UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
TWENTY-SEVENTH REGION

ALLIANCE MECHANICAL, INC.

Respondent

and Case 27-CA-21338

ROAD SPRINKLER FITTERS LOCAL UNION NO. 669.

Charging Party

**ACTING GENERAL COUNSEL'S BRIEF IN SUPPORT OF EXCEPTIONS TO THE ADMINISTRATIVE LAW JUDGE'S DECISION AND ORDER**

Counsel for the Acting General Counsel of the National Labor Relations Board ("the General Counsel" and "the Board," respectively) submits this Brief in Support of Exceptions to the Administrative Law Judge's Decision and Order in this matter.

## STATEMENT OF THE CASE

Road Sprinkler Fitters Local Union No. 669 ("Union") filed the underlying unfair labor practice charges in this matter against Alliance Mechanical, Inc. ("Respondent") on August 19, 2009[1], as amended on November 17. (GCX 1(a) and GCX 1(b))[2] On January 28, 2010, the Board's Regional Director for Region 27 issued a Complaint and Notice of Hearing based on those charges. (GCX 1(g)).

---

[1] All Dates are 2009 unless otherwise indicated.

[2] "GCX" refers to exhibits offered by the General Counsel at the hearing on April 28, 2010. "RX" refers to exhibits offered at the hearing by Respondent. "Tr" refers to the transcript of the hearing. "ALJD" refers to the Administrative Law Judge's Decision and Order.

Administrative Law Judge James M. Kennedy heard this matter in Eagle, Colorado, on April 28, 2010. On July 23, 2010, Judge Kennedy issued a Decision and Order. (ALJD P 1-26.). He found that Respondent violated Section 8(a)(3) and (1) of the National Labor Relations Act ("Act") by refusing to consider for hire Aaron Hoffman and by maintaining a hiring policy under which it refused to consider employee applicants who refused to renounce their Section 7 rights. (ALJD P 10 L 26-27; ALJD P 15 L 1-5). The Judge's proposed order requires Respondent to cease and desist from maintaining a hiring policy under which it refuses to consider for hire employee applicants unless they renounce their Section 7 rights, including requiring them to sign a yellow dog agreement. (ALJD 16 L 15-18). The proposed order also requires Respondent to cease and desist from, in any like or related manner, interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act. (ALJD 16 L 19-21). Affirmatively, the proposed order requires Respondent to rescind the hiring policy and practices, including using yellow dog contracts, whereby it refuses to consider for hire employees who are union members, have union backgrounds or union employment histories. (ALJD P 16 L 24-26) The Judge's proposed order also requires Respondent to make whole any employment applicant after March 2009 who it failed to consider for employment due to its unlawful employment policy and to post a Notice to Employees (Notice). (ALJD P 16 L 28-29). As more fully discussed below, General Counsel contends that Judge Kennedy failed to order appropriate relief.

## STATEMENT OF THE ISSUES

1. Whether Judge Kennedy erred by failing to order appropriate relief.

(Exceptions 1, 2, 3, 4, 5 and 6).[3]

## ARGUMENT

### I. THE ADMINISTRATIVE LAW JUDGE ERRED BY FAILING TO ORDER THE APPROPRIATE RELIEF

### A. The Administrative Law Judge erred by failing to order the standard remedy for his conclusions of law that Respondent refused to consider for hire Aaron Hoffman and employee applicants who refused to renounce their Section 7 rights.

