

Nos. 09-1038-ag, 09-1646-ag

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

COUNTY WASTE OF ULSTER, LLC
Petitioner/Cross-Respondent

v.

NATIONAL LABOR RELATIONS BOARD
Respondent/Cross-Petitioner

and

LOCAL 108, LABORERS INTERNATIONAL UNION
OF NORTH AMERICA
Intervenor

ON PETITION FOR REVIEW AND CROSS-APPLICATION FOR
ENFORCEMENT OF AN ORDER OF
THE NATIONAL LABOR RELATIONS BOARD

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

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**ON PETITION FOR REVIEW AND CROSS-APPLICATION FOR
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**BRIEF FOR
THE NATIONAL LABOR RELATIONS BOARD**

STATEMENT OF SUBJECT MATTER AND APPELLATE JURISDICTION

This case is before the Court on the petition of County Waste of Ulster, LLC (“County Waste”) to review, and the cross-application of the National Labor Relations Board (“the Board”) to enforce, a Decision and Order of the Board that

issued on February 11, 2009, and is reported at 353 NLRB No. 89. (A 121-30.)¹ Local 108, Laborers International Union of North America (“Local 108”) has intervened on behalf of the Board. County Waste filed its petition on March 13, 2009, and the Board filed its cross-application on April 21, 2009. Both filings were timely; the Act imposes no time limit on such filings.

The Board had jurisdiction over the proceedings below under Section 10(a) of the National Labor Relations Act, as amended (29 U.S.C. § § 151, 160(a)) (“the Act”), which empowers the Board to prevent unfair labor practices. This Court has jurisdiction under Section 10(e) and (f) of the Act (29 U.S.C. § 160(e) and (f)) because the unfair labor practices occurred in Montgomery and Kingston, New York.

The Board’s Order is final with respect to all parties under Section 10(e) and (f) of the Act. The Board’s Order was issued by a properly-constituted, two-member Board quorum within the meaning of Section 3(b) of the Act (29 U.S.C. § 153(b)). In *Snell Island SNF LLC v. NLRB*, 568 F.3d 410 (2d Cir. 2009), this Court correctly held that the two-member quorum has authority to issue decisions under Section 3(b) of the Act. As County Waste concedes (Br 24), the *Snell Island*

¹ “A” references are to the Joint Appendix. References preceding a semicolon are to the Board’s findings; those following are to the supporting evidence.

decision “is binding on this panel” and is the law of the circuit, and therefore, its challenge to that decision (Br 21-27) must be rejected.

STATEMENT OF THE ISSUE PRESENTED

Whether substantial evidence supports the Board’s finding that County Waste violated Section 8(a)(2) of the Act by allowing Local 124 to distribute a bonus to employees in order to influence them to vote for Local 124 instead of Local 108.

STATEMENT OF THE CASE

Acting on a charge filed by Local 108 (A 62), the Board’s General Counsel issued a complaint alleging in relevant part that County Waste violated Section 8(a)(2) of the Act (29 U.S.C. § 158(a)(2)) by allowing Local 124, R.A.I.S.E, IUJAT (“Local 124”) to distribute a Christmas bonus to employees prior to an election to determine whether employees wished to be represented by Local 124 or by Local 108, or to have no union representation. (A 63-67.) Following a hearing, the administrative law judge found that County Waste violated Section 8(a)(2) by letting Local 124 distribute the bonus to influence employees’ votes. (A 129.) County Waste and Local 124 filed exceptions. (A 148-76.) The Board found, in agreement with the judge, that County Waste violated Section 8(a)(2) of the Act by engaging in this conduct. (A 121.)

STATEMENT OF THE FACTS

I. THE BOARD'S FINDINGS OF FACT

A. County Waste's Business; Operations at Its Montgomery Facility

County Waste contracts to remove trash and recycling from residences in the Montgomery and Kingston, New York areas. (A 124; 3-4, 8, 49.) It employs 20 to 30 drivers and helpers at its Montgomery facility, and another 10 drivers and helpers at its Kingston facility. (A 124; 9.) County Waste's president, Scott Earl, and its general manager, Ernie Palmer, are both members of this limited liability corporation. (A 124; 2, 48.)

