

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, d/b/a
PACIFIC BEACH HOTEL,

and

Cases 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 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

COUNSEL FOR THE GENERAL COUNSEL'S REPLY BRIEF TO RESPONDENTS'
ANSWERING BRIEF TO COUNSEL FOR THE GENERAL COUNSEL'S CROSS-
EXCEPTIONS

Submitted by:
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Federal Cases

- 1) NLRB v. Borg-Warner Corp. Wooster Div., 356 U.S. 342 (1962)2

Board Cases

- 1) Kajima Engineering & Construction, Inc., 331 NLRB 1604 (2000)2
- 2) Pan American Grain Co., 351 NLRB 1412 (2007)2
- 3) Toma Metals, Inc. 342 NLRB 787 (2004)2
- 4) Windstream Corp., 352 NLRB 44 (2008)3

I. RESPONDENTS HAD A DUTY TO BARGAIN PRIOR TO LAYING OFF/TERMINATING EMPLOYEES

In response to Counsel for the General Counsel's Cross-Exceptions 1 and 2, Respondents argue that they did not discriminatorily refuse to rehire unnamed employees. (RAB at 2-4).¹ Respondents' argument demonstrates that Respondents fail to comprehend the differences between Section 8(a)(3) and Section 8(a)(5) of the Act. With the exception of seven named individuals, Counsel for the General Counsel did not allege that other employees suffered discrimination due to their union activities in violation of Section 8(a)(3) of the Act.

Counsel for the General Counsel did allege that Respondents' violated Section 8(a)(5) by terminating the entire bargaining unit and then failing to rehire certain employees without first bargaining with the International Longshore and Warehouse Union, Local 142 ("Union"). Respondents' decision to terminate the entire bargaining unit and decision not to rehire certain employees was essentially a layoff because the ALJ concluded Respondents were the true, and therefore continuous, employer of the bargaining unit. (ALJD 16:19-20; ALJD 43:28-31).² Clearly, Respondents had the obligation to provide notice to and bargain with the Union before the termination/layoff. Terminations/layoffs are a mandatory subject of bargaining, and bargaining-unit employees who are laid off and/or not rehired by an employer who fails to

¹ Counsel for the General Counsel will refer to Respondents' Answering Brief to Counsel for the General Counsel's Cross-Exceptions as "RAB." The Administrative Law Judge will be referred to as "ALJ" and the ALJ's Decision as "ALJD," followed by the relevant page and line numbers. The transcript of proceedings will be referenced as "Tr." and followed by the relevant volume and page number. Respondents' Exhibits will be referred to as "R" and followed by the relevant exhibit number.

² Counsel for the General Counsel is referring to the page and line numbers of the ALJD posted on the National Labor Relations Board's official website in PDF format. Counsel for the General Counsel noted this in footnote 3 of its Answering Brief to Respondents' Exceptions, which was served on Respondents on December 9, 2009. In the PDF version of the ALJD found online, the finding of fact referenced above is correctly found on page 16, lines 19 to 20, not page 17, lines 19 to 20. Needless to say, this PDF version of the ALJD is also available for the public to reference which, presumably, includes the Union and its counsel.

bargain with the employees' exclusive bargaining representative are entitled to offers of reinstatement and backpay. See Pan American Grain Co., 351 NLRB 1412, 1414-15, fn.11 (2007); Toma Metals, Inc., 342 NLRB 787, 791 (2004); Kajima Engineering & Construction, Inc., 331 NLRB 1604, 1618-20 (2000). Moreover, Counsel for the General Counsel identified the individual employees it believes are entitled to a remedy using Respondents' Exhibit 18. (Tr. 13:2323-24; R 18).³ Respondents' arguments are therefore meritless.

