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**UNITED STATES OF AMERICA**

**BEFORE THE NATIONAL LABOR RELATIONS BOARD, REGION 28**

MEDCO HEALTH SOLUTIONS OF  
LAS VEGAS, INC.,

Respondent,

and

UNITED STEEL, PAPER AND  
FORESTRY, RUBBER,  
MANUFACTURING, ENERGY,  
ALLIED INDUSTRIAL AND SERVICE  
WORKERS INTERNATIONAL UNION,  
AFL-CIO, CLC, LOCAL 675,

Charging Party.

Case Nos. 28-CA-22914 and  
28-CA-22915

**CHARGING PARTY UNITED  
STEEL, PAPER AND  
FORESTRY, RUBBER,  
MANUFACTURING, ENERGY,  
ALLIED INDUSTRIAL AND  
SERVICE WORKERS  
INTERNATIONAL UNION,  
AFL-CIO, CLC, LOCAL 675'S  
ANSWERING BRIEF TO  
RESPONDENT'S EXCEPTIONS  
TO THE DECISION OF THE  
ADMINISTRATIVE LAW JUDGE**

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## I. INTRODUCTION

Respondent Medco Health Solutions of Las Vegas, Inc. (“Employer” or “Medco”) excepts to the Administrative Law Judge William G. Kocol’s findings that it violated Section 8(a)(1) of the National Labor Relations Act (the “Act”) by: “prohibiting employees from wearing clothing that display messages that protest working conditions, inviting employees to quit their employment in response to their protest of working conditions and by maintaining an overly broad work rule that prohibits employees from wearing clothing with messages that are provocative, insulting, or confrontational.” Medco Health Solutions of Las Vegas, Inc.’s Brief in Support of Exceptions to Decision and Order of Administrative Law Judge (“Exceptions Brief”) at 5; Decision of the Administrative Law Judge, dated September 14, 2010 (“ALJD”) at 10. Further, the Employer excepts to the ALJ’s finding that it violated Sections 8(a)(5) and 8(a)(1) of the Act “by changing its dress code...without first allowing the Union an opportunity to bargain on the matter.” Exceptions Brief at 7; ALJD at 10. For the reasons set forth below, each of the ALJ’s findings should be sustained and each of Respondent’s exceptions should be overruled.

First, the Employer prohibited employee Michael Shore from wearing a union t-shirt expressing protected concerted complaints about its “WOW” employee incentive program, and inviting him to seek employment elsewhere if he didn’t like the program. The Employer’s contention that Shore was not engaging in protected concerted activity and that the “WOW” program is not a term or condition of employment is without merit. Although Shore was the only employee to wear the shirt on the day in question, other

employees had also expressed criticism of the “WOW” program, and concerns about the program were discussed at a nationwide meeting of the United Steelworkers. In any case, the right to wear union apparel is protected by Section 7, regardless of how many employees wear the item in question.

Second, the employer maintained and enforced in violation of Section 8(a)(1) an overbroad dress code rule prohibiting articles of clothing that contain words or images deemed “confrontational . . . , insulting or provocative.” A reasonable employee would understand these words to ban content protected by Section 7, particularly in light of the Employer’s interpretation of the rule as barring anything critical of Medco and its enforcement of the rule against an employee who wore a shirt expressing mild criticism of an employee incentive program.

Finally, the ALJ correctly held that the Employer violated Sections 8(a)(5) and 8(a)(1) by unilaterally implementing a new policy requiring pharmacists to wear lab coats at all times and requiring all employees to wear business casual attire on tour days. The policy was presented to Charging Party Local 675 of the United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union, AFL-CIO, CLC (“Union”) as a *fait accompli*, and when the Union demanded bargaining, Medco responded that it was not a mandatory subject of bargaining and that the Employer would not bargain over the issue. No collective bargaining agreement was in effect when this change took place, but in any event, the management rights clause on which Medco relies does not clearly and unmistakably waive the Union’s right to bargain over work rules that can lead to discipline.

## II. ARGUMENT

### A. **Exceptions 2-13, 32, 34, 36, and 37 Should Be Overruled – the ALJ Correctly Held That Medco Violated Section 8(a)(1) When It Prohibited Shore From Wearing a Shirt That Contained a Protected, Concerted Complaint Regarding a Term or Condition of Employment, and Its Prohibition Is Not Justified by Special Circumstances**

#### 1. **Wearing the “WOW” Shirt Was Protected under Section 7 Because It Was Both “Concerted” and “For the Purpose of Collective Bargaining or Other Mutual Aid or Protection” (Exceptions 2, 3, 7-10, 32, 34, 36, and 37)**

According to the Employer, the ALJ erroneously concluded that Shore engaged in protected activity when he wore the “WOW” t-shirt because Shore was the only employee who wore the shirt on the day in question and “[h]e did not discuss the fact that he was going to wear the t-shirt to work with any other employees, and no one in the Union directed Shore to wear the t-shirt to work.” Exceptions Brief at 22.