The Montgomery facility opens at 3 a.m. when the drivers come in to get their trucks before going out on the road to complete their routes. (A 124; 5, 13.) During the workday, the only person who stays at the facility is a dispatcher, and no supervisor is present. (A 124; 13-14, 44.)

B. After Starting an Organizing Drive and Filing a Representation Petition, Local 108 Discovers that County Waste Has Already Recognized Local 124; the Board Issues a Complaint Alleging that County Waste's Recognition of Local 124 Violates Section 8(a)(2) of the Act; the Parties Settle the Allegation and Sign a Stipulated Election Agreement

In the winter or early spring of 2004, Local 108 began organizing at County Waste by speaking to employees in the company parking lot. (A 124.) After filing a representation petition on June 4, Local 108 found out that County Waste had already extended recognition to Local 124 and was raising, as a bar to an election,

a contract executed between County Waste and Local 124. (A 124; 78, 87-118.)

The contract ran from June 1, 2004, to May 31, 2007, and covered County Waste's drivers and helpers at its Montgomery and Kingston facilities. (A 124; 87, 105.)

Local 108 filed an unfair labor practice charge alleging that County Waste violated Section 8(a)(2) of the Act (29 U.S.C. § 158(a)(2)) by extending recognition to Local 124 because that union did not represent an uncoerced majority of employees. (A 124; 76.) The Board's Regional Director issued a complaint based on the charge. (A 124; 76.)

On November 21, 2005, County Waste, Local 108, and Local 124 settled the complaint allegations and executed a stipulated election agreement, which they signed on November 23. (A 124; 70-75, 83-84.) Under the terms of the settlement, County Waste agreed to withdraw recognition from Local 124 as of December 2, 2005, and the parties agreed to end their collective-bargaining agreement as of the same date. (A 125; 71.) The election was scheduled for January 6, 2006. (A 128; 74, 84.)

C. In 2004, County Waste Does Not Give Bonuses; In 2005, a Week After Agreeing to the Settlement, County Waste Announces Bonuses, Which Local 124 Hands Out at the Montgomery Facility, Along With a Letter to Employees Taking Credit for the Bonuses; Local 124 Prevails in the January Election

In previous years, under a standing practice, County Waste gave out Christmas bonuses at the end of the year. (A 124; 17.) In 2004, however, after

entering into its collective-bargaining agreement with Local 124, County Waste did not pay bonuses. (A 124; 18, 40.) When employees complained in December, President Earl responded by instructing General Manager Palmer to tell employees that they should take the matter up with Local 124 because bonuses were not included in the contract. (A 125; 41, 49.)

Employees learned that they were going to receive a 2005 bonus on or around November 30, 2005, when Local 124 representatives came to the Montgomery facility and, inside the drivers' room, distributed envelopes to employees coming off their routes. (A 125, 129; 27-28.) The envelopes contained bonus checks from County Waste that amounted to one week's pay for each employee. (A 125, 128; 20, 27-29, 45, 47, 50.) Although some employees may have received their checks via direct deposit, the envelopes contained a written notice from Local 124, also dated November 30, stating:

Enclosed please find your 2005 Holiday Bonus Check . . . As some of you know, Local 124 IUJAT had been negotiating for a bonus with the Employer for several months and finally obtained this benefit for you and your families. Several of you expressed concern that the bonus would be cancelled [due] to the coming election with Local 108, however, we have convinced the Company to honor the commitments it made to our members prior to Local 108's interference. We hope the coming campaign and election will not be too disruptive

(A 125; 52, 85.)

The election took place as scheduled on January 6, 2006. The tally of ballots showed that of the 35 eligible voters, 7 cast votes for Local 108 and 21 cast votes for Local 124. (A 123.)

