UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

W.D. MANOR MECHANICAL CONTRACTORS, INC.

and **Cases 28-CA-22384**
28-CA-22394
28-CA-22487

SHEET METAL WORKERS' INTERNATIONAL ASSOCATION, LOCAL NO. 359, AFL-CIO-CLC

W.D. MANOR MECHANICAL CONTRACTORS, INC.

Employer

and **Case 28-RC-6650**

SHEET METAL WORKERS INTERNATIONAL ASSOCIATION, LOCAL NO. 359, AFL-CIO-CLC

Petitioner

GENERAL COUNSEL'S BRIEF IN SUPPORT OF EXCEPTIONS

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GENERAL COUNSEL'S BRIEF IN SUPPORT OF EXCEPTIONS TO THE ADMINISTRATIVE LAW JUDGE'S DECISION

Administrative Law Judge John J. McCarrick (the ALJ) found that, after Respondent's employees expressed an interest in being represented by the Sheet Metal Workers International Association, Local No. 359 (the Union), Respondent engaged in a raft of unfair labor practices designed to make its employees regret their attempt to exercise their Section 7 rights. These unfair labor practices were neither subtle nor isolated. They included threats that employees would be fired for engaging in Union activity, that Respondent would close its doors before it went Union, that employees should "pack their shit" if they supported the Union, and that employees would be replaced if they signed Union cards. (ALJD 20) These unfair labor practices also included repeatedly forbidding employees from speaking with the

Union; interrogating employees about their Union activities and requiring them to report the Union activities of their co-workers; and telling them that it was futile to support the Union. (ALJD 18-27) Finally, the ALJ found that Respondent's unfair labor practices included many instances of discrimination, including:

- disciplining and discharging employees (ALJD 28, 34);
- imposing more onerous working conditions on employees which were designed to isolate them from the Union (ALJD 29);
- failing to consider for hire and failing to hire employee-applicants (ALJD 32);
- hiring temporary employees instead of recalling laid off employees (ALJD 34); and
- subcontracting fabrication work to reduce workload and cause the termination of employees (ALJD 34).

These unfair labor practices had their intended effect, and Respondent's employees overwhelmingly voted against the Union on April 16, 2009. However, based on his findings that Respondent had engaged in extensive and severe unfair labor practices, the ALJ sustained the Union's objections and recommended that the election be set aside. (ALJD 38)

These limited exceptions address the ALJ's: failure to find certain 8(a)(1) violations or to order relief consistent with his findings (Sections II.A, B, C, E, and G, infra); failure to find that Respondent delayed offering employment to Nathan Weimann (Section II.D, infra); misapplication of *Toering Electric Company*, 351 NLRB 225 (2007), to dismiss the refusal to hire claims of Pat Montroy and Marco Molina (Section II.F, infra); extension of *The Guard Publishing Company d/b/a The Register-Guard*, 351 NLRB 1110 (2007), to overly-broad and discriminatory no solicitation rules orally promulgated by Respondent (Section II.H, infra); and failure to order compounded quarterly interest (Section II.I, infra). In all other respects, the Board should adopt the ALJ's recommended decision and order.

I. BACKGROUND

Respondent is engaged in the heating, air conditioning, and plumbing business in the Phoenix, Arizona metro area. Its business is divided between the plumbing side, which is overseen by Respondent's President Brian DeWitt, and the heating and air conditioning side, which is overseen by Respondent's Executive Vice President Don Petty. The heating and air conditioning business requires the use of fabricated sheet metal ducts and fittings, which are manufactured by Respondent's employees at its sheet metal shop in Phoenix. These ducts and fittings are installed on Respondent's jobsites in the field by other sheet metal employees employed by Respondent. The sheet metal shop employees are supervised by Respondent's Shop Foreman, Trevor Davies, and Respondent's Shop Leadman, Joshua Carillo, who report to Respondent's Sheet Metal Superintendent, Shawn Bowser. (ALJD 2-3; Tr. 43-44) Field employees report to one of eight foremen, who in turn report to one of two job superintendents. These superintendents also report to Bowser. (ALJD 3; Tr. 53, 55)

