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HTH Corporation, Pacific Beach Corporation, and
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UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

REGION 20, SUBREGION 37

HTH CORPORATION, PACIFIC BEACH CORPORATION, and KOA MANAGEMENT, LLC, a SINGLE EMPLOYER, dba PACIFIC BEACH HOTEL, Respondents, and HTH CORPORATION dba PACIFIC BEACH HOTEL, and KOA MANAGEMENT, LLC dba PACIFIC BEACH HOTEL, and PACIFIC BEACH CORPORATION dba PACIFIC BEACH HOTEL,	CASE NOS.:	37-CA-7311 37-CA-7334 37-CA-7422 37-CA-7448 37-CA-7458 37-CA-7476 37-CA-7478 37-CA-7482 37-CA-7484 37-CA-7488 37-CA-7537 37-CA-7550 37-CA-7587
	CASE NO.:	37-CA-7470
	CASE NO.:	37-CA-7472

and

INTERNATIONAL LONGSHORE AND WAREHOUSE UNION, LOCAL 142,

Union.

CASE NO.: 37-CA-7473

RESPONDENTS' REPLY BRIEF TO ILWU'S ANSWERING BRIEF TO RESPONDENTS' EXCEPTIONS TO ADMINISTRATIVE LAW JUDGE'S DECISION; CERTIFICATE OF SERVICE

Hearing:
Judge: James Kennedy
Date: November 4-12, 2008
February 19-27, 2009
Time: 9:00 a.m

RESPONDENTS' REPLY BRIEF TO ILWU'S ANSWERING BRIEF TO RESPONDENTS' EXCEPTIONS TO ADMINISTRATIVE LAW JUDGE'S DECISION

This reply brief responds to the following factual and legal errors contained in the ILWU's ("Union") Answering Brief:

First, the Union incorrectly argued that Respondents were the "single 'true' employer" of Pacific Beach Hotel ("Hotel") employees during 2007. *See Union's Answering Brief at 35* (hereinafter "*UAB at _.*"). In making this argument, the Union relied on a multitude of incorrect factual and legal assertions that are contradicted by the record or are contrary to Board law.

Second, the Union incorrectly argued that the Board's *Wright-Line* test should be applied to Respondents' decision not to hire several job individuals who applied to work at the Hotel beginning on December 1, 2007. The application of *Wright-Line* to the present situation was incorrect because the employees were not discharged; instead, they were not hired. Therefore, the correct standard to be applied can be found in *Jerry Ryce Builders, Inc.*, 352 NLRB No. 143 (2008). Under *Jerry Ryce*, the Respondents' decision not to hire certain individuals was clearly prudent and lawful.

Finally, the Union erred in arguing that Respondents unlawfully polled and interrogated Hotel employees. The Union's argument was erroneous because it applied the Board's safeguards standards for polling employees under *Struksnes Construction Co.*, 165 NLRB 1062 (1967), but such safeguards were not necessary because Respondents did not engage in any polling of Union sentiment in the first place. Rather, Respondents simply asked the employees an innocuous question that was not coercive under the circumstances, and therefore, the requirement to utilize *Struksnes* safeguards was never triggered.

I. The Union Incorrectly Argued That Respondents Were The Single True Employer Of Hotel Employees In 2007

Following issuance of the Administrative Law Judge's ("ALJ") Decision, the Union, similar to the General Counsel,[1] is no longer arguing that Respondents should be liable for the pending unfair labor practices as a joint-employer, principle-agent or successor employer with PBHM. Rather, the Union is now arguing Respondents should be liable for the unfair labor practices as the "single 'true employer'" of the Hotel employees. *UAB at 35.* This argument by the Union is based on a multitude of illogical arguments that are wholly without merit.