II. RESPONDENTS CLEARLY LOWERED WAGE RATES FOR CERTAIN EMPLOYEES WITHOUT BARGAINING WITH THE UNION

Respondents contend that they did not lower wage rates of certain employees. (RAB at 4). Respondents claim they merely "rehired" employees for different job classifications which resulted in these employees receiving lower wage rates. (RAB at 4). This ignores the ALJ's conclusion that Respondents were the true, and therefore continuous, employer of the employees (ALJD 16:19-20; ALJD 43:28-31), which necessarily entails a legal obligation to bargain over changes to wages, hours, and other terms and conditions of employment. NLRB v. Borg-Warner Corp. Wooster Div., 356 U.S. 342, 349 (1962). Attempting to dodge this obligation by pretending to be a "new" employer entitled to remake terms and conditions of employment in a "rehiring" process does not change that fact. Regardless of how Respondents attempt to explain the reasons for paying employees at lesser rates than they earned prior to December 1, 2007, there is no dispute that certain employees were paid at lower wage rates beginning December 1, 2007. (Tr. 1:113-15). It is undisputed that Respondents refused to bargain with the Union over this. (Tr. 1:135-36). Accordingly, Respondents' arguments are unavailing.

³ Respondents' Exhibit 18 classifies Danilo Cortez ("Cortez") as a Shogun Restaurant employee. However, Counsel for the General Counsel disputed this classification at the hearing. (Tr. 13:2324). Respondents subsequently admitted that Cortez was a steward and not a Shogun Restaurant employee. (Respondents' Answering Brief to International Longshore and Warehouse Union, Local 142's Cross-Exception to the Administrative Law Judge's Decision at 2, fn.1).

III. EMPLOYEES WHO MAY HAVE BEEN TERMINATED BY RESPONDENTS PURSUANT TO THEIR UNILATERALLY-IMPLEMENTED 90-DAY PROBATIONARY PERIOD ARE ENTITLED TO AN APPROPRIATE REMEDY

Respondents continue to claim they were a “new” employer with no obligation to bargain with the Union and with an absolute right to set an initial probationary period. (RAB at 5). This was clearly rejected by the ALJ, who found them to be the true, and therefore continuous, employer of the bargaining unit. (ALJD 16:19-20; ALJD 43:28-31). As such, the ALJ also found that Respondents violated Section 8(a)(5) by implementing the 90-day probationary period without bargaining first. (ALJD 44:9-13). Any employees aggrieved by this unilaterally-implemented policy are entitled to a remedy and their identification may be properly deferred to the compliance stage of the proceedings. See Windstream Corp., 352 NLRB 44 (2008). Accordingly, Respondents’ arguments lack substance.

IV. PBHM WAS AN AGENT OF RESPONDENTS AND RESPONDENTS RETAINED CONTROL OVER NEGOTIATIONS CONDUCTED BY PBHM

Respondents make several arguments to support their claim that PBH Management, LLC (“PBHM”) was not their agent, but for reasons set forth in Counsel for the General Counsel’s Brief in Support of Cross-Exceptions, these arguments are meritless. (Counsel for the General Counsel’s Brief in Support of Cross-Exceptions at 10-19). However, Respondents also claim that they lacked authority to approve any final collective-bargaining agreement negotiated by PBHM. Respondents’ contend that UBS retained approval authority over major contracts, such as a collective-bargaining agreement, and that Respondents did not retain any approval authority. (RAB at 7-8). This argument, like most of Respondents’ other contentions, is unbelievable.

In his pre-hearing affidavit, Respondents’ Regional Vice President, Robert “Mick” Minicola (“Minicola”), admitted that Respondents were the gate-keepers to UBS and that Respondents would not forward a contract to UBS pursuant to the loan agreement if Respondents

did not agree with the terms of the proposed contract. (Tr. 1:108-09). At the hearing, Minicola tried to change his story to claim that Respondents were merely a pass-through to UBS, but his pre-hearing affidavit precluded such chicanery. (Tr. 1:101, 108-09). For this same reason, Respondents' continuing effort to change their story here should be resoundingly rejected.