First, the Section 7 right to wear union apparel does not depend on a finding that two or more employees wore the same pin, button, or shirt. In applying the rule protecting employees who wear union insignia, the Board has never required a finding that the same item be worn by more than one employee. Cases have found violations where, as here, the employer ordered one employee not to wear an item of union apparel. *E.g., Borman’s Inc.*, 254 NLRB 1023 (1981), *enf. denied* 676 F.2d 1138 (6th Cir. 1982); *cf. Noah’s New York Bagels, Inc.*, 324 NLRB 266, 275 (1997) (one employee wore shirt found unprotected on other grounds). And the Board has struck down unlawful rules banning union insignia despite no evidence of any employee attempts to wear such items. *E.g., Marriott Corp. and Hosp.*, 313 NLRB 896, 898 (1994).

In any event, the fact that Shore was the only employee who wore the shirt does not mean he was the only employee who expressed criticism of the “WOW” program. Both Shore and Marissa Osterman, the bargaining unit chairperson, received complaints about the program, Tr. 258:23-259:15 (Osterman); Tr. 233:9-234:21 (Shore), and the Employer admits that some employees have expressed discontent. Tr. 35:23-36:6 (Agnew); Tr. 286:2-23 (Shanahan). Moreover, the “WOW” program is a nationwide program, and the shirts were distributed at a nationwide meeting at which representatives of various United Steelworkers local unions representing Medco employees around the country discussed concerns about the program, and possible action they could take, including presenting the Employer with a survey showing employees’ general discontent with the program. Tr. 259:16-263:6 (Osterman).

These facts undoubtedly establish that Shore was engaged in concerted activity when he wore a shirt protesting the “WOW” program. The Board has long held that an individual raising group concerns is engaged in concerted activity. *See generally Interboro Contractors*, 157 NLRB 1295 (1966), *enfd.* 388 F.2d 495 (2d Cir. 1967). For example, in *Alton H. Piester*, 353 NLRB No. 33, slip op. at 5 (2008), *enfd.* 591 F.3d 332 (4<sup>th</sup> Cir. 2010), the Board held that an employee’s individual complaint about a fuel surcharge assessed by the employer was protected because other employees had previously raised similar, though not identical, complaints. Likewise, where an individual expresses his or her concerns to fellow employees about certain terms and conditions of employment, that individual is engaged in concerted activity and is entitled to the Act’s protection. *St. Margaret Mercy Healthcare Ctrs.*, 350 NLRB 203, 204-05

(2007), *enfd.* 519 F.3d 373 (7<sup>th</sup> Cir. 2008). An individual’s action need not be authorized by the union or other employees as long as its purpose is to raise concerns about an employment issue on behalf of others or to rally other employees to the same cause. *Tampa Tribune*, 351 NLRB 1324 (2007); *see also NLRB v. Caval Tool Div., Chromalloy Gas Turbine Co.*, 262 F.3d 184 (2d Cir. 2001) (holding that a single employee attempting to initiate group action is engaged in concerted activity).

**2. The “WOW” Program Is a Term or Condition of Employment (Exceptions 2, 4, 5, 7, 8, 10-13, 32, 34, 36, 37)**

The Employer also argues that the ALJ erroneously concluded that the “WOW” program is a term or condition of employment. Exceptions Brief at 23-27. While concerted activity need not relate to a “term or condition of employment” within the meaning of Section 9(a) of the Act to be deemed protected, the “WOW” program is a term or condition of employment.

The right of employees to engage in concerted activity for “mutual aid or protection” includes the right to seek to “improve their lot as employees through channels outside the immediate employee-employer relationship.” *Eastex, Inc. v. NLRB*, 437 U.S. 556, 565 (1978). In evaluating an action’s protected status, the Board has never inquired into whether the subject matter of a concerted action is a mandatory subject of bargaining. Indeed, actions dealing with such subjects as professional licensing, immigration, and hospital staffing ratios have been deemed protected by Section 7, even though they are not mandatory subjects, and in fact, are not even within the power of employers to change. *Kaiser Engineers*, 213 NLRB 752, 755 (1974), *enfd.* 538 F.2d

1379 (9<sup>th</sup> Cir. 1976); *Riverboat Services of Indiana, Inc.*, 345 NLRB 1286, 1294, 1297 (2005); *Misericordia Hospital Medical Center*, 246 NLRB 351, 356 (1979), *enfd.* 623 F.2d 808 (2d Cir. 1980); *Frances House, Inc.*, 322 NLRB 516, 522-23 (1996). And of course, the right to wear union insignia does not depend on whether the insignia contains some commentary about working conditions. Thus, whether or not the “WOW” program is a mandatory subject of bargaining is immaterial. It is a workplace issue and employees are free to express their opinions about it.