First, the Union argued that, because Respondents required PBHM to hire all of the Hotel employees when PBHM assumed control of the Hotel on January 1, 2007, Respondents were the "single true employer" of the employees during 2007. This argument is illogical. Contrary to the Union's assertions, Respondents' request to have PBHM hire all the employees does not equate to Respondents retaining "control" over the employees. Rather, it simply was a business arrangement between Respondents and PBHM designed to smoothly transition operations from Respondents to PBHM based upon PBHM's own room occupancy projections and to protect the interests of the employees.[2] Surely, Respondents wanted PBHM to hire employees who were already familiar with the Hotel because Respondents – as the owners of the Hotel – still had an interest in the Hotel running as efficiently and as well as possible. Therefore, Respondents required PBHM to hire the current workforce because it made good business sense to do so. If, however, PBHM wanted to make any personnel changes after assuming control of the Hotel, it

[1] In addition, in its Brief in Support of Cross-Exceptions, the Union referred to Respondents as the "continuous 'true employer'" of the employees, which is the exact same label the Counsel for the General Counsel recently gave Respondents in their Answering Brief. Curiously, not only do the Union and Counsel for the General Counsel make the same new argument, they both cited to the exact same wrong page in the ALJ's Decision to claim the ALJ found Respondents to be the "true" employer of the Hotel employees. Specifically, on page 5 of its Brief in Support of Cross-Exceptions, the Union cited to page 16, lines 19-20. The Counsel for the General Counsel also cited to the same exact page and line numbers as support for this label. This citation is incorrect, and the fact that the Union and Counsel for the General Counsel made the same exact arguments, but based on the same exact mistake in doing so is more than just coincidental, it also raises concerns for Respondents as well.

[2] Surely, if the opposite were true and Respondents did not require PBHM to hire all the employees, Respondents could have faced an unfair labor practice charge for terminating the employees' employment.

was entirely free to change the make-up of the workforce. Therefore, PBHM clearly had control over the employees while it operated the Hotel, as Respondents had relinquished all control to PBHM during that time. Simply requiring PBHM to hire all the employees as of January 1, 2007 does not mean that Respondents retained control of the workforce over the next 11 months when PBHM operated the Hotel.

Second, the Union also argued that Respondents were the "single true employer" because PBHM needed to get approval from Respondents on any major contracts it signed. *See UAB at 27.* At the time, Respondents – who were still the owners of the Hotel itself – refinanced the Hotel through a loan with a bank called UBS. As a condition of the loan, UBS retained the right to approve or deny any "major contracts" that had a financial impact on the Hotel. From UBS' viewpoint, in order to provide security for its loan to Respondents, any major contract that impacted the financial status of the hotel needed to be approved by UBS. Therefore, Respondents did not retain approval authority; UBS did.

Surely, the fact that UBS had the right to approve or reject contracts that had a financial impact on the Hotel did not render Respondents as the "single true employer" of the Hotel. After all, it was the <u>bank,</u> and not Respondents, who retained control over the approval of any major contracts. Therefore, if the Union's argument that "approval of contracts" constitutes "control over workforce" had any merit, it would mean that UBS, and not Respondents, was the "true employer" of the employees in question. Such an assertion clearly would be absurd. Likewise, the Union's argument that Respondents were the "single true employer" of the Hotel employees simply because any major contracts were subject to UBS' approval also would be absurd.

Third, the Union tried to argue that PBHM kept Respondents informed of the progress of negotiations with the Union, and therefore, Respondents were the "single true employer." *See*

UAB at 27-29. This statement is factually untrue. During the time that PBHM operated the Hotel, it negotiated with the Union on its own. Specifically, PBHM reached several tentative agreements with the Union, and did not consult with or inform Respondents of any of the tentative agreements before signing them. *See Transcript of Proceedings at 538* (hereinafter "*Tr. at* __."). In addition, during this time, Respondents did not ask to see or review any of the tentative agreements reached between PBHM and the Union. *Tr. at 568.*

Fourth, the Union also argued that having a "confidentiality clause" in the Management Agreement between Respondents and PBHM meant that Respondents were the true employer at that time. This argument, like the others, is incorrect. Specifically, the use of a confidentiality clause was simply designed to protect the confidentiality of the matters contained in the Management Agreement, just as most contracts between two businesses are kept confidential. In other words, just as most agreements that deal with sensitive business related issues are kept confidential, the Management Agreement in this case contained a similar confidentiality clause.