Judge Kennedy concluded that Respondent violated Section 8(a)(3) and (1) of the Act by refusing to consider discriminatee Hoffman for hire. (ALJD P 10 L 25-26). Similarly, the Judge concluded that Respondent violated Section 8(a)(3) and (1) of the Act by refusing to consider employee applicants since March 2009 because Respondent unlawfully conditioned their employment on rescinding their Section 7 rights by signing a "yellow dog contract." (ALJD P 15 L 1-5). In FES (A Division of Thermo Power), 331 NLRB 9, 15 (2000), the Board established the following standard remedy for refusal to consider violations:

> a cease-and-desist order; an order to place the discriminatees in the position they would have been in, absent discrimination, for consideration

---

[3] Exception 7 involves an inadvertent error. In the Decision, Judge Kennedy found that General Counsel Kristyn Myers conducted the following questioning of Hoffman regarding his service experience:
Q: [By Ms. MYERS] Have you had any extended experience in service work on fire sprinklers?
A: Yes.
Q: Did you put that on our application?
A: I put down that –
Q: Did you put on your application that you had any service experience?
A. No, I just put down companies I worked for.
(ALJD P 9 L 14-12). However, the transcript reveals that Respondent's Owner Ron Aho was the party questioning Hoffman about his service experience. (Tr 47 L 12-19). Thus, the Decision should be amended to reflect that the questioning of Hoffman was conducted by Ron Aho.

> for future openings and to consider them for the openings in accord with nondiscriminatory criteria; and an order to notify the discriminatees, the charging party, and the Regional Director of future openings in positions for which the discriminatees applied or substantially equivalent positions.

Although Judge Kennedy found the unlawful refusal to consider violations, he failed to order this standard remedy for these violations as set forth in FES.

More specifically, with respect to discriminatee Hoffman, the Judge concluded that Respondent violated Section 8(a)(3) and (1) of the Act by refusing to consider him for hire. (ALJD P 10 L 25-26). Nevertheless, Judge Kennedy concluded that Hoffman is not entitled to any remedy because Respondent did not refuse to hire him. (ALJD P 15, L14-16). The underpinning of the Judge's conclusion that Respondent did not unlawfully refuse to hire Hoffman was his finding that there were no job openings Hoffman was qualified to fill. (ALJD P 13 L 6-9). However, the finding that there were no job openings and, therefore, no refusal to hire violation, does not preclude an order granting Hoffman the standard refusal to consider remedy. In FES, the Board unequivocally concluded that "an employer violates Section 8(a)(3) if it refuses to consider union applicants for employment even if there are no openings at the time of application." 331 NLRB at 16. Judge Kennedy affirmatively concluded that Respondent unlawfully refused to consider Hoffman for employment in violation of Section 8(a)(3). Therefore, it is axiomatic that Hoffman is entitled to the standard Board remedy for Respondent's unlawful conduct. Accordingly, the proposed order and Notice should include language requiring Respondent to place Hoffman in the position he would have been in, absent discrimination, for consideration for future openings and to consider him for the openings in accord with nondiscriminatory criteria; and language requiring Respondent to notify Hoffman, the Charging Party, and the Regional Director of Region

27 of future openings in positions for which Hoffman applied or substantially equivalent positions.

Regarding the employee applicants, Judge Kennedy concluded that Respondent maintained an unlawful hiring policy that excluded from consideration for hire those applicants who wished to maintain their union membership or who wished to exercise Section 7 rights and that this policy resulted in a refusal to consider violation. (ALJD P 15 L 1-5). The proposed order includes a make-whole remedy for any employee applicants who Respondent refused to consider under its unlawful policy since March 2009[4] but fails to include the standard refusal to consider remedy. (ALJD P 15 L 18-25; P 16-17). As discussed above, FES established the standard Board remedy for refusal to consider violations. Any employee applicants who Respondent refused to consider due to its unlawful employment policy are entitled to that standard remedy. Thus, the proposed order and Notice should include language requiring Respondent to place employee applicants who Respondent failed to consider due to its unlawful employment policy, in the position they would have been in, absent discrimination, for consideration for future openings and to consider them for the openings in accord with nondiscriminatory criteria; and language requiring Respondent to notify the employee applicants, the Charging Party, and the Regional Director of Region 27 of future openings in positions for which they applied or substantially equivalent positions.

