

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

REGION 20, SUBREGION 37

HTH CORPORATION, PACIFIC	CASES	37-CA-7311
BEACH CORPORATION, and KOA		37-CA-7334
MANAGEMENT, LLC, a SINGLE		37-CA-7422
EMPLOYER, d/b/a PACIFIC		37-CA-7448
BEACH HOTEL		37-CA-7458
		37-CA-7476
and		37-CA-7478
		37-CA-7482
		37-CA-7484
		37-CA-7488
		37-CA-7537
		37-CA-7550
		37-CA-7587
HTH CORPORATION d/b/a		
PACIFIC BEACH HOTEL,		
and	CASE	37-CA-7470
KOA MANAGEMENT, LLC d/b/a		
PACIFIC BEACH HOTEL		
and	CASE	37-CA-7472
PACIFIC BEACH CORPORATION		
d/b/a PACIFIC BEACH HOTEL		
and	CASE	37-CA-7473
INTERNATIONAL LONGSHORE AND		
WAREHOUSE UNION, LOCAL 142		

**ILWU'S REPLY BRIEF TO RESPONDENT'S ANSWERING BRIEF TO
INTERNATIONAL LONGSHORE AND WAREHOUSE UNION, LOCAL 142'S
CROSS-EXCEPTION TO THE ADMINISTRATIVE LAW JUDGE'S DECISION**

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TABLE OF CONTENTS

	<u>Page</u>
I. ARGUMENT	1
II. CONCLUSION	7

TABLE OF AUTHORITIES

CASES

Cardinal Home Products, Inc., 33 NLRB No. 154 (2003) 6

Clock Electric, Inc., 323 NLRB 1226 (1997) 5

Dunning v. National Industries, 720 F. Supp. 924
(M.D. Ala. 1989) 4

Kentucky General, Inc., 334 NLRB 154 (2001) 4

NLRB v Castaways Management, 870 F.2d 1539 (11th Cir. 1989) 4

NLRB v. Chelesa Laboratories, Inc., 825 F.2d 680
(2nd Cir. 1987) 6

NLRB v. Coca-Cola Bottling Co., 811 F.2d 82 (2nd Cir. 1987) 6

Pergarment United Sales, 296 NLRB 333 (1989) 6

Planned Building Services, 347 NLRB No. 64 (2007) 4

Sioux City Foundry, 241 NLRB, 481 (1979) 5

Trim Corp. of America Inc., 349 NLRB No. 56 (2007) 6

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**I.
ARGUMENT**

This reply brief responds to factual and legal errors contained in Respondents' Answering Brief that the Shogun employees are not entitled to a remedy sought by the International Longshore and Warehouse Union, Local 142 (hereinafter "ILWU" or "Union") in its Cross Exception to the Administrative Law Judge's (hereinafter "ALJ") Decision.

First, a ULP Charge against Respondents, Case No. 37-CA-7478, was filed against HTH Corporation dba Pacific Beach Hotel; Koa Management LLC; Pacific Beach Corporation (as a single Employer) on November 23, 2007 charging discriminatory collective action of refusing to offer employment/continued employment to a list of individuals, including Shogun employees. ULP Charge 37-CA-7478 was amended on January 4, 2008, and again on August 29, 2008 and the Complaint Conformed to Reflect All Amendments (hereinafter "complaint") (Exh. 1rrrr) at Page 4, ¶¶ (z), (aa) and (bb) identifies ULP Charge, Case 37-CA-7478 and the two amended charges.

Second, in spite of Counsel for the General Counsel's statement that the Shogun employees are not entitled to a remedy (Tr. 2324), the issue of whether on December 1, 2007 Respondents unilaterally and without bargaining with the Union closed the Shogun restaurant and released an undetermined number of employees who worked in the restaurant, thereby violated §§ 8(a)(5) and (1) of the Act (Decision, 44:15-17) was fully litigated and is closely connected to the ALJ's finding that Respondents unlawfully withdrew recognition on December 1, 2007;

resulting in the ALJ's September 30, 2009 Decision and Order for Respondents to recognize and bargain the ILWU. (Decision, 45:42-44) (hereinafter "Decision at page-line").

As litigated in the hearing, Respondents informed the employees that they would be required to reapply for their positions, and that not everyone would be hired. (Tr. 278). On December 1, 2007, when the Respondents resumed management of the Hotel, of the 34 bargaining unit members who applied, eleven (11) employees were not rehired as a result of the closing of the Shogun restaurant. (Resp. Exhs. 16, 18) After a review of the evidence the ALJ determined that shortly before Minicola made his business trip to Hong Kong in early October, Minicola had decided to close the Shogun Restaurant (Decision, 21:6-9). The ALJ further found that "[T]he Shogun was one of the signature restaurants of the Hotel. Its shutdown necessarily meant that the kitchen and wait staff of the food and beverage department would be reduced by the number of individuals employed at the Shogun." (Decision, 21: footnote 15).