In addition, from the Union's perspective, there was nothing in the Management Agreement that would have affected the Union's responsibilities as the bargaining representative of the Hotel employees. Rather, the Union had already been informed of all the information it needed in order to continue representing the Hotel employees. Specifically, the Union was informed that PBHM was the new employer of the Hotel, and Respondents would simply continue as the owner of the Hotel. Other matters contained in the Management Agreement – such as the financial deals between Respondents and PBHM – were of no concern to the Union. Therefore, the fact that such matters were kept confidential does not mean Respondents were the "single true employer" of the Hotel employees.

Fifth, the Union also argued that Respondents were the "single true employer" because Robert Minicola, who was the General Manager of HTH Corporation during 2007, conducted an investigation of a letter that an anonymous employee sent to Corine Watanabe, the President of HTH Corporation. *See UAB at 30.* This argument, like the others by the Union, is completely tenuous. For obvious reasons, Mr. Minicola and Ms. Watanabe found the anonymous letter to be a safety concern. The simple fact that Mr. Minicola spoke to employees at the Hotel about the anonymous letter to Ms. Watanabe does not mean that Respondents were still in charge of the Hotel. In addition, Mr. Minicola asked PBHM for permission to speak with the employees, before speaking with them. *Tr. at 2168.* In fact, every time Mr. Minicola spoke with the Hotel employees, he first asked PBHM for permission to do so. Therefore, the simple fact that Mr. Minicola spoke with the Hotel employees to investigate the anonymous letter that was sent to Ms. Watanabe does not mean that Respondents suddenly had control over the employees.

In other words, the Union's argument is similar to saying that if Ms. Watanabe hired a private investigator to investigate who sent her the anonymous letter, the private investigator could also be considered the "continuous true employer" of the Hotel. Clearly, such an argument would be absolutely absurd. The simple fact that an individual conducted an investigation on behalf of Ms. Watanabe does not render that individual the employer of the employees. Therefore, due to its absurdity, this argument by the Union should be rejected as well.

Finally, it is significant to note that even the Union itself acknowledged that Respondents relinquished control of the Hotel to PBHM from January 1 through November 30, 2007. Specifically, in its Answering Brief, the Union specifically stated that Respondents "reestablished itself as the single "true employer" on December 1, 2007. . ." *See UAB at 43.* Logically, Respondents could not "reestablish" itself as the true employer of the Hotel

employees, unless it had previously ceased being the employer of the employees. In this case, it is very clear that Respondents ceased being the employer as of January 1, 2007, and PBHM became the actual, true, and indisputable employer of the Hotel employees from January 1 through November 30, 2007.

Based on the foregoing, any argument by the Union that Respondents were the "single true employer" of the Hotel employees from January 1 through November 30, 2007 is clearly without merit and should be rejected.

In addition, as noted in Respondents' Reply Brief to the Counsel for the General Counsel's Answering Brief to Respondents' Exceptions, the Judge's failure to find that Respondents were in a joint-employer, principle-agent, or successor employer relationship with PBHM during January 1 through November 30, 2007 is absolutely fatal to the majority of the pending unfair labor practices against Respondents.[3] Specifically, the majority of the pending unfair labor practices were dependent upon a finding that Respondents could be liable under one of the three different theories of employer liability. In other words, if Respondents were not found to be in a joint-employer, principle-agent, or successor employer relationship with PBHM during 2007, all unfair labor practice charges that relied upon such a finding must be dismissed.

In addition, because Respondents were also not the "true" employer of the employees in 2007, Respondents cannot be liable for the unfair labor practices that occurred in 2007.

II. The Union's Application Of *Wright-Line* To The Present Case Was Inappropriate Because The Seven Alleged Discriminatees Were Not Discharged

In its Answering Brief, the Union argued that the seven alleged discriminatees in this case were improperly discharged under the Board's standards in *Wright-Line*, 251 NLRB 1083

[3] For a breakdown of the unfair labor practice charges that were dependent upon a finding of joint-employer, principle-agent or successor employer status, please refer to Respondents' Post-Hearing Brief at 1-4 and Appendices A & B.

(1980). This argument by the Union was improper, however, because the *Wright-Line* decision addressed the applicable legal standard to be applied in cases of *discharge.* In the present case, the seven alleged discriminatees were *not hired.* Therefore, the proper standard to be applied can be found in the Board's decision in *Jerry Ryce Builders, Inc.*, 352 NLRB No. 143 (2008) which dealt with the hiring of employees.