[4] A make-whole remedy is not the standard remedy for a refusal to consider violation. However, the compliance proceedings are an appropriate place to determine whether a refusal to consider discriminatee would have been selected for subsequent job openings in the absence of the proven discriminatory failure to consider and, therefore, entitled to a make whole remedy. FES, 331 NLRB at 15-16. Thus, Judge Kennedy's make-whole remedy can be read to apply to only those employee applicants after March 2009, that the General Counsel can establish at the compliance stage would have been hired, in the absence of Respondent's discriminatory refusal to consider. Id.

**B. The Administrative Law Judge erred by failing to order Respondent to provide the Regional Director with the names of all employee applicants since March 2009 and the dates they applied to work for Respondent.**

Judge Kennedy concluded that Respondent refused to consider for hire employee applicants who refused to renounce their Section 7 rights pursuant to an unlawful hiring policy under which it required employee applicants to sign yellow dog contracts, in violation of Section 8(a)(3) and (1) of the Act. (ALJD P 15 L 1-5). The Judge further concluded that Respondent's unlawful hiring policy has been in place since March 2009 and that Respondent has failed to rescind this policy. (ALJD P 15 L 17-19). As part of the remedy for this violation, Judge Kennedy determined that Respondent should be required to supply the Regional Office with the "names and dates of all job applicants since March 2009." (ALJD P 15 L 19-20). The purpose of this requirement is to enable the Region, through the compliance process, to determine whether Respondent refused to consider for hire any employee applicants since March 2009 under its unlawful hiring policy. (ALJD P 15 L 18 to 22). Judge Kennedy's use of the language "dates of all job applicants" is slightly ambiguous with respect to its intended meaning. However, in context of the reasoning behind the requirement, it can be inferred that Judge Kennedy meant to require Respondent to provide the Regional Director with the dates the employee applicants submitted their applications.

The Judge's directive to supply the Region with the names of all employee applicants since March 2009 and the dates they applied to work for Respondent, is not reflected in the proposed order. The absence of this directive in the proposed order is undoubtedly an inadvertent error as there is no record evidence indicating otherwise. Thus, the proposed order should include language requiring Respondent to provide the

Regional Director with the names of all employee applicants since March 2009 and the dates they applied to work for Respondent.

**C. The Administrative Law Judge erred by failing to order Respondent to provide the Regional Director with the employment applications of all employee applicants since March 2009 and the most recent contact information for all such employee applicants**

In addition to providing the Region with the names of all employee applicants since March 2009 and the dates of their application, General Counsel seeks an order requiring Respondent to provide the Region with the employment applications and the most recent contact information for all employee applicants since March 2009. This information will enable the Region to effectuate Judge Kennedy's remedy for the employee applicants. Specifically, it will provide the Region with the means to contact these potential discriminatees during the compliance process to determine, pursuant to the Judge's order, whether Respondent refused to consider any of those individuals under its unlawful hiring policy. Thus, the proposed order should include language requiring Respondent to provide the Regional Director with the employment applications and the most recent contact information for all employee applicants since March 2009.

**D. The Administrative Law Judge erred by failing to order Respondent to preserve and make available to the Regional Director records for purposes of backpay calculations.**

Judge Kennedy's proposed order requires Respondent to "[m]ake whole, with interest, any employment applicant after March 2009 who it failed to consider for employment due to its unlawful employment policy." (ALJD P 16 L 28-29). In similar cases involving make-whole remedies, the proposed order typically includes a provision requiring the Respondent to preserve and make available to the region, records

necessary to enable the Region to analyze the amount of backpay due under the terms of the order. See NLS Group, 352 NLRB 744, 745 (2008); Toering Electric, 351 NLRB 225, 237 (2007). Accordingly, the proposed order should include language requiring the Respondent to "preserve and, within 14 days of a request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order."

**E. The Administrative Law Judge erred by failing to order Respondent to mail the Notice to Employees to all employees and to all job applicants since March 2009.**

The proposed order includes the traditional notice posting language requiring Respondent to post the Notice at its jobsite for 60 days. (ALJD 16). In addition to the traditional posting requirements, the General Counsel seeks an order requiring Respondent to mail copies of the Notice to all employees and employee applicants since March 2009. Remedial matters are traditionally within the Board's province and the Board has broad discretion to fashion remedies that will most effectively effectuate the purposes of the Act. Blockbuster Pavilion, 331 NLRB 1274, 1275 (2000); see also Abramson, LLC, 345 NLRB 171, 178 fn.3 (2005).