In early 2008, Pat Montroy, the Union's Organizer, sought to convince Respondent to sign a contract with the Union covering Respondent's sheet metal workers. He spoke with Wes Bowser, a jobsite foreman, and DeWitt, and left messages for Petty. These efforts failed to bear fruit. From late February 2008 until November 2008, the Union did not seek to organize Respondent. However, in November 2008, the Union resumed its efforts after being asked to do so by an employee. These efforts included contacting employees at jobsites and elsewhere to discuss the benefits of unionization and to solicit authorization cards, and having Union members apply for work with Respondent. This organizing campaign resulted in the Union filing a representation petition on March 13, 2009, in Case 28-RC-6650. (ALJD 3) In the period between the Union's commencement of its organizing campaign and the filing of

the petition, Respondent committed numerous unfair labor practices intended to discourage its employees from organizing. As the ALJ observed, "the record is replete with Respondent's anti-union animus both before and after January 20, 2009." (ALJD 32:9-10)

II. ANALYSIS

A. The ALJ Erred by Dismissing Complaint Paragraphs 5(f)(2), (3), (5), (6), and (8)

The ALJ found that Respondent's Sheet Metal Foreman Scott Hartranft met with four employees on December 15, 2008. During this meeting, Hartranft told the employees that, if Union Organizer Montroy appeared at the jobsite, they could not speak with him, even on their 15 minute breaks. The ALJ also found that Hartranft told the employees that Sheet Metal Worker Superintendent Bowser stated that Respondent would shut its doors if a Union were selected. (ALJD 22; Tr. 402-04). Based on these facts, the ALJ found that Respondent violated Section 8(a)(1) by promulgating unlawful rules prohibiting employees from speaking with Union agents during company hours and on non-working time and threatening to close the plant. (Comp. para. 5(f)(1), (4), and (7)) (ALJD 22)

At the same time, however, the ALJ dismissed Complaint paragraphs 5(f)(2), (3), (5), (6), and (8),which allege that Hartranft threatened employees by telling them they had to inform Respondent if any Union agents came to the jobsite; Union agents would be excluded from the jobsite; employees who spoke to Union agents or signed Union cards would be fired; employees who spoke to Union agents on company time would be replaced; and employees who spoke to Union agents on company time would face reprisals. The ALJ's dismissal was primarily based on his finding that Hartranft did not explicitly say any of these things.

It is well established that an employer's statements are not to be considered in a vacuum. Rather, in determining whether statements may be considered innocuous remarks or

threats that inhibit Section 7 activities, the full context must be considered. See *Medic One, Inc.,* 331 NLRB 464 (2000) ("statements comprising alleged threats must be evaluated in the overall context in which the statements were made"); *Bi-Lo Foods,* 303 NLRB 749 (1991). Thus, statements, when taken in the context of earlier threats, may give further immediacy or otherwise reinforce the earlier threats. That is the case here. Hartranft's statements to employees on December 15, must be viewed in the context of threats he made to the same group of employees just five days earlier. More specifically, the ALJ found that, on December 10, Hartranft told the employees that Montroy was not allowed on the jobsite; they were to notify Hartranft immediately if they saw Montroy; they were not allowed to speak to Montroy on company time; and they would be fired if they were caught speaking to Montroy. (ALJD 22) It would be unrealistic to expect that employees would have forgotten about these threats when Hartranft spoke to them again on December 15, or that his very similar threats would not predictably remind the same employees of these threats and give a sense of immediacy to them. In this context, the express rules prohibiting contact with Montoy and threat to close the plant constitutes a repromulgation or reaffirmation of Hartranft's threats from December 10, and the Board should find Respondent violated the Act as alleged in Complaint paragraphs 5(f)(2), (3), (5), (6), and (8).