Nevertheless, the “WOW” program is a term or condition of employment. Even small, non-monetary incentives are mandatory subjects of bargaining when their purpose is to serve as a “carrot” prompting employees to be more productive. *EIS Brake Parts*, 331 NLRB 1466, 1469 (2000); *U-Haul Co. of Nevada, Inc.*, No. JD(SF) 65-05, 2005 WL 2574009 (NLRB Div. of Judges, Sept. 30, 2005) (holding that monthly lunches are mandatory subject of bargaining because they “have been held out as a ‘carrot’ to induce increased production by unit employees”). “WOW” award recipients receive lanyards and certificates and are recognized publicly. Tr. 32:12-15, 34:25-35:6 (Agnew); GC Ex. 2. Tom Shanahan, the Employer’s former Vice President and General Manager considers the “WOW” program an “integral program for employees” that is designed to “give[] them a good feeling about the job and the work they’re doing everyday.” Tr. 283:3-8, 343:24-344:14 (Shanahan). In his view, “WOW” awards demonstrate an employee’s expertise, and Medco uses the “best practices” of “black belt” recipients “to drive people to be ... better performers.” Tr. 288:25-289:8 (Shanahan). Although the Employer contends that the “WOW” awards are not used to determine pay raises or promotions, it

keeps a record of each employee's "WOW" awards and some of the same criteria used to select "WOW" recipients are also used in making promotion decisions. Exceptions Brief at 26; Tr. 105:20-106:6, 109:23-112:18 (Agnew).<sup>1</sup> The Employer and its high level management officials clearly consider the "WOW" awards to be meaningful and have invested a great deal in the program. There is a full-time "WOW" coordinator at the Las Vegas facility who is responsible for administering the program. Tr. 44:5-9, 283:21-25 (Shanahan). The "WOW" award ceremony is hosted by the facility's Vice President and is attended by members of management. Tr. 284:22-23 (Shanahan). The "WOW" award ceremonies are held every week and last approximately 25 to 45 minutes, Tr. 284:25 (Shanahan). Employees are relieved of their work duties and remain on paid time when they participate. Tr. 285:2-3 (Shanahan). Therefore, the "WOW" program is plainly a term or condition of employment.

As the ALJ has pointed out, the cases the Employer cites in support of its position that the "WOW" program is not a term or condition of employment are inapposite. ALJD at 5-6 (distinguishing *New River Industries*, 945 F.2d 1290 (4th Cir. 1991), *Southwestern Bell Tel. Co.*, 200 NLRB 667 (1972), *Noah's New York Bagels*, 324 NLRB 266, 275 (1997)). Moreover, it is important to note that unlike *New River Industries* and *Southwestern Bell Tel. Co.*, the case here involves more than just an instance of an employee "belittling" or "thumbing [his] nose...at the company and management." *New*

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<sup>1</sup> Given the importance it places on the "WOW" program, the Employer's contention that it does not even consider an employee's "WOW" awards in making promotion decisions is not credible. At the very least, employees would reasonably

(Footnote continued)

*River Industries*, 945 F.2d at 1295; *Southwestern*, 200 NLRB at 668. As previously noted, the awards ceremonies were not a one-time event. *Cf. New River Industries*, 945 F.2d at 1294-1295 (one time offer of free ice cream cone did not amount to a term and condition of employment). The Employer devoted much time and resources to the “WOW” program. Tr. 44:5-9, 283:21-25 (Shanahan) (full-time “WOW” coordinator at the Las Vegas facility); Tr. 284:22-23 (Shanahan) (“WOW” ceremony hosted by Vice President and attended by members of management). Employees also spent 25 to 45 minutes every week attending “WOW” award ceremonies. Tr. 284:25 (Shanahan). Employee discontent with the “WOW” program reached such a critical mass that the Union had discussed, on a nationwide level, possible action it could take to bring the employees’ concerns to Medco’s attention. Tr. 259:16-263:6 (Osterman).

### **3. Medco Violated the Act by Inviting Shore to Quit His Employment (Exceptions 12 and 13)**

The Employer cites no authority to support its position that the ALJ erred in finding that Medco violated the Act when, in response to Shore’s criticism of the “WOW” program, Shanahan conceded he “told [Shore] that [if] he didn’t feel he could support the programs that we offered or support the company initiatives that, you know, there were plenty of jobs out there. Maybe this wasn’t the place for him.” Tr. 297:10-13 (Shanahan); Exceptions Brief at 27, fn. 3. However, the Board has long held that comments materially identical to Shanahan’s admitted statement constitute unlawful threats. *Alton H. Piester*, 353 NLRB No. 33, slip op. at 2-3 (2008), *enfd.* 591 F.3d 332

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believe that “WOW” awards are considered when Medco selects “leads.”

(4<sup>th</sup> Cir. 2010) (manager told employees “that if they didn’t like [a change in the fuel surcharge policy], they could ‘clean out their truck and move to another job’”); *Jupiter Medical Center Pavilion*, 346 NLRB 650, 651 (2006) (manager told employee who complained about working conditions, “[m]aybe this isn’t the place for you ... there are a lot of jobs out there”); *House Calls, Inc.*, 304 NLRB 311, 313 (1991) (manager told employees who complained about late paychecks “that they could quit if they did not like it”); *Rolligon Corp.*, 254 NLRB 22, 22 (1981) (manager told union supporters to “go and find a job where you will be satisfied”). Therefore, the Employer violated Section 8(a)(1) by inviting Shore to quit if he couldn’t support the “WOW” program.

