that she did not learn until January 2004 that Local 300S represented the employees (Tr. 1321). Moreover, even assuming that a very limited few of the employees had knowledge of the recognition prior to January 8, 2004, that knowledge cannot be considered to be "clear and unequivocal notice" of the violation sufficient to commence the 10(b) period against either the employees, in general, or the Charging Party, in particular. *Valley Floor Coverings*, 335 NLRB 20 (2001). Respondent, which has raised the affirmative defense of Section 10(b), has not met its burden of showing such notice. *Leach Corp.*, 312 NLRB 990, 991 (1993).

Respondent also repeats arguments it made in its earlier brief concerning the remedy. Respondent argues that the remedy imposed by the Board of reimbursing dues money deducted from employees' pay is punitive in that Respondent alone, and not Local 300S, is being required to refund these monies. However, there is no reason to believe that the Board, in fashioning its remedy, had not considered these arguments and rejected them. It should also be noted that Respondent was well aware of the allegations being made against it when the charge and amended charge were filed against it on February 19

and September 30, 2004, respectively. If Respondent chose to continue deducting dues and remitting them to a union suspected of receiving unlawful recognition, it did so at its own peril. Respondent could easily have stopped deducting and remitting dues or, if it continued to deduct dues, it could have placed them in an escrow account for its own protection. Further, for Respondent to argue that it is being penalized in that it must reimburse the dues which Local 300S gets to keep is sheer nonsense and affront to the Board's intelligence. As Respondent well knows, the contract that it signed with 300S contains a clause indemnifying Respondent in connection with any claims of liability arising out of Respondent's deductions of dues and fees (GCX 26).

For all of the above reasons, it is urged that Respondent's Motion for Reconsideration be denied.

Bernard S. Mintz
Counsel for the General Counsel
Region 22, National Labor Relations Board

Dated at Newark, NJ
This 26th day of September, 2006

Service

Copies of General Counsel's Opposition to Respondent's Motion for Reconsideration are being faxed today to the parties, with their permission, as indicated below:

Morris Tuchman, Esq.
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NOT INCLUDED IN
BOUND VOLUMES

BLS
Queens, NY

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

ELMHURST CARE CENTER ✓

and

Cases 29-CA-22674 ✓
29-CB-10843

LOCAL 1115, SERVICE EMPLOYEES
INTERNATIONAL UNION¹

and

LOCAL 300S, PRODUCTION SERVICE AND
SALES DISTRICT COUNSEL, UFCW, CLC

and

LOCAL 300S, PRODUCTION SERVICE AND
SALES DISTRICT COUNSEL, UFCW, CLC

and the

LOCAL 1115, SERVICE EMPLOYEES
INTERNATIONAL UNION

ORDER DENYING MOTIONS FOR RECONSIDERATION
AND REHEARING

On September 30, 2005, the Board issued its Decision
and Order in the above-entitled proceeding, finding that

¹ We have amended the case caption to reflect the disaffiliation of Local 1115, Service Employees International Union, and Local 300S, Production Service and Sales District Counsel, UFCW, CLC from the AFL-CIO.

the Respondent Employer extended, and the Respondent Union Local 300S accepted, recognition prematurely, thereby violating Sections 8(a)(1), (2), and (3) and Sections 8(b)(1)(A) and (2) of the National Labor Relations Act, respectively.² The Board also found that the Respondents unlawfully entered into a collective-bargaining agreement. The Board ordered the Respondents to reimburse employees for all dues and initiation fees withheld pursuant to the contractual union security and dues checkoff clauses.

On November 15, 2005, the Respondent Employer filed a motion for reconsideration and rehearing before the full Board and, on November 18, 2005, the Respondent Union Local 300S, filed a motion for reconsideration. The General Counsel filed an opposition to the Respondents' motions, and the Respondent Employer filed a reply to the General Counsel's opposition. The Charging Party Local 1115 filed no response.

The Board, in a contract bar case, inquires only into whether there was a representative complement at the time of recognition, whereas in premature recognition cases, the Board must be satisfied that there was a representative complement at that time and that the employer was then

engaged in normal business operations.³ In the underlying decision, the Board majority followed the *Hilton Inn* two-prong test and found that the Respondent Employer was not engaged in its normal business operations at the time it extended recognition to the Respondent Union Local 300S. In their motions, the Respondents request that the Board reconsider this finding.

In footnote 8 of the underlying decision, the Board majority reaffirmed the two-prong test set forth in *Hilton Inn* as "appropriate and proper in cases of this nature." In response to the dissent's argument that the "normal business operations" prong of the *Hilton Inn* test 'serves no clear statutory purpose,' the Board majority also stated that no party had asked that the precedent be overturned and that the issue had not been briefed.⁴ The Respondent Employer now contends that the Board majority overlooked an argument that the "normal business operations" prong of the *Hilton Inn* test should be removed as it creates an inconsistency between the Board's treatment of contract-bar

³ See *General Extrusion Co.*, 121 NLRB 1165, 1167 (1958); *Hilton Inn Albany*, 270 NLRB 1364, 1365 (1984).

⁴ Member Liebman adheres to her dissenting position. However, she agrees that the Respondents have not presented extraordinary circumstances warranting reconsideration of the Board's decision, which already dealt with the argument now made by the Respondent.

representation cases and premature recognition unfair labor practice cases. There was no such argument made on brief.

Section 102.48(d)(1) of the Board's Rules and Regulations permits a party to move for reconsideration or rehearing, because of extraordinary circumstances. Based on the above, there has been no showing of extraordinary circumstances to support the Respondents' motions. Thus, there is no basis warranting our reconsideration of the Board's decision or a rehearing in this case. Accordingly, we deny the Respondents' motions.

The Respondents also urge the Board to modify those portions of the remedy and Order, set forth in the underlying decision, which require them to reimburse employees, with interest, "for all initiation fees, dues and other monies paid by them or withheld from them pursuant to the terms of the union-security and the dues-checkoff clauses of the March 19, 1999 collective-bargaining agreement." Consistent with the Board's policy on such remedial matters, we will permit the parties to introduce, at the compliance stage of this proceeding, evidence relevant to whether the remedy is "unduly burdensome." See *Lear Siegler, Inc.*, 295 NLRB 857, 861 (1989); *Lummus Corp.*, 125 NLRB 1161 (1959).

IT IS ORDERED that the Respondents' motions for reconsideration and rehearing are denied.

The Board, having been polled at the request of one of the Members of the original panel and a majority not having voted in favor, IT IS ORDERED that the Respondents' requests for full Board reconsideration of this case is denied.

Dated, Washington, D.C., January 31, 2007.

Robert J. Battista, Chairman

Wilma B. Liebman, Member

Peter C. Schaumber, Member

(SEAL)

NATIONAL LABOR RELATIONS BOARD