II. THE BOARD'S CONCLUSIONS AND ORDER

On February 11, 2009, the Board (Chairman Liebman and Member Schaumber) issued its Decision, Order, and Direction of Second Election, finding, in agreement with the administrative law judge, that County Waste violated Section 8(a)(2) of the Act (29 U.S.C. § 158(a)(2)) by assisting Local 124 by allowing it to distribute a Christmas bonus to employees on company time and premises in order to influence them to vote for Local 124 instead of Local 108. (A 121.) The Board's Order requires County Waste to cease and desist from the violation found. (A 121.) Affirmatively, the Order requires County Waste to post a remedial notice at its Montgomery and Kingston facilities. (A 121.) The Board also directed a second election among the unit employees.²

² This aspect of the Board's Order is not a "final order" within the meaning of Section 10(e) and (f) of the Act (29 U.S.C. § 160(e) and (f)), and therefore is not subject to judicial review at this time. *See Bonwit Teller v. NLRB*, 197 F.2d 640, 642 n.1 (2d Cir. 1952); *Beverly Enters. v. NLRB*, 139 F.3d 135, 144 (2d Cir. 1998). *See also Boire v. Greyhound Corp.*, 376 U.S. 473, 476 (1964).

SUMMARY OF ARGUMENT

The right of employees to a free and fair election to choose a collective-bargaining representative is of paramount importance under the Act. When an employer weighs in on the side of one union over another, employees are deprived of that right. In this case, shortly before a scheduled election, County Waste allowed its favored union, Local 124, to distribute previously unannounced bonuses to employees at its facility while they were coming off their daily routes. County Waste also let Local 124 include with the bonuses a letter to employees extolling Local 124's self-identified role in obtaining the extra money, and denigrating Local 108 for allegedly "interfering" with the bonuses.

The Board reasonably found that by bestowing this favorable treatment on Local 124, County Waste unlawfully assisted that union in the election campaign. The timing and circumstances surrounding County Waste's action strongly support the Board's finding. In order to settle an unfair labor practice complaint allegation that it had previously violated Section 8(a)(2) of the Act by recognizing Local 124 to avoid Local 108's organizing campaign, County Waste entered into a settlement agreeing to withdraw recognition from Local 124, and stipulating that an election would be held to ascertain employees' preferences. Yet, just a few days after agreeing to the settlement, and shortly before the election, County Waste put its thumb on the scale by permitting Local 124 to distribute Christmas bonuses at its

facility during the workday, along with a letter taking credit for this unexpected largesse. On this record, the Board reasonably concluded that by permitting Local 124 to take these actions in order to influence the election outcome, County Waste unlawfully assisted Local 124.

Contrary to County Waste's contentions, substantial evidence supports the Board's finding that Local 124 distributed the bonuses to employees. General Manager Palmer admitted that he told the facility's dispatcher to give the checks to Local 124's representatives to hand out to employees. Thus, the Board's finding that County Waste gave Local 124 the opportunity to distribute the checks is supported by the testimony of a company official. Furthermore, Local 124's letter to employees, which accompanied the bonuses, stated on its face that the bonus checks were enclosed.

Finally, County Waste was not privileged to treat Local 124 more favorably as an "incumbent" union. As the Board reasonably found, Local 124 ceased to hold that status as of November 23, when County Waste entered into the Section 8(a)(2) complaint settlement agreeing to withdraw recognition from Local 124.

ARGUMENT

SUBSTANTIAL EVIDENCE SUPPORTS THE BOARD'S FINDING THAT COUNTY WASTE UNLAWFULLY ASSISTED LOCAL 124 IN VIOLATION OF SECTION 8(a)(2) OF THE ACT BY ALLOWING LOCAL 124 TO DISTRIBUTE BONUSES IN ORDER TO INFLUENCE EMPLOYEES' VOTES

A. Principles of Unlawful Employer Assistance to Unions

It has long been recognized that a fundamental purpose of the Act is to guarantee that a labor organization is “the free choice of the workers, and not a choice dictated by [their employer].” H. Rep. 1147, 74th Cong., 1st Sess., at 18 (1935), reprinted in 2 *NLRB, Legislative History of the National Labor Relations Act, 1935*, at 3067 (1949) (“*Leg. Hist. 1935*”). To that end, the Board and the courts have long recognized that Board-supervised elections provide the preferred method of implementing that guarantee. *See Linden Lumber Division v. NLRB*, 418 U.S. 301, 305-10 (1974).