B. The ALJ Erred by Dismissing Complaint Paragraph 5(g)(4)

The ALJ found that in December 2008, Respondent's Leadman Joshua Carrillo told employees that they could "get their final paychecks" and go their "separate ways" because Respondent "was not a Union shop and never would be." The ALJ also found that Carrillo told employees that Respondent "will shut the shop's doors before they ever became a Union sheet metal shop." (ALJD 7:21-26) Based on these facts, he found that Carillo threatened employees and told them it was futile for them to support the Union, in violation of Section

8(a)(1).

However, the ALJ dismissed Complaint paragraph 5(g)(4), which alleged that Carrillo threatened to discharge employees who talked about the Union, on the grounds that no evidence was adduced to support it. (ALJD 23) Contrary to the ALJ's conclusion, employee Charles Duffy, whose testimony the ALJ implicitly credited, testified that Carrillo made these threats in an impromptu meeting of fabrication shop employees immediately after seeing them speak with a Union agent. (Tr. 639) Because the threat to fire employees was provoked by the employees' meeting with the Union, Carrillo's threat, in the context of when and why he called the meeting, was reasonably understood to encompass further meetings with the Union. Accordingly, Complaint paragraph 5(g)(4) should be sustained.

C. ALJ Erred by Dismissing Complaint Paragraph 5(i)(4)

The ALJ found that Respondent violated the Act by asking employees to disclose the union activities of other employees, promulgating an overly-broad rule prohibiting employees from soliciting other employees for the Union while on the clock, and threatening to discharge employees who solicited for the Union. (ALJD 25:34, 40-41) These findings were based on evidence that in March 2009, Respondent's Superintendent Mike Longley addressed sheet metal workers at a jobsite, where he read them a letter written by the Business Manager of the another union representing Respondent's plumbers. That letter stated, in part, that "if, while on the clock, you fail to work or otherwise engage in efforts to support the [sheet metal workers'] organizing effort you will be subject to discipline, up to and including discharge." (ALJD 4:31-39; GCX 19) Longley also warned employees that they were not allowed to talk about organizing during company hours; that sheet metal employees were not allowed to talk to plumber employees about the Union; and that they should report any plumber who tried to

do so. (ALJD 4:40-45)

The ALJ, however, dismissed Complaint paragraph 5(i)(4), which alleges that Longley promulgated a rule permitting only certain union agents on the jobsite. There can be little question that Respondent had unequivocally informed its employees that representatives of the Union were not allowed on its premises or could not communicate with sheet metal employees, as detailed by the ALJ throughout his decision. But Respondent did not apply the same rules to the union representing its plumbing employees. On the contrary, that union was permitted to communicate, by letter and otherwise, with not only plumbing employees on the jobsite, but also sheet metal employees. Indeed, Respondent provided assistance to this other union, by having Longley read its letter to a captive group of employees.

D. The ALJ Erred by Dismissing Complaint Paragraph 6(a)

The ALJ found that Respondent disciplined and fired employee Nathan Weimann because he engaged in Union activities, but dismissed the allegation that Respondent delayed in hiring Weimann. (ALJD 28) Although the ALJD discusses Weimann's employment with Respondent at length, it gives short shrift to the process that led to his hire. Those facts are as follows: In December 2008, Weimann responded to an advertisement in a local newspaper for sheet metal workers by calling the number listed. He spoke to Carrillo by phone, who scheduled an interview. Carrillo and Shop Foreman Trevor Davies met with Weimann the next day. During this interview, Carrillo and Davies asked Weimann about his union affiliation and disparaged the Union's apprenticeship program. Although Carrillo promised to call Weimann later that day, he did not. As a result, Weimann repeatedly called Carrillo and left messages. It was not until a week later that Respondent hired Weimann. (Tr. 659-65)