Next, the ALJ also found that "[O]ne of the cashiers, Jacqueline Taylor-Lee testified about the meeting she attended in the Oceanarium Restaurant with staff from both restaurants" (Decision, 26:7-8). Also, the ALJ then noted, "[T]he Shogun was now closed, so these employees were from the Oceanarium and Neptune's Garden." (Decision, 26:footnote 23). Taking into account all of the above, the ALJ's Conclusions of Law No. 15 states, "[O]n December 1, 2007 Respondents unilaterally and without bargaining with the Union closed the Shogun Restaurant and released an undetermined number of employees who worked in that restaurant, in violation of §8(a)(5) and (1) of the Act. (Decision, 44:15-17)

Further, as litigated in the hearing, Respondents'

"application-review/rehiring" process was not adhered to uniformly. Union animus was established through the inconsistent testimony of Respondents' managers admitting an overall failure to follow the "six factors" in the rehiring process decision. For example, when asked to provide the "numbers" reduced for each department, Minicola said they were highly confidential and were not written down when disclosed to John L. and Linda Morgan. (Tr. 1359). When questioned further, Minicola reversed himself and said that he did not communicate the numbers to John L. and Morgan because they were "confidential between the Comptroller and me." (Tr. 1361). The inconsistency of Minicola statement was disclosed when Linda Morgan testified that Minicola told John Lopianetzky and herself exactly how many employees they could hire for every department. (Tr. 1521-22). Lopianetzky's testimony is consistent with Morgan, but he says that the "numbers" were based upon "projected revenues." (Tr. 1164). It was per position per department. (Tr. 1165). Additionally, Lopianetzky testified that they (Minicola, Morgan and himself) would gather the applications, put them in folders, first by departments, then by classification, and then review the applications. (Tr. 1120). Linda Morgan testified differently, and stated that the applications were first segregated into different parts and sent out to their respective departments for review. (Tr. 1512). Morgan further confirmed that she sent the applications to the housekeeping department and believed that Minicola and Lopianetzky did the same for all other departments. (Tr. 1516, 1529-30). Directly contrary to Morgan's testimony, Christine Ko denied receiving any applications. (Tr. 1762).

Also litigated at the hearing were the inconsistencies in the "use" of the "six factors" by Respondents' managers and

the lack of any written list of the criteria leads to a logical conclusion that the "application-review/rehiring" process was in actuality a "pretext to discrimination". See, e.g., NLRB v Castaways Management, 870 F.2nd 1539, 1542-1543 (11th Cir. 1989) (In assessing credibility, judge properly considered the consistency and straightforwardness of the testimony and whether it related to the "logical consistency" of the record.) For example, Todd Hatanaka (hereinafter "Hatanaka"), a 20-year employee at Pacific Beach Hotel, has worked twelve years as a purchasing clerk and eight years as a bartender (Tr. 900-01). Prior to December 1, 2007, there were six full-time bartenders and one part-timer. In company-wide seniority, only one person had more seniority than Hatanaka. (Tr. 915) The only full-time bartender not rehired was Hatanaka. (Tr. 914). Prior to December 1, 2007, he had worked as a full-time bartender in the Oceanarium, Shogun, and Neptune restaurants. (Tr. 901). At the hearing, John Lopianetzky testified that one of the reasons he did not recommend Hatanaka to be re-hired was due to the "impact on bartender positions as a result of the Shogun restaurant closing" and "complaints from managers" that Todd did not do his work. (Tr. 1139-40). The record established that Respondent introduced no evidence showing that the "six factors" existed in written form or was consistently applied for "all employees," including Shogun Restaurant employees who were not rehired on December 1, 2007. Unwritten policies, as opposed to written policies, can be easily turned into tools of discrimination. Dunning v. National Industries, 720 F.Supp. 924, 931 (M.D. Ala. 1989); see also Planned Bldg Services, 347 NLRB No. 64 at 46 (2007) (the fact that a putative policy is unwritten, and not strictly adhered to, lends support to a finding that it is pretextual); Kentucky General, Inc., 334 NLRB 154, 161 (2001)

(policy on which union applicants were rejected is pretextual, where, inter alia, policy was unwritten); Sioux City Foundry, 241 NLRB, 481, 484 (1979) (alleged policy relied on to reject applicants who were strikers from other employers "is a mere pretext" where, inter alia, this 'policy' was not written down anywhere"). Indeed, the inconsistency in John Lopianetzky and Christine Ko's "use of" the unwritten six factors supports the view that the reasons for not hiring the seven (7) union committee members/applicants were pretextual. See, Clock Electric, Inc., 323 NLRB 1226, 1232 (1997) enforced in part and remanded, 162 F.3d 907 (6th Cir. 1998) ("The inconsistent application of the unwritten rule supports the view that this reason for refusal to hire was pretextual").