Here, an order requiring Respondent to mail the Notice to all employees and employee applicants is necessary to effectuate the purposes of the Act. The employee applicants were never hired by Respondent and are therefore dispersed. Without a mailing of the Notice, these applicants are unlikely to be notified of Respondent's unfair labor practices and the remedy they could be entitled to receive. In addition, Respondent's current employees work at locations other than Respondent's facility.

The Board has ordered notices to be mailed under similar circumstances. See NLS Group, 352 NLRB at 745 (requiring mailing of the notice where employees work in widely scattered locations); Abramson,345 NLRB at 177 fn. 3 (ordering the mailing of the notice to current and former employees, even where the general counsel did not request the remedy, because the unit employees worked on individual construction job sites across two states); Southwestern Electric Co., 330 NLRB 170 (2000) (requiring the mailing of notices to individuals whose names appeared on the union's out-of-work list); Blockbuster Pavilion, 331 NLRB at 1275 (ordering the respondent to mail notices to former and present employees where the employees work on a seasonal basis and for a variety of employers). Accordingly, Respondent should be ordered, in addition to posting copies of the Notice at its facility, to mail copies of the Notice to all employees and to all employee applicants who applied to work for Respondent since March 2009.

**CONCLUSION**

For the reasons stated, the General Counsel respectfully requests that the Board modify the Judge's proposed order to require Respondent to take the following affirmative action:

(1) Place Aaron Hoffman and any employee applicant discriminatees in the position they would have been in, absent discrimination, for consideration for future openings and to consider them for such openings in accord with nondiscriminatory criteria;

(2) Notify Aaron Hoffman and any employee applicant discriminatees, the Charging Party, and the Regional Director of Region 27 of future openings in positions

for which Aaron Hoffman or the employee applicant discriminatees applied or substantially equivalent positions;

(3) Provide the Regional Director with the names of all employee applicants since March 2009, the dates they applied to work for Respondent, their employment applications, and the most recent contact information for those applicants;

(4) Preserve and, within 14 days of a request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order; and

(5) Mail copies of the Notice to all employees and employee applicants who applied to work for Respondent since March 2009.

Dated at Denver, Colorado, this 17th day of September, 2010.

Respectfully submitted,

Kristyn A. Myers

Kristyn A. Myers

Counsel for the Acting General Counsel
National Labor Relations Board
Region 27
700 North Tower, Dominion Plaza
600 Seventeenth Street
Denver, Colorado 80202
(303) 844-6657
Kristyn.Myers@nlrb.gov

**CERTIFICATE OF SERVICE**

I hereby certify that a copy of Acting General Counsel's Brief in Support of Exceptions to the Administrative Law Judge's Decision and Order, together with a Certificate of Service, was served as indicated below, on September 17, 2010, on the following parties:

Office of the Executive Secretary
National Labor Relations Board
1099 14th Street, N.W.
Washington, DC 20570
E-FILE: www.nlrb.gov

ALJ James M. Kennedy
National Labor Relations Board
901 Market Street, Suite 300
San Francisco, CA 94103-1779
E-FILE: www.nlrb.gov

Natalie C. Moffett
Osborne Law Offices, P.C.
4301 Connecticut Avenue NW, Suite 108
Washington, DC
E-Mail at NMoffett@Osbornelaw.com

Ron Aho
Alliance Mechanical, Inc.
Post Office Box 1855
Eagle, CO 81631
E-Mail at AllianceMechanical@CenturyTel.net

Richard Gessner
Road Sprinkler Fitters, Local Union No. 669
Post Office Box 471748
Aurora, CO 80047
E-Mail at rgess6691@comcast.net

Kristyn A. Myers
Counsel for the General Counsel