UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES – SAN FRANCISCO BRANCH OFFICE

DECO-AKAL JV

and **Case 28-CA-21082**

JUAN J. VIELMA, an Individual

INTERNATIONAL UNION SECURITY, POLICE, AND FIRE PROFESSIONALS OF AMERICA (SPFPA)

and **Case 28-CB-6508**

JUAN J. VIELMA, an Individual

COUNSEL FOR THE GENERAL COUNSEL'S ANSWERING BRIEF TO RESPONDENT UNION'S EXCEPTIONS TO ADMINISTRATIVE LAW JUDGE'S DECISION

Mara-Louise Anzalone
Counsel for the General Counsel
National Labor Relations Board
Region 28
2600 North Central Avenue, Suite 1800
Phoenix, AZ 85004-3099
Telephone: (602) 640-2117
Facsimile: (602) 640-2178

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

DECO-AKAL JV

and **Case 28-CA-21082**

JUAN J. VIELMA, an Individual

INTERNATIONAL UNION SECURITY, POLICE, AND FIRE PROFESSIONALS OF AMERICA (SPFPA)

and **Case 28-CB-6508**

JUAN J. VIELMA, an Individual

COUNSEL FOR THE GENERAL COUNSEL'S ANSWERING BRIEF TO RESPONDENT UNION'S EXCEPTIONS TO ADMINISTRATIVE LAW JUDGE'S DECISION

I. OVERVIEW

Pursuant to Section 102.46 of the Rules and Regulations of the National Labor Relations Board (Board), Counsel for the General Counsel submits this Answering Brief to the Exceptions filed by Respondent International Union Security, Police, and Fire Professionals of America (Respondent Union) to the decision of Administrative Law Judge (ALJ) Joseph Meyerson, which issued on June 13, 2007 (the ALJD). As discussed in more detail below, the ALJ appropriately found that Respondent Union failed to sustain its burden of proving the validity of a union security provision based on the federal enclave exception to Section 14(b) of the Act and that the Board has jurisdiction over this matter. Accordingly, the

Board should sustain the ALJ's findings of fact, conclusions of law, proposed remedy and recommended order.

II. PROCEDURAL BACKGROUND

The facts in this case are conceded: Respondent Union caused the termination of Charging Party Juan J. Vielma for his failure to tender union dues pursuant to a union security provision contained in a collective-bargaining agreement with his employer. (J.X. 8 ¶¶ 18-22; J.X. 7) Counsel for the General Counsel argued that, because Vielma worked in Texas, that state's "right-to-work" law prohibited the enforcement of the clause. The sole issue presented to the ALJ was whether the clause survives Texas' right to work law because Vielma's former workplace, the Immigration, Customs and Enforcement El Paso Service Processing Center (SPC), constitutes an exclusive federal enclave for purposes of the Act.

At hearing, Respondent Union failed to introduce any evidence as to the issue critical for purposes of determining the SPC's federal enclave status – whether Texas has in fact ceded exclusive jurisdiction of the land where the SPC is located to the United States, or whether the United States has ever accepted such jurisdiction. The only evidence in the record on this issue is the parties' stipulation that: (a) the process of researching legislative history involving deeds of cession from Texas to the United States, and acceptance thereof, is a complex and lengthy process; and (b) they are unaware of any deed of cession, or acceptance thereof, that covers any land on which the SPC is located. (J.X. 8 ¶¶ 24, 27).

III. RELEVANT STATUTORY PROVISIONS

A. 40 U.S.C. § 3112

40 U.S.C. § 3112 provides as follows:

> (a) Exclusive jurisdiction not required. It is not required that the federal government obtain exclusive jurisdiction in the United States over land or an interest in land it acquires.
>
> (b) Acquisition and acceptance of jurisdiction. When the head of a department, agency, or independent establishment of the Government, or other authorized officer of the department, agency, or independent establishment, considers it desirable, that individual may accept or secure, from the State in which land or an interest in land that is under the immediate jurisdiction, custody, or control of the individual is situated, consent to, or cession of, any jurisdiction over the land or interest not previously obtained. The individual shall indicate acceptance of jurisdiction on behalf of the Government by filing a notice of acceptance with the Governor of the State or in another manner prescribed by the laws of the State where the land is situated.
>
> (c) Presumption. It is conclusively presumed that jurisdiction has not been accepted until the Government accepts jurisdiction over land as provided in this section.