**4. The “WOW” T-Shirt is Union Apparel Protected by Section 7, Whose Prohibition Is Not Justified by Special Circumstances (Exception 6)**

The Section 7 right of employees to wear union apparel in the workplace was established long ago in *Republic Aviation Corp. v. NLRB*, 324 U.S. 793, 801-03 (1945). “[E]mployees have a protected right under Section 7 of the Act to make known their concerns and grievances pertaining to the employment relation and, therefore, to wear union insignia while at work.” *Bell-Atlantic Pennsylvania*, 339 NLRB 1084, 1086 (2003), *enfd.* 99 Fed. Appx. 233 (D.C. Cir. 2004). That right encompasses not only buttons and pins, but t-shirts as well. “Absent ‘special circumstances’ an employer cannot prohibit its employees from wearing union insignia, buttons, or T-shirts while at work.” *North Hills Office Services, Inc.*, 346 NLRB 1099, 1113 (2006).

The right to wear union apparel is not limited to shirts or pins containing a union’s name, logo, or emblem, and nothing else. The Board has repeatedly held that wearing

union apparel with messages that comment on working conditions is protected by Section 7. Specifically, it is protected activity to wear an article of clothing that “communicate[s] legitimate employee[] concerns about ... working conditions.” *Bell-Atlantic*, 339 NLRB at 1086; *see also Marriott Corp. and Hosp.*, 313 NLRB 896, 898 (1994) (“The right to protest in words or display opinion-revealing insignia, where in either case the basis is unionism or considerations of working conditions, is not to be impeded by an employer absent special circumstances.”). For example, in *Escabana Paper Co.*, 314 NLRB 732 (1994), *enfd. sub nom. NLRB v. Mead Corp.*, 73 F.3d 74 (6th Cir. 1996), the Board held that the employer, Mead, could not prohibit buttons stating “Just Say NO-Mead” and “Hey Mead-Flex this.” In *Borman’s Inc.*, 254 NLRB 1023 (1981), *enf. denied* 676 F.2d 1138 (6th Cir. 1982), the Board held protected a t-shirt that read “I’m tired of bustin’ my ass” next to the employer’s name. *See also W San Diego*, 348 NLRB 372, 373-74 (2006) (holding protected button reading “Justice Now! Justicia Ahora!”); *Midstate Telephone Corp.*, 262 NLRB 1291 (1982), *enf. denied* 706 F.2d 401 (2d Cir. 1983) (holding protected t-shirt referencing past strike).

In other cases, the Board has found that employees who wore shirts displaying messages critical of their employers engaged in protected activity but that the employees’ Section 7 rights were overridden by special circumstances justifying the prohibition of the shirts. Special circumstances exist only where union apparel “may jeopardize employee safety, damage machinery or products, exacerbate employee dissension, or unreasonably interfere with a public image that the employer has established, as part of its business plan, through appearance rules for its employees.” *Bell-Atlantic*, 339 NLRB

at 1086.

The Employer argues that the ALJ erred by not deciding the issue of whether special circumstances existed to justify prohibiting Shore from wearing the t-shirt in the presence of customers. Exceptions Brief at 29. However, no special circumstances justify the prohibition of the “WOW” t-shirt. Cases applying the special circumstances doctrine invariably concern employees who have significant contact with the public and/or wore buttons or shirts containing obscene or inflammatory content or messages disparaging the employer’s product or service. *E.g., Noah’s New York Bagels*, 324 NLRB 266, 275 (1997) (significant customer contact; t-shirt mocked employer’s product and appealed to ethnic prejudice); *Pathmark Stores, Inc.*, 342 NLRB 378 (2004) (significant customer contact; t-shirt suggested that the employer was “cheating” customers); *Leiser Construction, LLC*, 349 NLRB 413, 414-15 (2007), *enfd.* 281 Fed. Appx. 781 (10<sup>th</sup> Cir. 2008) (sticker depicted person urinating on a rat); *Komatsu America Corp.*, 342 NLRB 649, 650 (2004) (t-shirt appealed to ethnic prejudice); *see also Bell Atlantic*, 339 NLRB at 1086 (Board deferred to arbitrator’s ruling that t-shirt was unprotected because employees had significant customer contact and shirt depicted employees as bloodied “road kill” squashed by employer).

Neither of these conditions is present in this case. First, Shore and other employees at the Las Vegas facility do not have face-to-face contact with customers or clients. Shore was a coverage review representative, and interacted with patients, doctors, and pharmacists only over the phone. Tr. 215:13-216:18 (Shore). Thus, there is little danger that any article of clothing worn by Shore or another employee would

“unreasonably interfere with a public image that the employer has established.” *Bell-Atlantic*, 339 NLRB at 1086.

With one important exception, the Medco facility is totally closed to the public. Tr. 26:18-28:8 (Agnew). The exception is that clients and prospective clients are taken on tours of the facility to see how Medco operates. Tours occur on a sporadic basis, sometimes as often as two or three times in one week, and some weeks not at all. Employees typically are notified ahead of time that a tour is scheduled. Tr. 62:9-64:2, 130:3-132:8 (Agnew); Tr. 217:6-22 (Shore); Tr. 299:3-301:22 (Shanahan). Bargaining unit employees never interact with people taking tours, and tours pass no closer than eight feet from Shore’s work area. Tr. 217:17-22 (Shore); Tr. 301:6-22 (Shanahan).

