

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

SODEXO AMERICA LLC

and

Case 21-CA-39086

PATRICIA ORTEGA, an Individual

SODEXO AMERICA LLC; AND

USC UNIVERSITY HOSPITAL

and

Case 21-CA-39109

SERVICE WORKERS UNITED

USC UNIVERSITY HOSPITAL

and

Cases 21-CA-39328

21-CA-39403

NATIONAL UNION OF HEALTHCARE

WORKERS

RESPONDENT SODEXO AMERICA LLC'S REPLY TO OPPOSITION
TO MOTION FOR RECONSIDERATION AND FOR STAY OF DECISION

Respondent Sodexo America, LLC (“Sodexo”) files this reply memorandum in support of its motion for reconsideration and for stay of decision. Sodexo joins in the reply memorandum filed by USC University Hospital (“Hospital”).

INTRODUCTION

The Acting General Counsel opposes the motion for reconsideration. Charging Party National Union of Healthcare Workers (“NUHW”) joins in the Acting General Counsel’s opposition.¹ Neither Charging Party Patricia Ortega nor Charging Party Service Workers United has opposed the motion for reconsideration.

The Acting General Counsel argues that the Board should not reconsider its finding that the off-duty access policy (“Policy”) violated National Labor Relations Act (“NLRA”) § 8(a)(1), 29 U.S.C. § 158(a)(1). The Acting General Counsel argues that all “duties” are “activities” and, therefore, the Board’s majority decision did not rewrite the policy.² The Acting General Counsel further argues that the third exception to the Policy was unnecessary. The Acting General Counsel argues the objections to the Order and to the Notice to Employees (“Notice”) should be deferred to the compliance stage, and are premature in any event because of the remand order. The Acting General Counsel argues that the language in the Notice [“We will not do anything to interfere with these

¹ NUHW’s opposition does not apply to Sodexo as that union did not file a charge against Sodexo. It has only file a charge against the Hospital. Complaint at 2-3.

² The Acting General Counsel suggests the term “duties” may be ambiguous. OPP. AT 5. No such finding was made by the Board or the administrative law judge (“ALJ”). The point was not raised in the Acting General Counsel’s exceptions and was waived.

[Section 7] rights”] is not overbroad because the appropriate language—“we will not in any like or related manner...”—appears elsewhere in the Notice. OPP. AT 7.

Significantly, by his silence, the Acting General Counsel concedes the following points that were raised in Sodexo’s motion:

- Both the Order and the Notice are overbroad as they order Sodexo to cease “promulgating” or “enforcing” the Policy. The Complaint did not allege and majority’s decision did not find that Sodexo promulgated or enforced the Policy.
- Both the Order and the Notice are overbroad as they proscribe a policy that restricts off-duty access to employees visiting a patient, obtaining medical treatment, or for any other reason where the off-duty employee is acting as a member of the general public.
- Both the Order and the Notice are overbroad and premature as they prohibit the enforcement of the Policy for any reason. There is no evidence or finding that the Policy was enforced by Sodexo. Moreover, enforcement is unlawful only where the discipline implicates conduct protected by NLRA § 7, 29 U.S.C. § 157.

For these reasons alone, reconsideration is required and an enforcement stay must be imposed. Below, Sodexo will address the specific arguments the opposition raises.

ARGUMENT

Sodexo’s motion is not premature as the remand order does not include Sodexo. The case has been remanded to determine whether the Hospital unlawfully disciplined four of its employees. The remand order applies to the Hospital only, as is made clear from the following passage from the majority’s decision:

The Hospital admits that it disciplined employees Michael Torres, Ruban Duran, Alex Correa, and Noemi Aguirre because they violated the unlawful no-access policy. But simply because the

Hospital issued the discipline pursuant to an unlawfully broad policy does not mean the discipline itself violated the Act. ... [W]e remand to the judge with instructions to reopen the record and determine whether the activity of the four-named employees implicated the concerns underlying Section 7.

Slip op. at 2-3 (emphasis added).

Deferral to the Compliance stage is not an adequate response to the serious issues raised by these motions. The regional director is without authority to correct these errors in the compliance proceedings. If the regional director agrees that the Order should be modified, the appropriate procedure is for the regional director to ask the Board to reconsider its decision. *NLRB Casehandling Manual: Compliance* §10506.8. The Notice, which is intended to communicate the respondent's remedial obligations, is fixed. It cannot be modified in Compliance absent an agreement by the parties or a Board order. *Id.*, §§ 10518, 10518.1.

The Acting General Counsel's opposition does not undercut the strength of the argument that, in finding the policy unlawful, the majority's opinion improperly substituted the word "activities" for "duties." The term "activity" in its singular or plural form is not found anywhere in the portion of the Policy under attack. The two terms are not interchangeable. The dictionary definition of the noun "activity" is broadly defined as "a specific deed, action, function, or sphere of action" *Random House College Dictionary* 14 (Rev. Ed. 1980). In the employment context, the dictionary definition of the noun "duty" is the "action or a task required by one's position or occupation." *Id.*, at 411. The term "duty" has a narrower, and commonly understood, meaning that is directly tied to the performance of an employee's work tasks. The Policy as drafted is

clear and not unlawful. An off-duty employee can return to perform regular work tasks or specifically-directed work tasks.