Section 8(a)(2) of the Act (29 U.S.C § 158(a)(2)) makes it an unfair labor practice for an employer “to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it.” *See also Int’l Ladies’ Garment Workers’ Union v. NLRB (Bernhard-Altman)*, 366 U.S. 731, 738 (1961); *NLRB v. Windsor Castle Health Care Facilities, Inc.*, 13 F.3d 619, 622-23 (2d Cir. 1994). Section 8(a)(2) reflects congressional recognition that such employer practices are “[t]he greatest obstacle[] to collective bargaining.”

78 Cong. Rec. 3443 (1934), reprinted in *1 Leg. Hist. 1935*, at 15. Indeed, to conclude otherwise would improperly place in an employer's "hands the power to completely frustrate employee realization of the premise of the Act—that its prohibitions will go far to assure freedom of choice and majority rule in employee selection of representatives." *Garment Workers (Bernhard-Altman)*, 366 U.S. at 738-39.

In cases involving violations of Section 8(a)(2), the Board need not find that the employer intended to aid the union unlawfully. *Id.* at 739. Likewise, the Board does not inquire into the employees' subjective reactions to the employer's assistance. Rather, an employer's assistance to the union is unlawful if it has a tendency "to coerce employees in the exercise of their organizational rights." *NLRB v. Vernitron Elec. Components, Inc.*, 548 F.2d 24, 26 (1st Cir. 1977). In making that determination, the Board reasonably "take[s] into account the economic dependence of the employees on their employers" *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 617 (1969). The Supreme Court long ago recognized that, in the case of rival unions, even "[s]light suggestions as to the employer's choice between unions may have telling effect" among employees. *Int'l Ass'n of Machinists v. NLRB*, 311 U.S. 72, 78 (1940).

The Board's findings of fact are conclusive if supported by substantial evidence on the record as a whole. 29 U.S.C. § 160(e). A reviewing court may not

“displace the Board’s choice between two fairly conflicting views, even though the court would justifiably have made a different choice had the matter been before it *de novo*.” *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951). *Accord NLRB v. G&T Terminal Packaging Co.*, 246 F.3d 103, 114 (2d Cir. 2001). This Court will not overturn the Board’s factual findings “unless no rational trier of fact could have arrived at the Board’s conclusion.” *Windsor Castle*, 13 F.3d at 623. Therefore, the Board’s findings “‘cannot lightly be overturned,’ especially when these findings are based upon the Board’s assessment of witness credibility.” *NLRB v. American Geri-Care, Inc.*, 697 F.2d 56, 60 (2d Cir. 1982) (internal citations omitted).

B. The Board Reasonably Found that County Waste Unlawfully Assisted Local 124 by Allowing It To Distribute Bonuses to Employees During the Election Campaign in Order To Influence Them To Vote for Local 124 Instead of Local 108

The Board reasonably found that County Waste improperly sought to influence its employees to vote for Local 124 instead of Local 108 by permitting Local 124 to distribute bonus checks to employees on company time at its premises during an election campaign. (A 129.) As shown in the Statement of Facts, after Local 108 began an organizing campaign, County Waste recognized Local 124 and signed a collective-bargaining agreement, which prompted Local 108 to file a charge alleging that this action violated Section 8(a)(2) of the Act (29 U.S.C. § 158(a)(2)). To settle the unfair labor practice complaint that followed, County

Waste, on November 23, entered into a settlement agreement, requiring it to withdraw recognition from Local 124 as of December 2. At the same time, the parties stipulated that an election would be held on January 6. Yet, shortly after entering into the settlement agreement and election stipulation, County Waste authorized Local 124 to hand out newly-announced Christmas bonuses that were worth one week's pay—hardly a “trivial or insubstantial benefit,” as the Board noted. (A 128.) In these circumstances, the Board reasonably found that County Waste's action was “designed to influence the employees” in their votes on election day. (A 129.) Further, by letting Local 124 distribute the bonuses—along with a letter taking credit for this sizeable and well-timed benefit that employees had not received the year before—County Waste effectively lent Local 124 a hand in the upcoming election.