In dismissing this allegation, the ALJ found that "Respondent's hiring of Weimann

flies in the face of General Counsel's allegation" of delay. (ALJD 28:9-10) But the Board has held that "the fact that [an employer] eventually made an offer of employment [ ] does not preclude a finding that the [employer] unlawfully delayed making that offer because of union considerations." *Tradesmen International, Inc.*, 351 NLRB 579 (2007); see also *Savoy Brass Manufacturing Co.*, 241 NLRB 51 (1979) (finding delay in hiring to be an unfair labor practice, even though the discriminatees were eventually offered jobs), enfd. 628 F.2d 1345 (2nd Cir. 1980). The ALJ also found that the length of delay involved – one week – was insufficient to establish discrimination. But this finding overlooks the facts specific to this case, which include evidence that Respondent sought to fill positions immediately, as demonstrated by Carrillo's promise to contact Weimann the same afternoon as his interview; the nature of the position to be filled, a construction job on a project quickly ramping up; and substantial evidence of animus towards applicants with any affiliation with the Union. Notably, absent Weimann's repeated telephone calls to Carrillo, the delay in this case could have extended months, or he may not have been hired at all. Moreover, Respondent failed to present any evidence as to the length of time that typically elapses between interview and hire; whether any other applicants were being considered at this time; or any other facts that could explain Carrillo's failure to respond to Weimann as promised. Under these circumstances, the record supports a finding that Respondent discriminated against Weimann by delaying his offer of employment, as alleged in Complaint paragraph 6(a).

E. The ALJ's Decision Should be Clarified to Find that Respondent Violated Section 8(a)(3) by Increasing the Prices of Items in its Vending Machines [Complaint Paragraph 6(f)]

Paragraph 6(f) of the Complaint alleges that Respondent violated Section 8(a)(3) of the Act on or about January 20, 2009, by imposing more onerous working conditions on employees by increasing the price of items for sale in the Respondent's vending machines.

Without any explanation, the ALJD states that this allegation will be dismissed in a general paragraph listing all of the dismissed allegations. (ALJD 35:8-10) But in the proposed Notice, the ALJD indicates that the ALJ found a violation: "WE WILL NOT impose more onerous working conditions by…increasing the prices on vending machine items for sale…." (ALJD Appendix) Although the ALJ's Decision lists this allegation in the analysis section, it neglects to discuss it. (ALJD 29)

The record supplies ample evidence to support the finding of a violation, as suggested by the ALJ's Notice. More specifically, Respondent's fabrication shop is located adjacent to Respondent's main office. (RX 10) Before January 20, 2009, employees were allowed to use the break room in the main office area, which contained vending machines. (Tr. 500-501) After Union supporters applied for work at Respondent's main office in January 20, 2009, in plain view of Respondent's employees, Respondent confined its fabrication shop employees to the fabrication shop for breaks and lunch. (Tr. 500; 641) The ALJ found that Respondent did so to limit employees' union activities, in violation of Section 8(a)(3):

> It was not until the Union attempted to organize Respondent's employees by making direct appeals to them at the workplace that Respondent decided to solve its "security" problem which conveniently cut off the Union's direct appeals to those employees. The timing of the implementation of Respondent's security measures creates the inference that they were designed to limit its employees' union activities and violated Section 8(a)(3) as alleged in Complaint paragraph 6(e).

(ALJD 29:32-39)

At the same time, Respondent placed vending machines in the fabrication shop, which were the only machines to which shop employees had access. Unlike the vending machines in the main office, however, the prices for identical items in the fabrication shop were higher. In some cases, the amount was significant, up to 20 cents. (Tr. 552-53) There can be little question that requiring employees to pay more

for the same vending machine items in an attempt to discourage union activity violates Section 8(a)(3) of the Act. See *Henry Vogt Machine Company,* 251 NLRB 363 (1980) (revocation of cafeteria privileges because employees selected union violated Section 8(a)(3)). The ALJ's Decision should be corrected to reflect, consistent with the proposed Notice, that Respondent violated the Act by increasing the price of items for sale in its vending machines.

F. The ALJ Erred by Failing to Find that Respondent Failed to Hire and Consider for Hire Applicants Pat Montroy and Marco Molina [Complaint Paragraph 6(h)(2)]

The ALJ found that Respondent violated the Act when it failed to hire and consider for hire five employee-applicants who sought employment with Respondent on January 20, 2009. However, relying on an over-expansive application of *Toering Electric Company*, 351 NLRB 225 (2007), the ALJ declined to find that Respondent similarly discriminated against two other employee-applicants, Montroy and Marco Molina.