As noted in Section I above, PBHM was the employer of the Hotel employees from January 1 through November 30, 2007. When Respondents took over operations of the Hotel on December 1, 2007, they were a new employer at that time (despite having also been the employer on December 31, 2006 and the years prior). Therefore, when all the employees transferred to work for Respondents as of December 1, 2007, they all had to apply for a job position at the Hotel. As noted above, even the Union agreed that Respondents were a new employer as of December 1, 2007. *See UAB at 43* (stating that Respondents "reestablished itself as the single "true employer" on December 1, 2007. . .")(emphasis added).

Because Respondents were legally a new employer as of December 1, 2007 – as even the Union acknowledged – all employees who applied for a position with Respondents would be considered a new hire. Therefore, any employee who was not hired at that time would need to be evaluated under the Board's standards in *Jerry Ryce Builders* (which addresses new hires), and not *Wright-Line* (which addresses terminations).

Based on the arguments provided in Respondents' Brief in Support of Exceptions, the seven alleged discriminatees were clearly not hired for valid reasons. Therefore, Respondents request that their hiring decisions be upheld by this Board.

III. Respondents Did Not Poll Or Interrogate Employees

The Union also argued that Respondents conducted an unlawful poll of the Hotel employees when it failed to provide the employees with the proper safeguards under *Struksnes Construction Co.*, 165 NLRB 1062 (1967). This argument by the Union is flawed, however, because *Struksnes* safeguards are applicable only in cases where Union sentiment is at issue. In the current case, Respondents did not conduct any polls about Union sentiment.

Rather, the "poll" in question consisted of Respondents asking employees how they felt about a boycott of the Hotel. At the time, the boycotts were having a significant and negative impact on the financial situation at the Hotel. Several employees expressed their disapproval of the boycotts, and Respondents simply gave other employees the chance to voice their concerns. Under Board law, not all polling is unlawful. Rather, only polling that is viewed as coercive in light of the surrounding circumstances may be unlawful. *See Blue Flash Express*, 109 NLRB 591 (1954)(polling is unlawful only when it was coercive in light of the surrounding circumstances). In this case, simply asking employees how they felt about the boycott was not coercive because it was not conducted to determine the Union's majority status at the Hotel or to ask employees about their Union sentiment. Therefore, the polls about the boycotts (a) were not unlawful and (b) did not trigger the *Struksnes* safeguard requirements. Accordingly, the unfair labor practice alleging that Respondents conducted an illegal polling of employees should be dismissed.

DATED: Honolulu, Hawaii, December 23, 2009.

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UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

REGION 20, SUBREGION 37

HTH CORPORATION, PACIFIC BEACH CORPORATION, and KOA MANAGEMENT, LLC, a SINGLE EMPLOYER, dba PACIFIC BEACH HOTEL, Respondents, and	CASE NOS.:	37-CA-7311 37-CA-7334 37-CA-7422 37-CA-7448 37-CA-7458 37-CA-7476 37-CA-7478 37-CA-7482 37-CA-7484 37-CA-7488 37-CA-7537 37-CA-7550 37-CA-7587
HTH CORPORATION dba PACIFIC BEACH HOTEL,		
and	CASE NO.:	37-CA-7470
KOA MANAGEMENT, LLC dba PACIFIC BEACH HOTEL,		
and	CASE NO.:	37-CA-7472
PACIFIC BEACH CORPORATION dba PACIFIC BEACH HOTEL,		
and	CASE NO.:	37-CA-7473
INTERNATIONAL LONGSHORE AND WAREHOUSE UNION, LOCAL 142,		
Union.	**CERTIFICATE OF SERVICE**	

CERTIFICATE OF SERVICE

I hereby certify that on December 23, 2009, the foregoing RESPONDENTS' REPLY BRIEF TO ILWU'S ANSWERING BRIEF TO RESPONDENTS' EXCEPTIONS TO

ADMINISTRATIVE LAW JUDGE'S DECISION; CERTIFICATE OF SERVICE was electronically filed with OFFICE OF EXECUTIVE SECRETARY in Washington, D.C., and a copy of the same was hand delivered to:

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