Where, as here, two unions are competing to represent employees, an employer may not assist one by means that are coercive or discriminatory. *See, e.g., Windsor Castle*, 13 F.3d at 623. In *Windsor Castle*, an employer unlawfully assisted a union by offering “sham” employment to the union's organizers so that they could engage in employer-authorized organizing at the facility. *Id.* at 623. County Waste likewise unlawfully assisted Local 124 by providing that union with well-timed and privileged access to its employees, and the opportunity to hand out (and take credit for) a generous and unexpected benefit. The Board has

consistently found such unequal access to constitute an unfair labor practice. *See id.*; *Duane Reade Inc.*, 338 NLRB 943, 944 (2003) (employer gave unlawful assistance by providing meeting space on company time to one union and by requiring employees to attend that union's meetings, while denying equal access to a rival union), *enforced*, 99 Fed. Appx. 240 (D.C. Cir. 2004). The Board reasonably found that County Waste unlawfully assisted Local 124 by allowing its representatives to take credit for the corporation's largesse by distributing the bonus checks during the workday at the facility, in order to influence the outcome of an upcoming election.

C. County Waste's Contentions Are Without Merit

Before this Court, County Waste's principal assertion (Br 14) is that Local 124 did not distribute the bonus checks. This argument fails in the face of the admission by a company official at the unfair labor practice hearing that he authorized Local 124 to distribute the bonus checks. Thus, General Manager Palmer, who was also a member of the corporation, testified that Dispatcher Carol Patula had called him to say that Local 124 representatives were at the facility, and that she wanted to know what to do about the bonuses. Palmer told Patula to "let him hand them out." (A 45.) Palmer was referring to Local 124 agent James Ferenzello's handing out the bonuses. Thus, Palmer directly instructed his

dispatcher to give Local 124 representatives the checks, and to let them present the checks to employees.

Given this admission, County Waste's claim (Br 19) that it was "physically impossible" for Local 124 to have distributed the checks is puzzling at best. Moreover, nothing in Palmer's exchange with the dispatcher, or elsewhere in the record, supports County Waste's conjecture (Br 19) that Local 124 only distributed the checks after a few employees complained that they had not received a bonus. County Waste's further assertion (Br 8-9) that Local 124 only gave out two or three checks relies on nothing more than Palmer's "guess" (A 45) that just a few checks remained when the dispatcher called him. In any event, the Board reasonably found (A 127) that County Waste unlawfully assisted Local 124 irrespective of whether that union distributed checks to each and every employee.

Furthermore, County Waste fails to come to terms with the express wording of Local 124's letter to employees, which states: "Enclosed please find your 2005 Holiday Bonus Check." (A 85.) Thus, the letter on its face establishes that Local 124 distributed the bonus checks to employees. Although County Waste seeks (Br 16) to dismiss the letter as "campaign literature" that it did not have "anything to do with," the administrative law judge reasonably inferred (A 129) that it endorsed the letter. After all, the letter is dated November 30—around the date on which employees learned that they would receive a bonus and County Waste let Local

124 distribute the checks. It is also no coincidence that this occurred during a critical period; as shown, to settle an unfair labor practice complaint, County Waste had just agreed to withdraw recognition from Local 124, its preferred union, and Local 124 was facing an election challenge by Local 108. In sum, the letter's wording, together with General Manager Palmer's admission that he told his dispatcher to let Local 124 representatives distribute the bonuses, provides ample evidence to support the Board's finding that County Waste permitted Local 124, not only to hand out the bonuses, but also to give employees a letter taking credit for County Waste's largesse, all in order to influence the election outcome.

County Waste's reliance (Br 15-16) on employee Michael Schiavone's pay stubs, showing that his pay was directly deposited, does not undermine the Board's finding that County Waste unlawfully assisted Local 124. As Schiavone explained, although he has direct deposit, he still receives an envelope containing his pay stub at the facility, and at the end of November, when he returned to the facility after completing his route, he received an envelope from Local 124 that also included the November 30 letter. (A 28, 34.)