1. Facts

On January 20, 2009, seven job applicants arrived at Respondent's main office with the intent to apply for sheet metal positions. These applicants had met at the Union hall earlier that day. (Tr. 309-310) These applicants were all either out of work sheet metal employees or union organizers, with authorization from the Union to apply for and accept any employment with Respondent. (ALJD 8; Tr. 309-311; 731-733; 767; 796-797; 844; 871)

Two of these applicants arrived at Respondent's main office early in the morning without any outward indication that they were union supporters. (Tr. 700; 733) Those two were Don Latham, who had learned that Respondent was hiring through Respondent's Foreman Scott Reese (who had instructed Latham fill out an application at the main office), and Lance Jamison. (Tr. 308; 695-696; 700; 734; 769; 796; GCX 57) Upon arriving at

Respondent's main office, Latham rang the buzzer. Respondent's receptionist Ruth Patterson asked them what they wanted, and Latham informed her that they were there to apply for sheet metal jobs. Patterson allowed Latham and Jamison into the office, gave them each an application, clipboard, and pen, and invited them to sit in the waiting area to fill out the applications. (ALJD 8; Tr. 700-01; 734)

A short time later, the five other applicants, including Montroy and Molina, arrived. Unlike Latham and Jamison, they wore Union jackets, shirts, and hats. When Montroy rang the buzzer and announced that they wanted to apply for sheet metal jobs, Patterson informed them that Respondent was not hiring. Montroy responded that that could not be correct, because there were two applicants inside filling out applications. After some back and forth between the Montroy and Patterson, Montroy told the group that they should leave because Respondent would not hire them because they were Union. At that moment, about 10 men entered the lobby area, including Bowser and DeWitt. DeWitt went outside and asked Montroy what they wanted. Montroy replied that they wanted to apply for work. DeWitt said he would get them applications and walked back into the office. [ALJD 8; Tr. 327-30; 735; 799-801; 805; 846; 874]

When Patterson began to place the applications on clipboards and gather pens for the five employee-applicants in Montroy's group, DeWitt told her to just give them the applications, and not to give them clipboards or pens. DeWitt then took these applications outside to Montroy. Montroy asked if they could come into the office and fill them out and DeWitt stepped within a foot of Montroy and said in a raised voice "Do you need to?" Sensing a threat, Molina positioned himself behind Montroy. DeWitt also told Patterson, "if this happens again, you can just call 911 and tell them that you feel threatened and that they

would come and take [them] away for a couple of hours. Take them to jail." (ALJD 8-9; Tr. 333-34; 764; 808-09; 850; 879)[1] Based on Respondent's conduct, Montroy and Molina decided the risk of retaliation was too great to warrant completing an application which would include their home addresses. (Tr. 334-35; 809) Although Respondent hired 19 sheet metal employees between January 20 and January 30, 2009, it hired none of the applicants that came to its office on January 20. (ALJD 10:5-9)

2. The ALJ Erred by Finding that Montroy and Molina Did Not Apply for Employment

The sole basis for the ALJ's dismissal of Montroy's and Molina's claims is that they failed to submit their written employment applications to Respondent. Thus, the ALJ concluded, "neither Montroy nor Molina satisfied the Toering requirement that an application be filed." (ALJD 31:35-36)

In *Toering*, the majority explained that, to meet the definition of an employee entitled to the Act's protections, there must be a showing that:

> (1) there was an application for employment, and (2) the application reflected a genuine interest in becoming employed by the employer. As to the first component, the General Counsel must introduce evidence that the individual applied for employment with the employer or that someone authorized by that individual did so, on his or her behalf. In the latter instance, agency must be shown.