Accordingly, the matter of whether on December 1, 2007 Respondents unilaterally and without bargaining with the Union closed the Shogun restaurant and released an undetermined number of employees who worked in the restaurant, thereby violating §§ 8(a)(5) and (1) of the Act (Decision, 44:15-17) is closely connected to the ALJ's finding that Respondents unlawfully withdrew recognition on December 1, 2007; resulting in the ALJ's September 30, 2009 Decision and Order for Respondents to recognize and bargain the ILWU. (Decision, 45:42-44).

Further as stated above, Respondents' "application-review/rehiring" process was not adhered to uniformly and was fully litigated in the hearing. The record established that Respondent introduced no evidence showing that the "six factors" existed in written form or was consistently applied for all employees, which would include Shogun Restaurant employees not rehired on December 1, 2007. Also, union animus was established through the inconsistent testimony of Respondents' managers admitting an overall failure to follow the "six factors" in the

rehiring process decision. "It 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." Pergarment United Sales, 296 NLRB 333, 334 (1989), enfd. 920 F.2d 130 (2nd Cir. 1990); See also, Cardinal Home Products, Inc., 33 NLRB No. 154 (2003) (judge properly found § 8 (a) (1) violation that was not alleged in the complaint where § 8(a)(3) violation alleged and § 8(a)(1) violation on both plainly focused on the same set of facts, the ultimate issue of respondents motivation was the same in both instances, and respondent acknowledged that this issue was fully litigated at the hearing). In the context of the Act, due process is satisfied when a complaint gives a respondent fair notice of the acts alleged to constitute the unfair labor practice. and when the conduct indicated in the alleged violation has been fully and fairly litigated. See, NLRB v. Coca-Cola Bottling Co., 811 F.2d 82, 87 (2nd Cir. 1987); NLRB v. Chelesa Laboratories, Inc., 825 F.2d 680, 682 (2nd Cir. 1987), cert. denied, 484 U. S. 1026 (1988). See also, Trim Corp. of America Inc., 349 NLRB No. 56 (2007) (Allegation that employer violated Section 8(a)(1) by threatening employees with loss of employment if they did not renounce union representation was sufficiently related to timely filed Section 8(a)(5) allegation - that employer unlawfully withdrew recognition from union - and was fully and fairly litigated, even though 8(a)(1) allegation was first asserted in NLRB general counsel's post-hearing brief, where both 8(a)(1) and 8(a)(5) allegations turn on whether supervisor made coercive statement and involve same legal theory and arise out of same facts, employer's defense for both allegations was that supervisor did not make allegedly coercive statements, and issue

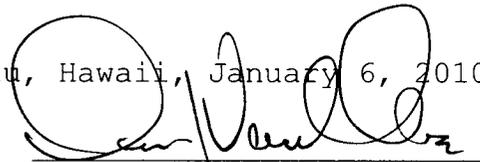
of what supervisor said to employees was fully and fairly litigated.)

II.
CONCLUSION

Therefore based upon the arguments stated above, that the Board should reject Respondents misguided belief that ILWU's cross exception seeking a remedy for Shogun restaurant employees who were not rehired on December 1, 2007 should be denied. Instead, the ALJ correctly determined that Respondents' failure to bargain with the Union over the effects of its decision to close the Shogun Restaurant effective December 1, 2007 to be "in violation of §8(a)(5) and (1) of the Act." (Decision, 44:15-17). It is undisputed that Respondents did not bargain with the Union over the order of succession of layoff and of which Shogun Restaurant employees it would recall, effective December 1, 2007.

Accordingly, the judge correctly concluded that Respondents violated §8(a)(5) and (1) of the Act by failing to provide the Union with adequate notice and an opportunity to bargain over the economic decision to terminate/layoff, the order of layoff, and the decision not to re-hire/recall the eleven (11) Shogun Restaurant employees. Finding these violations, the remedy identified in the ILWU's cross-exceptions to the Administrative Law Judge's Decision should be awarded by the Board.

DATED: Honolulu, Hawaii, January 6, 2010.



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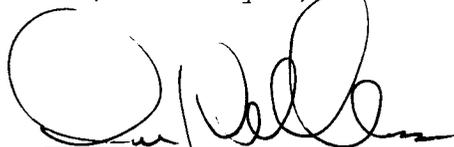
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I hereby certify that one copy of the foregoing document was duly served upon the following person by electronic filing and by depositing in the U.S. Mail, postage pre-paid on January 6, 2010:

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