40 U.S.C. § 255 (West Supp. 2007).

B. Texas Government Code Chapter 2204

Chapter 2204 of the Texas Government Code addresses the procedure that must be followed to cede jurisdiction to the federal government. Specifically, Section 2204.103, "Cession of Jurisdiction to the United States," states as follows:

> (a) On written application of the United States to the governor, the governor, in the name and on behalf of this state, may cede to the United States exclusive jurisdiction, subject to Subsection (c), over land acquired by the United States under this subchapter over which the United States desires to acquire constitutional jurisdiction for a purpose provided by Section 2204.101.

> (b) An application for cession must be:
>
> (1) accompanied by proper evidence of the acquisition of the land;
> (2) authenticated and recorded; and
> (3) include or have attached an accurate description by metes and bounds of the land for which cession is sought.
>
> (c) A cession of jurisdiction may not be made under this section except on the express condition, which must be included in the instrument of cession, that this state retains concurrent jurisdiction with the United States over every portion of the land ceded so that all civil or criminal process issued under the authority of this state or a court or judicial officer of this state may be executed by the proper officers of this state on any person amenable to service of process within the limits of the land to be ceded, in the same manner and to the same effect as if the cession had not occurred.

V.T.C.A., Government Code § 2204.103 (West Supp. 2007).

IV. ANALYSIS

While § 8(a)(3) of the Act permits enforcement of agency fee agreements, see *Marquez v. Screen Actors Guild, Inc.*, 525 U.S. 33 (1998), § 14(b) of the Act provides that state labor laws, such as Texas' "right to work" law, may prohibit union security agreements that would otherwise be permissible under § 8(a)(3):

> Nothing in the Act shall be construed as authorizing the execution or application of agreements requiring membership in a labor organization as a condition of employment in any State or Territory in which such execution or application is prohibited by State or Territorial law.

State laws do not, however, apply to "federal enclaves" within which the federal government has exclusive jurisdiction.

Applying the relevant statutes set forth above, the ALJ found, and Respondent Union concedes, that:

> mere ownership of land by the Federal Government does not automatically confer jurisdiction to the Government. To the contrary, the presumption is that such jurisdiction is not conferred upon the Federal Government until such time as it accepts jurisdiction from the state, and notifies the state of that acceptance.

(ALJD 7, ll. 28-31) The ALJ found, and Respondent Union further concedes, that no party offered any evidence that jurisdiction over the SPC was ceded, pursuant to the applicable statutes, by Texas to the federal government. (ALJD 9, ll.41-44; 10, ll.2-4)

A. The ALJ Properly Assigned the Burden of Proof to Respondents.

In assigning the burden of proof to Respondent Union, the ALJ found as follows:

> I am of the belief that fundamental principles of fairness require that the burden of proof rests with the Respondents to prove that in fact the Federal Government has exclusive jurisdiction over the SPC. It would be virtually impossible for the General Counsel and the Charging Party to prove the absence of the conveyance, in other words to prove a negative, in this case, specifically that the Federal Government does not possess exclusive jurisdiction over the SPC. It would be much easier for the Respondents to demonstrate that the State of Texas conveyed exclusive jurisdiction to the Federal Government over the SPC and that the conveyance was accepted by the Federal Government, if in fact such events had occurred.

(ALJD 10 ll.46-54) As the ALJ correctly observed, the "fairness" concept takes into account the reality that "all or most of the relevant information on a particular element of a claim is within the control of one party or that one party has a unique nexus with the issue in question and therefore that party should bear the burden of affirmatively raising the matter." *Wright & Miller*, Federal Practice & Procedure, 5 Fed. Prac. & Proc. Civ.3d § 1271 (West Supp. 2007) (citing *Friedman v. Friedberg Law Corp.*, 6 F. Supp.2d 656 (D.C. Mich. 1998) ("courts often consider fairness" when determining whether a defense must be pleaded as an affirmative defense).

State v. Rodriguez, 302 S.E.2d 666 (S.C. 1983), cited by the ALJ in his decision, addressed very similar issues to those raised by this case. In *Rodriguez*, the defendant was convicted of a crime in state court, and argued on appeal that the situs of his crime, a federal naval hospital, was an exclusive-jurisdiction federal enclave that divested the state court of jurisdiction. Specifically, Rodriguez contended that "the State has the burden of proving jurisdiction and that it failed to establish its jurisdiction over the federal lands in the original proceedings." 302 S.E.2d at 667. The South Carolina Supreme Court disagreed:

> . . .40 U.S.C. 255 [] provides that until formal acceptance of jurisdiction, it is conclusively presumed the federal government has acquired no jurisdiction. See *Adams v. U.S.*, [319 U.S. 312 (1943)].
>
> We agree the burden of proving jurisdiction rests on the State. *State v. Wharton*, 263 S.C. 437, 211 S.E.2d 237 (1975). *However, this burden does not require the state to prove the nonoccurrence of events which might deprive it of jurisdiction.* Absent an affirmative act by the United States, the state is presumed to have jurisdiction over the federal lands. *The state need not prove the United States has not deprived it of that jurisdiction.*

Id. (emphasis added)

In citing "fundamental principles of fairness," the ALJ joins in this rationale, as well as those of a multitude of decisions which have assigned the burden of proof to the party asserting exclusive federal jurisdiction over a particular parcel of land. See, e.g., *Smith v. Commonwealth*, 248 S.E.2d 135 (Va. 1978) ("[t]o hold otherwise would be to require the Commonwealth to prove the negative, i.e. that the United States was not deeded and did not accept exclusive jurisdiction"), cert. denied 441 U.S. 967 (1979); see also *Ross v. State*, 411 So.2d 247, 249 (Fla. Dist. Ct. App. 1982) (defendant prosecuted under state law has burden to prove that acts occurred on exclusive federal enclave); *Dobbins v. State*, 151 S.E.2d 549, 550

(Ga. App. 1966) (party claiming exclusive jurisdiction over a federal enclave bears the burden of proof to prove such a claim).[1]

Moreover, the ALJ's conclusion is also in keeping with established Board law. The Board has long held that "the general rule is that the party raising an affirmative defense . . . has the burden of establishing that defense." *Levitz Furniture Co. of the Pacific, Inc.*, 333 NLRB 717, 725 (2001); *Sage Development Co.*, 301 NLRB 1173, 1189 (1991); *Marydale Products Co.*, 133 NLRB 1232 (1961), enfd. 311 F.2d 890 (5th Cir.), cert. denied 375 U.S. 817 (1963); see also *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983) (finding that Board's shifting of burden of proof to respondent to make out affirmative defense was not an impermissible construction of the Act). The Board regularly imposes this burden on respondents. See, e.g., *In re Precision Concrete and Building Trades Organizing Project*, 337 NLRB 211, 218 (2001) ("[a] statute of limitations defense is an affirmative defense and the initial burden of proceeding with an affirmative defense rests with Respondent") (citing *Silver State Disposal Service, Inc.*, 326 NLRB 84, 85 (1998)); *Mining Specialists, Inc.*, 335 NLRB 1275, 1282 (2001) (failure to mitigate damages is an affirmative defense. . .and the burden is on the employer to show the necessary facts); *W.D.D.W. Commercial Systems & Investments, Inc.*, 335 NLRB 260, 269 (2001) (whether "salts" were not entitled to the Act's protection, due to "disabling conflict" is affirmative defense which rests with respondent).

[1] Respondent Union argues that General Counsel *is* in fact required to prove negative allegations, "regardless of difficulty." (Exceptions at 13) But the cases Respondent cites in support of this extraordinary statement in fact state nothing of the kind. *Buffalo Restaurant Equipment, Inc.* simply assigned a bankruptcy trustee the burden of proving an item's fair market value, and *Peace v. Employment Security Commission* assigned a discharged employee the burden of proving he was discharged for a reason other than just cause.

For these reasons, the ALJ's assignment of the burden of proof to Respondent Union was appropriate in every respect, and Respondent Union's Exceptions in this regard should be denied.

B. The ALJ Properly Rejected Respondent Union's Claim that the Board Lacks Jurisdiction over this Case.

In his decision, the ALJ correctly noted:

> while Texas can certainly enforce its right to work law, and the Board cannot; it is equally true that the Board can enforce the Act, which Texas cannot do. There is simply nothing inappropriate in the Board finding that a union security provision in a collective bargaining agreement is unlawful in the State of Texas under Section 14(b) of the Act.

(ALJD 11, ll. 31-34) Respondent Union devotes a significant portion of its Exceptions brief to disputing this fundamental reality, arguing that the Charging Party may challenge his discriminatory discharge only in Texas state court. (See Exceptions at 3-10) This argument is antithetical to the concept of federal preemption. The ALJ wisely declined to purchase this bill of goods, nor should the Board. (See ALJD, 11 ll. 25-27, noting that cases relied upon by Respondent Union "merely establish that both the Board and the state where the alleged violations of the right to work law occurred have 'concurrent' jurisdiction to prosecute these matters").