However, the ALJ was correct in finding the distinction between tour days and other days is not relevant in this case because the Employer’s rule was not narrowly constructed to apply only when customers may be present at the facility. ALJD at 6; *USF Red Star, Inc.*, 339 NLRB 389, 391 (2003) (where employer does not distinguish between public areas and non-public areas in its prohibition, Board need not consider whether special circumstances exist in public areas).<sup>2</sup> The Employer admits that Shanahan instructed Shore never to wear the “WOW” t-shirt to work, regardless of whether it was a tour day or not. Tr. 50:24-52:3, 60:5-61:7, 64:15-23, 212:9-15 (Agnew); Tr. 294:12-

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<sup>2</sup> In any event, special circumstances would not justify the prohibition, even on tour days. The fact that visitors occasionally walk past bargaining unit employees without speaking or interacting with them does not constitute special circumstances, particularly in light of the comparatively mild nature of the “WOW” shirt’s message. Otherwise, the special circumstances doctrine would be the exception that swallows the rule, as few workplaces are sealed off from outsiders at all times.

297:13 (Shanahan). Agnew testified that it would be unacceptable for Shore to wear the shirt on any day because it was “insulting to the Company.” Tr. 64:15-23, 212:9-15 (Agnew).

Second, there is nothing obscene or inflammatory about the shirt. It contains no profanity and no sexual or violent images, and it does not disparage the Employer’s product or service. The shirt expresses mild criticism of a working condition, and it is that criticism – and only that criticism – that drew Shanahan’s ire. Shanahan told Shore that he considered the shirt a “slam against the WOW program and him personally.” Tr. 230:4-11 (Shore).

**B. Exceptions 1, 11, 14-16, 32, 34, 36, 37 Should Be Overruled - the Dress Code Provision Barring Clothing with “Confrontational ..., Insulting or Provocative” Messages Is Overbroad and Unlawfully Restrains and Coerces Employees in the Exercise of Their Section 7 Rights and the ALJ Correctly Declined to Dismiss the Challenge to the Provision As Untimely**

**1. The Dress Code Provision Is Overbroad (Exceptions 1, 11, 15, 16, 32, 34, 36, 37)**

“[A]n employer violates Section 8(a)(1) when it maintains a work rule that reasonably tends to chill employees in the exercise of their Section 7 rights.” *Lutheran Heritage Village – Livonia*, 343 NLRB 646, 646 (2004) (citing *Lafayette Park Hotel*, 326 NLRB 824, 825 (1998)). Where a “rule does not explicitly restrict activity protected by Section 7, the violation is dependent upon a showing of one of the following: (1) employees would reasonably construe the language to prohibit Section 7 activity; (2) the rule was promulgated in response to union activity; or (3) the rule has been applied to restrict the exercise of Section 7 rights.” *Lutheran Heritage Village*, 343 NLRB at 647.

Any ambiguity in a rule's language is construed against the employer. *Lafayette Park Hotel*, 326 NLRB at 828. "The Board has long held that legitimate managerial concerns to prevent harassment do not justify policies that discourage the free exercise of Section 7 rights by subjecting employees to investigation and possible discipline on the basis of the subjective reactions of others to their protected activity." *Consolidated Diesel Co.*, 332 NLRB 1019, 1020, 1020 n.6 (2000) (collecting cases). Thus, the Act prohibits rules whose words are "vague and ambiguous and so overly broad as to fail to define permissible conduct" without the application of significant discretion by the employer. *Advance Transp. Co.*, 310 NLRB 920, 925 (1993); *see also Palms Hotel & Casino*, 344 NLRB 1363, 1369 (2005) (Member Liebman, dissenting) (explaining the problem of "amorphous" words).

A corresponding doctrine, discussed in detail in Section II.A.4 above, is the right of employees to wear union apparel in the workplace, including articles of clothing containing messages that comment on working conditions. *Bell-Atlantic Pennsylvania*, 339 NLRB 1084, 1086 (2003), *enfd.* 99 Fed. Appx. 233 (D.C. Cir. 2004). The interplay of these two doctrines bars employers from maintaining work rules that reasonably tend to chill employees in the exercise of their right to wear union apparel expressing criticism of working conditions. By prohibiting clothing containing messages deemed "confrontational ..., insulting or provocative," the work rule at issue here violates this principle and infringes on employees' Section 7 rights. Although the rule does not bar Section 7 activity on its face, it fails both the first and third prongs of the test set forth in *Lutheran Heritage Village*, 343 NLRB at 647.

The Employer argues that because the parties had stipulated that Medco allowed employees to wear union-related t-shirts, employees could not have possibly construed Medco's policy to prohibit them from wearing union related clothing. Exceptions Brief at 27-28. It is clear from the record that what was meant by the stipulation was that the parties agreed Medco allowed employees to wear t-shirts bearing the union insignia or name. Tr. 235:25 ("the issue is no longer the front.") (Zaken). Shore's t-shirt displayed the insignia of United Steelworkers Local 993 on the front and the words "I don't need a WOW to do my job" on the back. Tr. 221:13-222:15 (Shore); GC Ex. 5. Therefore, the issue remains whether employees would reasonably construe the rule to prohibit them from wearing apparel containing commentary on working conditions at Medco, whether or not such apparel bears the union insignia.