351 NLRB at 233. Significantly, there is nothing in *Toering* that states what form a valid application for employment must take. In this case, there is ample evidence that Montroy and Molina repeatedly told Respondent they wished to be considered for employment and that they "would give eight hours of work for eight hours of pay." (Tr. 329) There can be little doubt that these words express an unequivocal desire for employment – in other words, an

[1] Notably, at hearing, Patterson testified that Montroy yelled at, harassed, and intimidated her. The ALJ discredited her testimony, based on a tape recording of the events made by Montroy, which "clearly establishes that at no time did he or any other job applicant yell, intimidate or harass Patterson." (ALJD 9:16-19)

oral application for employment. See *Marriot Corp.*, 251 NLRB 1355 (1980) (oral request for employment in refusal to hire allegation). But even if *Toering* were to be construed to require a written employment application, Respondent in this case waived its right to insist on a written application where it initially refused to provide one; discriminated against the employee-applicants when they sought to complete the applications by refusing to allow them in the building and refusing to provide clipboards and pens; and threatened the employee-applicants, both physically and by telling them that Respondent would file false charges with the police to have them arrested if they showed up again. Finally, the ALJ's insistence on a written employment application under *Toering* elevates form over substance. Based on the totality of the evidence, it is beyond doubt that Respondent would not have considered Montroy or Molina for employment, written application or not. The law does not require the undertaking of a vain or useless act. See *Association of Westinghouse Salaried Employees v. Westinghouse Electric Corp.*, 283 F.2d 93, 96 (3rd Cir. 1960) ("the law does not require a party to do a useless act"); *U.S. v. Raines*, 203 F. Supp. 147, 151 (N.D. Ga. 1961).

Because the record establishes that all of the other requirements of *FES, A Division of Thermo Power*, 331 NLRB 9 (2000), are met (see Tr. 286, 289, 309, 365 (Montroy) and Tr. 792-95 (Molina); ALJD 31-32), the Board should find that Respondent unlawfully failed to hire, or consider for hire, Montroy and Molina, as alleged in Complaint paragraph 6(h)(2).

G. The ALJ Erred by Failing to Place in the Proposed Notice an Affirmative Remedy for the Section 8(a)(3) Violation Concerning Warnings Issued to Employee Robert Jones [Complaint Paragraph 6(k)]

The ALJ found that on March 27, 2009, Respondent's Sheet Metal Superintendent, Shawn Bowser instructed employee Robert Jones that he "was not allowed to organize, solicit for or speak about the Union during company time, only on break time and after hours."

(ALJD 5:15-17) Following this warning, Jones talked about the Union with the sheet metal workers with whom he was working. That same day, he was given a written warning for "soliciting for the Union." (ALJD 5:20-21; GCX 20) The ALJ found that Bowser's "promulgation and enforcement of Respondent's no solicitation rule was too broad" where Respondent did not prohibit employees from speaking with on another during work time about a variety of non-work related subjects. (ALJD 5:22-25, 26:18-25) The ALJ also found:

> Having found that Bowser's March 27, 2009, edict to Jones that he was not allowed to organize, solicit for or speak about the Union during company time, only on break time and after hours was an overly broad no solicitation rule that violated Section 8(a)(1) of the Act it follows that Bowser's discipline of Jones for violating this rule violated Section 8(a)(3) of the Act as alleged in Complaint paragraph 6(k) in that Jones was disciplined for engaging in union activities.

(ALJD 34:18-24)

Based on these findings, the ALJ ordered that Respondent remove from its files any reference to the unlawful discipline of "Robert Jones Power"[2] dated March 27, 2009, and within three days thereafter notify him in writing that this has been done and that the discipline will not be used against him in any way. However, in an apparent oversight, the ALJ neglected to include this affirmative remedy provision in the proposed Notice to Employees. Such an oversight should be corrected, to ensure that the remedial purpose of the Notice, to inform employees of their rights protected by the Act and to set forth publicly and in clear language Respondent's remedial obligations, is carried out. See *Ishikawa Gasket America, Inc.*, 337 NLRB 175 (2001). CGC requests that the following language be inserted into the Notice:

> WE WILL within 14 days, remove from our files, any and all records of our March 27, 2009 unlawful discipline of ROBERT

[2] The insertion of the last name "Power" appears to be a typographical error as there is no reference in the transcript to an individual by the name of Robert Jones Power.