In *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236 (1959), the United States Supreme Court announced a broad doctrine of preemption under the Act, interpreting Sections 7 and 8 of the Act as delimiting broad "areas of conduct" that must remain free of state regulation, irrespective of whether a conflict with federal policy was presented by any individual case. In order to preclude the possibility of state court awards based on erroneous

determinations that certain conduct was not covered by the Act, the Court established the standard that activities "arguably subject" to the Act are beyond the jurisdiction of state courts.

In *Retail Clerks Local 1625 v. Schemerhorn*, 375 U.S. 96 (1963), cited by Respondent Union, the Court provided an exception to this rule where a party claimed violation of a state right-to-work law. In other words, the *Schemerhorn* case provided for *concurrent* jurisdiction over such claims. See generally, *Labor Law-National Labor Relations Act-State Courts Have Jurisdiction Over Libel Actions Although Conduct Involved Is Arguably Subject To NLRA*, 78 Harv. L. Rev. 1670, 1675 (1965). Respondent Union vastly overreaches in its Exceptions, arguing that what the Supreme Court really *meant* in *Schemerhorn* was that federal preemption, and its accompanying grant of jurisdiction, *does not apply* when a state's right-to-work statute is involved.

The extent of Respondent Union's overreaching is apparent from the Supreme Court's decision in *Algoma Plywood and Veneer Co. v. Wisconsin Employment Relations Board*, 336 U.S. 301 (1949). There, the Court succinctly explained the interplay between § 8(a)(3)'s "express disclaimer . . . of intention to interfere with State law" and "the permission granted the States by § 14(b) of the Taft-Hartley Act to carry out policies inconsistent with the Taft-Hartley Act itself." According to the Court:

> these provisions can have application, obviously, only where State and federal power are concurrent; it would have been futile to disclaim the assertion of federal policy over areas which the commerce power does not reach.

336 U.S. at 314-15, cited by *Local 34, International Molders and Allied Workers Union (Malleable Iron Range Company)*, 150 NLRB 913, 918 (1965). Thus, the very cases Respondent Union cites establish that Congress intended to "preempt the field" of union-security agreements, subject only to a limited exclusion for state right-to-work laws. These cases demonstrate that, at most, states may share *concurrent* jurisdiction with respect to violations such as those present here. For this reason, Respondent Union's Exceptions with respect to the Board's jurisdiction should be denied.

V. CONCLUSION

Based upon the foregoing, it is respectfully submitted that the Board should adopt the ALJ's findings of fact and conclusions of law that Respondent Union violated Sections 8(b)(1)(A) and 8(b)(2) of the Act.

Dated at Phoenix, Arizona, this 8th day of August 2007.

Respectfully submitted,

/s/Mara-Louise Anzalone
Mara-Louise Anzalone
Counsel for the General Counsel
National Labor Relations Board
Region 28
2600 North Central Avenue, Suite 1800
Phoenix, AZ 85004-3099
Telephone: (602) 640-2117
Facsimile: (602) 640-2178

CERTIFICATE OF SERVICE

I hereby certify that a copy of COUNSEL FOR THE GENERAL COUNSEL'S ANSWERING BRIEF TO RESPONDENT UNION'S EXCEPTIONS TO ADMINISTRATIVE LAW JUDGE'S DECISION, in DECO-AKAL JV, Cases 28-CA-21082 et al., was served by E-Gov E-Filing and facsimile (with permission) on this 8th day of August 2007:

Via E-Gov E-Filing:

Lester A. Heltzer, Executive Secretary
Office of the Executive Secretary
National Labor Relations Board
1099 14th Street NW – Room 11602
Washington, DC 20570

One copy via facsimile(with permission) on the following:

Mark L. Heinen, Attorney at Law
Gregory, Moore, Jeakle, Heinen
& Brooks, P.C.
The Cadillac Tower
65 Cadillac Square, Suite 3727
Detroit, MI 48226-2822
Facsimile: 313-964-2125

John C. Scully, Attorney at Law
National Right to Work Legal Defense
Foundation
8001 Braddock Road, #600
Springfield, VA 22160
Facsimile: 703-321-9319

John A. Ferguson, Attorney at Law
Bracewell & Giuliani, LLP
800 One Alamo Center
106 South St. Mary's Street
San Antonio, AZ 78205-3603
Facsimile: 210-226-1133

/s/Mara-Louise Anzalone
Mara-Louise Anzalone
Counsel for the General Counsel
National Labor Relations Board
Region 28
2600 North Central Avenue, Suite 1800
Phoenix, AZ 85004-3099
Telephone: (602) 640-2117
Facsimile: (602) 640-2178