First, employees would reasonably fear that protected messages are prohibited by the Employer's rule because of the vagueness of the words "confrontational," "insulting," and "provocative." The Board has held unlawful a rule barring solicitation that is "insulting ... or would tend to disrupt order, discipline or production within the plants," *Great Lakes Steel*, 236 NLRB 1033, 1037 (1978), *enfd.* 625 F.2d 131 (6<sup>th</sup> Cir. 1980), a rule prohibiting "harassment, intimidation, distraction, or disruption of another employee," *Advance Transp. Co.*, 310 NLRB 920, 925 (1993), and rules banning employees from "[m]aking false, vicious, profane or malicious statements toward or concerning the [employer] or any of its employees." *Lafayette Park Hotel*, 326 NLRB 824, 828 (1998), *enfd.* 203 F.3d 52 (D.C. Cir. 1999) (citing *American Cast Iron Pipe Co.*, 234 NLRB 1126 (1978), *enfd.* 600 F.2d 132 (8th Cir. 1979); *Cincinnati Suburban Press*,

289 NLRB 966, 975 (1988); *Spartan Plastics*, 269 NLRB 546, 552 (1984)). Likewise, in *Consolidated Diesel Co.*, 332 NLRB 1019 (2000), the Board rejected a harassment policy which subjected employees to investigation for “any unwelcome action, intended or not, which is considered offensive [by] a receiver or third party.” *Id.* at 1019-20.

As in *Consolidated Diesel*, the rule here would lead employees to believe that even a message expressing mild criticism of the Employer could subject them to discipline if only one person deemed the message “confrontational,” “insulting,” or “provocative.” These terms are even more vague than words such as “vicious” and “malicious,” deemed unlawful in *Lafayette Park Hotel* and the cases cited therein, which at least connote a clear intent to offend on the part of the speaker. They are certainly more ambiguous than the words “false” and “profane,” which have generally understood meanings.

Second, employees who fear that protected messages are prohibited by the Employer’s rule would apparently be correct in their assessment because the rule has been applied to restrict Section 7 rights. Medco asserts that the t-shirt worn by Shore, containing nothing more than a union logo and the phrase “I don’t need a WOW to do my job,” violates the dress code rule, despite the fact that it displays no profanity or obscene images, makes no false statements of fact, and does nothing to disparage the Employer’s products or services. In Medco’s view, a t-shirt expressing mild criticism of an internal employee incentive program constitutes “degrading, confrontational, slanderous, insulting or provocative” clothing.

Indeed, Shanahan, recently the highest ranking executive at the Las Vegas facility,

readily admitted that the rule is intended to ban any clothing containing messages that are critical of the Employer, testifying that “confrontational” means any statement “that obviously [would] be offensive to another individual or to a group of individuals,” including “with respect to the company,” Tr. 290:20-291:1 (Shanahan), and that “insulting” means “a direct knock ... at a person, policy, program, [or] the company.” Tr. 291:3-8 (Shanahan).

Thus, recent cases in which the Board approved certain work rules limiting employee speech do not apply here. In *Palms Hotel & Casino*, 344 NLRB 1363 (2005), the Board found lawful a rule prohibiting “any type of conduct, which is or has the effect of being injurious, offensive, threatening, intimidating, coercing, or interfering with fellow Team Members or patrons.” *Id.* at 1367. And in *Lutheran Heritage Village – Livonia*, 343 NLRB 646 (2004), the Board found lawful rules barring “abusive and profane language,” “harassment,” and “verbal, mental and physical abuse.” *Id.* at 647. *Lutheran Heritage Village* is easily distinguishable, as Medco’s rule reasonably tends to capture a much larger universe of messages, including speech commenting on workplace issues using clean language and without targeting individuals for harassment. And in *Palms*, the terms used to describe prohibited speech, words such as “threatening,” “intimidating,” and “coercive,” are plainly designed to capture conduct whose *purpose* is to attack or coerce another individual, not merely to express commentary about working conditions. Moreover, unlike here, there was no indication in *Palms* that the rule at issue had been used to prohibit Section 7 activity or that the managers responsible for enforcing the rule interpreted it as prohibiting Section 7 activity. *Id.* at 1368.

Further, although the holdings of *Lutheran Heritage Village* and *Palms* are not controlling here, those cases were wrongly decided and should be overruled. As Members Liebman and Walsh point out in their dissent in *Lutheran Heritage Village*: “[T]he ill-defined scope of the Respondent’s ‘verbal abuse’ and ‘abusive language’ rules, as well as its ‘no harassment’ rule, would reasonably tend to cause employees to . . . refrain from voicing disagreement with their terms and conditions of employment or vigorously attempting to organize skeptical workers.” 343 NLRB at 652. The dissenters explained:

There will no doubt be instances when an employee may consider communicating with a co-worker, even at the risk of being unwelcome, to emphasize an opinion, or to prompt a desired course of action that he is legitimately entitled to seek under the Act. Without a defining context, or limiting language, the rules at issue here could subject to discipline—and thus inhibit—an angry conversation with a supervisor expressing dissatisfaction over an evaluation, a heated discussion between employees over the benefits of unionization, or a loud protest by employees over safety conditions. . . . In the course of protected activity, tempers often flare, emotions run high, and employees sometimes do use language that is abusive but not so egregious as to cost them the protection of the Act. Section 7 protection is not limited to amiable or decorous communications. Rules against abusive language could reasonably discourage employees from Section 7 activity because they inhibit communication that would be protected under the Act.