> JONES, and within 3 days thereafter, notify JONES in writing that we have taken this action, and that the material removed will not be used as a basis for any future personnel action against him or referred to in response to any inquiry from any employer, employment agency, unemployment insurance office, or reference seeker, or otherwise used against him.

H. The ALJ Applied the Wrong Standard in Evaluating Respondent's Oral No-Solicitation Rules

In analyzing the Complaint allegations relating to Respondent's orally promulgated discriminatory no-solicitation rules, the ALJ held that in *The Guard Publishing Company d/b/a The Register-Guard*, 351 NLRB 1110 (2007), "the Board adopted a new standard for determining if an employer's discriminatory enforcement of work rules violates Section 8(a)(1) of the Act." ALJD 16:44-17:2. More specifically, the ALJ held that, "to be unlawful, discrimination must be along Section 7 lines. In other words, unlawful discrimination consists of disparate treatment of activities or communications of a similar character because of their union or other Section 7 protected status." ALJD 17:4-9, citing 351 NLRB at 1118. The ALJ applied this standard in deciding whether Respondent violated the Act by telling employees they could not discuss the Union with other employees or Union representatives, or distribute Union materials. See Compl. para. 5(b)(3), 5(b)(6), 5(b)(8), 5(c)(1), 5(d)(6), 5(f)(4), 5(g)(4), 5(i)(2), 5(i)(3), 5(j), and 5(k).

Each of these allegations, however, is far removed from *The Register-Guard. The Register-Guard* centered on an employer's property rights, namely, its ability to limit employee use of its electronic mail system. A majority consisting of chairman Batista and members Kirsanow and Schaumber examined the Board's caselaw concerning whether employees have a specific right to use an employer-owned property – such as bulletin boards, telephones, and televisions – for Section 7 communications. Although the majority affirmed

the Board's age-old rule employers may restrict their employees' use of their equipment or media so long as the restrictions are nondiscriminatory, it redefined the meaning of nondiscriminatory. Id. at 1116-18. In doing so, however, the majority did not suggest that its ruling was meant to extend to rules restricting solicitations that do not involve the use of an employer's property systems. On the contrary, the majority's attempt to reconcile its decision with *Republic Aviation Corp. v. NLRB,* 324 U.S. 793 (1945), suggests the opposite. Specifically, the majority reasoned that the more stringent standard for proving discrimination was appropriate because of the employer's "property interest" in its e-mail system, and limiting access to the employer's property does not implicate employees' ability to engage in oral in-person communications to further their Section 7 rights:

> In contrast to the employer's policy at issue in *Republic Aviation,* the Respondent's CSP does not regulate traditional, face-to-face solicitation. Indeed, employees at the Respondent's workplace have the full panoply of rights to engage in oral solicitation on nonworking time an also to distribute literature on nonworking time and in nonworking areas, pursuant to *Republic Aviation* and *Stoddard-Quirk.* What the employees seek here is the use of the Respondent's communications equipment to engage in additional forms of communication beyond those that *Republic Aviation* found permitted.
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> * * *
>
> The dissent contends that because the employees here are already rightfully on the Respondent's premises, only the Respondent's managerial interests – and not its property interests – are at stake. That would be true if the issue here concerned customary, face-to-face solicitation and distribution, activities that involve only the employees' own conduct during nonwork time and do not involve use of the employer's equipment.

351 NLRB at 1115-16.

In this case, the ALJ has mistakenly extended the holding of *The Register-Guard* to facts the majority in that case never intended to reach, namely, "customary, face-to-face solicitation and distribution." Such activity has always enjoyed special protection because the workplace is "uniquely appropriate" for Section 7 activity, *NLRB v. Magnavox Co. of*

Tennessee, 415 U.S. 322 (1974), and application of the discrimination standards announced in *The Register-Guard* to this type of Section 7 activity would be singularly inappropriate under *Republic Aviation* and its progeny.