V. RESTORATION OF THE TENTATIVE AGREEMENTS IS JUST AND PROPER

Respondents' basic argument is that there should not be an extension of the certification year if they are required to honor all the tentative agreements. (RAB at 9). Denial of either an extension of the certification year or the requirement that Respondents honor all tentative agreements reached between them and the Union, and between PBHM and the Union, would allow Respondents to profit from their misdeeds. Such a result would fundamentally fail to effectuate the purposes of the Act.

The extension of the certification year addresses the time wasted while the Union's strength was at its zenith following certification as Respondents bargained in bad faith throughout 2006, sabotaged negotiations between PBHM and the Union on the threshold of a collective-bargaining agreement in 2007, and then unlawfully withdrew recognition. Thus, the extension of the certification year is necessary to restore what was taken from the Union – a period of time to engage in honest negotiations uninterrupted by the disaffection caused by Respondents' bad-faith antics and other unfair labor practices. Without such an extension, Respondents could eagerly stall negotiations once again in hopeful anticipation of a decertification petition.

Requiring Respondents to honor all tentative agreements reached by Respondents and the Union, as well as the tentative agreements reach by PBHM and the Union, restores the status quo and prevents Respondents from stalling negotiations by endlessly revisiting old issues

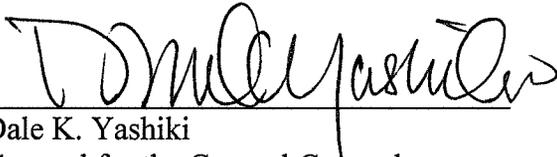
with the Union once again. Accordingly, both remedies are necessary to prevent Respondents from benefitting from their protracted course of misconduct. Anything less would permit Respondents to replicate their mockery of the Act.

VI. COUNSEL FOR THE GENERAL COUNSEL IS REQUESTING THAT THE BOARD REEXAMINE THE PROPRIETY OF COMPOUND INTEREST IN THIS CASE

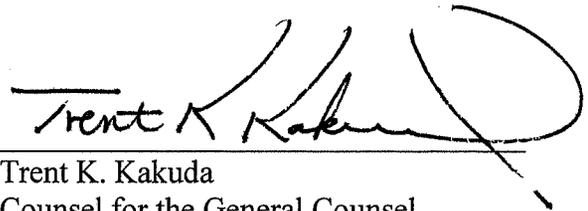
Respondents contend that an award of compound interest is contrary to Board law. (RAB at 9-10). Counsel for the General Counsel, however, is respectfully requesting that the Board reexamine the propriety of awarding compound interest. With all of the outrageous misconduct involved here, Counsel for the General Counsel submits that this is the perfect case in which to do so.

DATED AT Honolulu, Hawaii, this 6th day of January, 2010.

Respectfully submitted:



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CERTIFICATE OF SERVICE

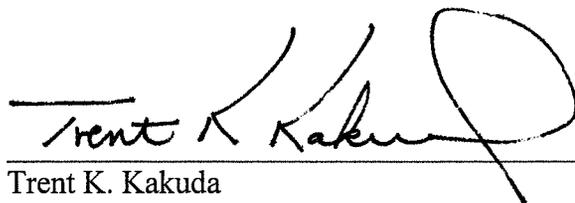
The undersigned hereby certifies that Counsel for the General Counsel's Reply Brief to Respondents' Answering Brief to Counsel for the General Counsel's Cross-Exceptions has this day been electronically filed with the National Labor Relations Board's Office of the Executive Secretary in Washington, D.C., and a copy served upon the following persons by e-mail:

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The undersigned also hereby certifies that a copy of Counsel for the General Counsel's Reply Brief to Respondents' Answering Brief to Counsel for the General Counsel's Cross-Exceptions was served this day on the following persons by hand delivery:

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Dated at Honolulu, Hawaii, this 6th day of January, 2010.



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