*Id.* at 651-652. The dissenting Members asserted that while “employers have a legitimate interest in protecting themselves by maintaining rules that discourage conduct that might result in employer liability, . . . that interest is appropriately subject to the requirement that employers articulate those rules with sufficient specificity that they do not impinge on employees’ free exercise of Section 7 rights.” *Id.* at 652. Given that overbroad rules may chill completely an employee’s exercise of his Section 7 rights, *Lutheran Heritage Village* and *Palms* should be overruled. The analytic framework offered by the dissenters

is the better approach and should be adopted by the Board.

**2. The ALJ Correctly Declined to Dismiss the Challenge to Medco's Dress Code Rule (Exception 14).**

The Employer further argues that the ALJ erred in failing to dismiss the challenge to Medco's dress code rule as untimely, because the rule has existed in virtually identical form since 1997. Resp. Ex. 3; Tr. 142:21-146:11 (Agnew). This contention is without merit, as the maintenance and enforcement of an unlawful work rule is a continuing violation and it makes no difference when the rule was first promulgated, so long as it remains in effect. *North American Pipe Corp.*, 347 NLRB 836, 846 n.10 (2006); *Int'l Brotherhood of Elec. Workers, Local 6 (San Francisco Elec. Contractors Assn.)*, 318 NLRB 109, 126 (1995).<sup>3</sup>

**C. Exceptions 17-31, 33, and 35-37 Should Be Overruled – The ALJ Correctly Held That Medco Violated Sections 8(a)(5) and (1) by Changing the Dress Code Policy Without First Allowing the Union an Opportunity to Bargain Because the Management Rights Clause Did Not Constitute a Waiver of the Union's Right to Bargain and the Employer Presented the Union with a *Fait Accompli* and Refused to Bargain.**

**1. No Collective Bargaining Agreement – and No Management Rights Clause – Was In Effect at the Time of the Unilateral Change (Exceptions 21-29, 31, 33, 35, 36, 37).**

The Employer argues that the ALJ erred in finding that Medco did not have authority to unilaterally change the dress code policy to require pharmacists to wear lab coats because no collective bargaining agreement – and thus, no management rights

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<sup>3</sup> The Union also contends that the Employer waived the right to raise a statute of limitations defense by failing to plead the issue in its answer, and that the ALJ erred by allowing the Employer to amend its answer to raise the defense during the hearing. Tr.

(Footnote continued)

clause – was in effect at the time of the unilateral change. Exceptions Brief at 31.

In general, an employer must maintain existing terms and conditions of employment following union certification or the expiration of a collective bargaining agreement and prior to the execution of a new agreement. *Litton Financial Printing Div., Div. of Litton Business Systems, Inc. v. NLRB*, 501 U.S. 190, 198 (1991) (citing *NLRB v. Katz*, 369 U.S. 736 (1962); *Laborers Health and Welfare Trust Fund v. Advanced Lightweight Concrete Co.*, 484 U.S. 539, 544 n.6 (1988)). However, the Board has long recognized certain exceptions to this rule. Specifically, union security, dues checkoff, no-strike, and arbitration provisions do not survive the expiration of an agreement. *Bethlehem Steel*, 136 NLRB 1500 (1962), *remanded on other grounds sub nom. Marine & Shipbuilding Workers v. NLRB*, 320 F.2d 615 (3d Cir. 1963); *Litton Financial Printing*, 501 U.S. at 198. Likewise, “[a] management-rights clause in a collective-bargaining agreement and any waivers contained therein do not survive the expiration of the contract – absent some evidence of the parties’ intentions to the contrary. Thus, any waiver of a union’s bargaining rights that relies on a management rights clause ... is limited to the time the contract is in force.” *Clear Channel Outdoor, Inc.*, 346 NLRB 696, 703 (2006) (citing *Furniture Rentors of America*, 311 NLRB 749, 751 (1993), *enf. denied* 36 F.3d 1240 (3d Cir. 1994); *Pan American Grain Co.*, 343 NLRB 318 (2004)).

Here, from some time in 2006 until August 2009, the bargaining unit of pharmacists working for the Employer was represented by the Guild for Professional

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186:25-188:20. See *ANG Newspapers*, 350 NLRB 1175, 1180-81 (2007).

Pharmacists. Resp. Ex. 4. The Guild was decertified on August 11, 2009 and the United Steelworkers was certified in its place. Tr. 165:25-166:9 (Agnew); GC Ex. 5. The previous Guild agreement was scheduled to expire on September 1, 2009. The parties began negotiations for a successor agreement on September 21, 2009. Tr. 395:11-19 (Campbell). The new agreement was ratified on December 14, 2009, and was deemed retroactive to September 1, 2009. Tr. 361:10-12 (Webb).