There is no merit to County Waste's further assertion (Br 20) that it was "obligated" to let Local 124 distribute the bonuses in late November because that union technically remained the employees' bargaining representative until December 2. Equally baseless is County Waste's bald assertion (Br 20) that it

would have violated the Act if it had not let Local 124 hand out the checks. County Waste points to no authority to support these claims. County Waste forgets that, in order to settle a complaint allegation that it had violated Section 8(a)(2) of the Act (29 U.S.C. § 158(a)(2)) by recognizing Local 124, it entered into a settlement agreement on November 23, which required it to end its collective-bargaining relationship with Local 124 as of December 2. Accordingly, as the Board found (A 129), Local 124 lost “incumbent” status when County Waste signed the settlement agreement on November 21. In these circumstances, as the Board found (A 129), the favoritism that County Waste bestowed on Local 124 by letting it distribute the bonuses and letter was not privileged under *RCA del Caribe, Inc.*, 262 NLRB 963, 965 (1982), which held that the filing of a representation petition by an outside union did not require an employer to cease bargaining with an incumbent union. Thus, the Board explained (A 129), Local 124 “no longer had the legal advantage of non-neutrality that is permitted by *RCA del Caribe*,” and County Waste no longer had a “legally recognized” or “legitimate” reason to treat Local 124 differently than Local 108—yet it did so anyway.

County Waste only confuses matters (Br 20-21) by attempting to draw a parallel between its situation and that of an employer who is faced with deciding whether to grant or withhold a raise during an election campaign. This analogy is wholly inapposite. As County Waste recognizes (Br 13), the question of whether it

violated Section 8(a)(1) of the Act (29 U.S.C. § 158(a)(1)) by granting the bonuses is not before the Court. The Board severed and remanded (A 121) that issue.³ In any event, an employer can hardly claim that it is placed in an untenable position—that it would violate the Act whether or not it gives bonuses—if it decides to alter its practice by granting bonuses in the midst of an election campaign.

In sum, the Board reasonably found that County Waste, by permitting Local 124 to hand out bonuses to employees along with a letter taking credit for that act of beneficence, improperly sought to influence its employees to vote for that union. This attempt to influence votes through preferential treatment was in derogation of the employees' right to a free and fair election without their employer's thumb on the scale and, therefore, violated Section 8(a)(2) of the Act.

³ As County Waste correctly notes (Br 13), the Court can take judicial notice that, after the Board issued its Decision, Order, and Direction of Second Election, the Board's General Counsel and Local 108 jointly agreed to withdraw the Section 8(a)(1) allegation. On that basis, the administrative law judge, on May 1, 2009, issued a Supplemental Decision recommending dismissal of that allegation. Although the judge's Supplemental Decision is pending before the Board at this time, it has no effect on the issue before the Court in the instant case.

CONCLUSION

For the foregoing reasons, the Board respectfully submits that the Court enter a judgment denying County Waste's petition for review, and enforcing the Board's Order in full.

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	:
and	:
	:
LOCAL 108, LABORERS INTERNATIONAL UNION OF NORTH AMERICA	:
	:
Intervenor	:

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), the Board certifies that its brief contains 4,234 words of proportionally-spaced, 14-point type, and the word processing system used was Microsoft Word 2000.

/s/ Linda Dreeben

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Dated at Washington, DC
this 22nd day of July, 2009

ANTI-VIRUS CERTIFICATION FORM

See Second Circuit Interim Local Rule 25(a)6.

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**UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT**

COUNTY WASTE OF ULSTER, LLC	:	
	:	
Petitioner/Cross-Respondent	:	Nos. 09-1038-ag, 09-1646-ag
	:	
v.	:	
	:	
NATIONAL LABOR RELATIONS BOARD	:	Board Case No.
	:	2-CA-37437
Respondent/Cross-Petitioner	:	
	:	
and	:	
	:	
LOCAL 108, LABORERS INTERNATIONAL UNION OF NORTH AMERICA	:	
	:	
Interevenor	:	

CERTIFICATE OF SERVICE

The undersigned hereby certifies that the Board has this date sent to the Clerk of the Court by e-mail to agencycases@ca2.uscourts.gov, and first-class mail the required number of copies of the Board’s final brief in the above-captioned case, and has served two copies of that brief by e-mail and first-class mail upon the following counsel at the addresses listed below:

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Dated at Washington, DC
this 22nd day of July 2009