I. The ALJ Erred by not Ordering Interest to be Compounded on a Quarterly Basis.

In determining make whole relief for the discriminatees, the General Counsel asserts that the ALJ erred in failing to order that interest on backpay be compounded on a quarterly basis. Only the compounding of interest can make adjudged discriminatees fully whole for their losses. IRS practice, along with precedent from other areas of law, provide ample legal authority for assessing compound interest to remedy unfair labor practices.[3] See, 26 U.S.C. § 6622(a) (as part of the Tax Equity and Fiscal Responsibility Act of 1982, Congress had mandated that the IRS compound interest on the overpayment and underpayment of taxes); *Saulpaugh v. Monroe Community Hosp.*, 4 F.3d 134, 145 (2d Cir. 1993) (compound interest appropriate in Title VII case); *Doyle v. Hydro Nuclear Services*, 2000 WL 694384, at *14 (DOL Admin. Rev. Bd. May 17, 2000) (involving whistleblower protection under Energy Reorganization Act of 1974), revd. on other grounds sub nom. *Doyle v. U.S. Secretary of Labor*, 285 F.3d 243 (3d Cir.), cert. denied 537 U.S. 1066 (2002) (Department of Labor Administrative Review Board adopts policy of compounding interest on backpay awards); *Trans-World Mfg. Corp. v. Al Nyman & Sons, Inc.*, 633 F. Supp. 1047, 1057 (D. Del. 1986) (patent infringement case; compounding interest "will conform to commercial practices and proved the patent holder with adequate compensation for foregone royalty payments"); *Brown v. Consolidated Rail Corp.*, 614 F. Supp. 289, 291 (N.D. Ohio 1985) (Vietnam Veterans

[3] When Congress amended the Internal Revenue Code in 1982 to require the Internal Revenue Service to access compound interest on the overpayment or underpayment of taxes, it noted that it was conforming the IRS computation of interest to commercial practice. See S. Rep. No. 97 – 494(1), at 305 (1982), reprinted in 1982 U.S.C.C.A.N. 781, 1047.

Readjustment & Assistance Act case; compound interest awarded regardless of defendant's good faith or justification); *United States v. 319.46 Acres of Land More or Less*, 508 F. Supp. 288, 291 (W.D. Okla. 1981) (eminent domain case; Fifth Amendment "just compensation" standard would be satisfied only by compound interest award). Indeed, the trend in recent years has been increasingly towards remedies that include compound interest, and the Act will soon be an anomaly if the Board continues with its current practice.

Accordingly, Counsel for the General Counsel asks that the Board adopt a policy that requires interest to be compounded on a quarterly basis. Under its current policy, the Board calculates interest on monetary remedies using the short-term Federal rate plus three percent. See *New Horizons for the Retarded, Inc.*, 283 NLRB 1173 (1987). Because the short-term Federal rate is updated on a quarterly basis, it would make administrative sense to also compound interest on the same basis. Id at 1173-74. In addition, compounding interest on a quarterly basis is more moderate that daily compounding, which has not been applied in the analogous Title VII context, but is more reflective of market realities than annual compounding, which is inadequate because it provides a significantly lower interest rate from that charged by private financial institutions that lend money to discriminatees.

III. CONCLUSION

Based on the foregoing, Counsel for the General Counsel requests that the Board reverse the ALJ's rulings that are the subject of these exceptions and find that Respondent violated Section 8(a)(1), and (3) of the Act, as described above; order that Respondent post, at all of Respondent's facilities, full Notices to Employees that address and remedy all violations

found; order that interest on all backpay be compounded on a quarterly basis; adopt the ALJD in all other respects; and order other relief deemed appropriate by the Board.

Dated at Phoenix, Arizona, this 2nd day of June 2010.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of GENERAL COUNSEL'S BRIEF IN SUPPORT OF EXCEPTIONS in W.D. MANOR MECHANICAL CONTRACTORS, INC., Cases 28-CA-22384 et al., was served by E-Gov, E-Filing, E-Mail and Overnight Delivery via United Parcel Service, on this 2nd day of June 2010, on the following:

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