The Acting General Counsel does not cite to a single Board or court decision that holds an off-duty access policy is unlawful simply because the policy specifies it does not apply to who are returning to the work site in order to work. While the Policy's statement to that effect may be obvious (as, indeed, is the exception for the off-duty employee being wheeled in to the Emergency Room on a stretcher), it does not render the Policy impermissibly overbroad or, or in the absence of evidence of anti-union animus, reflect an attempt to discriminate against the exercise of Section 7 rights. The Board should reconsider its decision and affirm the ALJ.

Board orders must be enforced by a federal court of appeals. Indeed, if judicially enforced, the Order and the Notice become orders of the federal appellate court. Slip op. at 3 n.6.

The violation of a court-enforced order carries the possibility of a contempt sanction. Thus, “[i]f [the employer] is found in violation of the cease-and-desist order, it is subject not only to the normal remedial measures, but also to contempt sanctions for disobeying the order. NLRB orders thus should be sufficiently narrow to avoid exposing the parties subject to them to a minefield of contempt sanctions for future violations of the NLRA that are unrelated to past conduct.” *NLRB v. C.E. Wylie Constr. Co.*, 934 F.2d 235, 237 (9th Cir. 1991). The federal courts thus require Board orders to reach no farther than the adjudged unfair labor practices.

Sodexo's violation is solely based on its alleged posting of the Policy. Slip op. at 1. At most, Sodexo can only be ordered to cease-and-desist from posting the Policy. It cannot be ordered to cease-and-desist from "promulgating" the Policy because there is no allegation or finding that Sodexo did so. Similarly, Sodexo cannot be ordered to cease-and-desist from "enforcing" the Policy because there is no allegation or finding that it did so.

Further, the Board must explain the need for the remedy it seeks to impose. *Local Joint Exec. Bd. of Las Vegas v. NLRB*, 657 F.3d 865, 869 (9th Cir. 2011). The federal court of appeal that reviews the decision in these cases has the solemn responsibility "to ensure that the Board's rules are consistent with the NLRA" and are explained adequately. *Id.*, at 873.

A Board order or notice, such as the Notice here, which requires the respondents to cease-and-desist from committing any violations of the NLRA, is in the nature of a broad order. *NLRB v. Express Pub. Co.*, 312 U.S. 426, 432-33 (1941). Absent evidence of a proclivity to violate the NLRA, which was neither alleged nor proven here, such orders and notices are beyond the Board's authority to impose. For over seventy years, the Board's practice has been to limit its notices to stating the respondent will not engage in the "conduct from which he is ordered to cease and desist" *Id.*, at 439. Thus, recent notices in cases filed in the Board's twenty-first region do not contain the "[w]e will not do anything" language. *E.g.*, *Service Employees Int'l Union (Lakewood Regional Med. Center)*, 358 NLRB No. 18, slip op. at 3 (Mar. 12, 2012) (union violation); *Avanti Health System, LLC*, 357 NLRB No. 129, slip op. at 2 (Dec. 12, 2011)

(employer violation); *Fresh & Easy Neighborhood Market, Inc.*, 356 NLRB No. 90, slip op. at 1 n. 3, 9-10 (Jan. 31, 2011) (same). Neither the Board nor the Acting General Counsel explains why these cases are different. The language must be stricken.

The Acting General Counsel argues the Notice's reference to "facilities" is not overbroad because the Notice must reach "Respondents' employees throughout their facilities and premises including, but not limited to, satellite buildings, multiple eating areas or eating places" OPP. AT 7. There is no evidence in the record that such locations exist at the Hospital. More importantly, the Board plainly intended that the remedial provisions apply only to the "Hospital facility," and had no difficulty limiting the remedy to "the Hospital's facility" Slip op. at 3. Assuming any remedy is warranted, the term "Hospital facility" should be substituted in the Notice for "our facilities" and "its facilities." As a food service contractor headquartered in Maryland (Slip op. at 5), Sodexo may have operations at many other sites that are unrelated to the Hospital and the proceeding.

Finally, unless it has a quorum, the Board is without authority to act. The lack of jurisdiction is never waived. Sodexo maintains that the president did not have authority to recess-appoint Members Block and Griffin because Congress was not in recess. Thus, the Board lacked a quorum to act when it rendered its decision and is currently without a quorum.

CONCLUSION

Based upon the foregoing, it is requested that the motion for reconsideration be granted. The ALJ's decision should be affirmed, and the Complaint should be dismissed.

Alternatively, instead of lumping Sodexo and the Hospital together, there should be separate orders and notices that address only those allegations that are alleged and proven as to each respondent. It is further requested that the Board stay its July 3, 2012 decision until it rules on these motions.

DATED: August 7, 2012

Respectfully submitted,

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PROOF OF SERVICE VIA ELECTRONIC
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I, Brandi D. Paape, declare that:

I am over the age of eighteen years and not a party to the action; I am employed in the County of San Diego, California; where the mailing occurs; and my business address is 4747 Executive Drive, Suite 700, San Diego, California 92121-3107. I further declare that I am readily familiar with the business' practice for collection and processing of correspondence for mailing with the United States Postal Service pursuant to which practice the correspondence will be deposited with the United States Postal Service this same day in the ordinary course of business. I caused to be served the following document(s): **RESPONDENT SODEXO AMERICA LLC'S MOTION FOR RECONSIDERATION AND FOR STAY OF DECISION**, by placing either a copy thereof in a separate overnight envelope or by electronic mail for each address well known and draw any doing see listed as follows:

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I then sealed the envelope(s) and, with the postage thereon fully prepaid, either deposited it/each in the United States Postal Service or placed it/each for collection and mailing on August 7, 2012 at San Diego, California, following ordinary business practices.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on August 7, 2012.



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860.080/POS.bdp