The Employer claims that the parties verbally agreed to “operate under” “the current Guild contract” until a successor agreement was ratified. Tr. 83:12-85:7, 86:22-87:13 (Agnew); Tr. 325:19-326:13 (Shanahan). But there is no writing memorializing or supporting the existence of this alleged verbal agreement, and the Union firmly rejects that such an agreement was ever made. Tr. 87:6-13 (Agnew); Tr. 381:6-18, 382:8-10, 383:2-384:3 (Campbell). The Employer contends that the ALJ erred in rejecting the testimony of Shanahan and Michele Agnew, the Employer’s human resources director, that the parties agreed to continue all provisions of the Guild contract or “operate under” that contract during the pendency of negotiations for the new collective bargaining agreement. Exceptions Brief at 31; Tr. 83:12-85:7, 86:22-87:13 (Agnew); Tr. 325:19-326:13 (Shanahan). The ALJ stated: “I do not credit the testimony of Agnew and Shanahan on this issue. Their testimony was ambiguous and their demeanor was unconvincing.” ALJD at 10. Instead, the ALJ credited the testimony of David Campbell, the Union’s secretary-treasurer, that in a meeting held before bargaining commenced and before the Union had even received its certification from the Board, he simply reminded the Employer of its statutory obligation to maintain the status quo pending a new labor

agreement. ALJD at 9-10; Tr. 381:6-18, 382:8-10, 383:2-384:3 (Campbell). Indeed, Agnew admits that she does not remember what Campbell actually said. Tr. 101:24-103:15 (Agnew).

When credibility is at issue, as it is here, the ALJ's conclusions "assume added importance because [he] 'has the responsibility of evaluating the credibility of witnesses and the weight to be given their testimony.'" *Dalewood Rehabilitation Hospital, Inc. v. NLRB*, 566 F.2d 77, 80 n. 3 (9th Cir. 1977) (quoting *NLRB v. Vegas Vic*, 546 F.2d 828 (9th Cir. 1976)). In addition, when the "determination of motive or purpose hinges entirely upon the degree of credibility to be accorded the testimony of interested witnesses, the credibility findings of the Trial Examiner are entitled to special weight and are not to be easily ignored." *Ward v. NLRB*, 462 F.2d 8, 12 (5th Cir. 1972) (internal quotations omitted); *see also Universal Camera Corp. v. NLRB*, 340 U.S. 474, 496 (1951).

The ALJ also correctly found that Medco's conduct while negotiations were ongoing was consistent with maintaining the legal status quo, and not with an express agreement to "operate under" the Guild agreement. ALJD at 10. The ALJ cites, as an example, Agnew's insistence in an e-mail dated September 3, 2009 – after the purported verbal agreement took place – that there was no contract, and therefore the Employer was not obligated to grant stewards paid time for union business, which is required by Article XIV of the Guild Agreement. ALJD at 10; Resp. Ex. 4.<sup>4</sup> This e-mail was carbon copied

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<sup>4</sup> It bears noting that Agnew admitted a separate (and quite blatant) violation of  
(Footnote continued)

to Shanahan and Medco Labor Attorney Tom Pierce, neither of whom took action to correct Agnew's decision. GC Ex. 17; ALJD at 10. Another example is that the Employer failed to comply with the contract's dues checkoff provision, Tr. 205:10-206:4 (Agnew), and the Union did not attempt to force Medco to do so. Tr. 404:20-405:13 (Campbell). In sum, there is simply no evidence of an express agreement to continue the provisions of the Guild contract other than the bare, unsupported statements of Agnew and Shanahan, which were rejected as not credible by the ALJ. ALJD at 10.

**2. Even If the Management Rights Clause Was Effective at the Time of the Unilateral Change, the Implementation of the Lab Coats Policy Was Still Unlawful Because the Union Did Not Clearly and Unmistakably Waive the Right to Bargain (Exceptions 21-23).**

The Employer argues that the ALJ erred in failing to consider whether the language of the management rights clause in the Guild agreement authorized Medco to unilaterally change the dress code policy. Exceptions Brief at 31. However, the management rights clause in the Guild agreement does not effect a clear and unmistakable waiver of the right to bargain over the dress code. Resp. Ex. 4. The management rights clause in the Guild agreement (which is identical to the provision later adopted in the Steelworkers agreement, with the word "Union" being substituted for "Guild") provides in relevant part:

The promulgation and enforcement of rules and regulations not inconsistent with the provisions of this Agreement are vested in the Employer, provided that if the Guild deems any such rule or regulation to be inconsistent with the provisions of this Agreement, it shall so notify the Employer. Within

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Section 8(a)(1) in her e-mail by stating that she ordered a steward not to speak with employees about a disciplinary investigation. GC Ex. 17.

twenty-four (24) hours of notice to such effect, the Employer may withdraw the rule or regulation. Otherwise the Guild may submit it to settlement by the adjustment procedure of this Agreement but the rule or regulation shall remain in force pending such settlement.

Resp. Ex. 4; GC Ex. 7.

The Board applies the “the clear and unmistakable waiver standard in determining whether an employer has the right to make unilateral changes in unit employees’ terms and conditions of employment during the life of the collective-bargaining agreement.” *Provena St. Joseph Medical Center*, 350 NLRB 808, 810 (2007). It is well settled that a “general management-rights clause ... which refers simply to the right of the Respondent to promulgate ‘rules’ is simply too general in its language to constitute a waiver of a labor organization’s bargaining rights over rules which are backed up with discipline.” *ANG Newspapers*, 350 NLRB 1175, 1175 n.3, 1181 (2007) (citing *High-Tech Cable Corp.*, 309 NLRB 3, 4 (1992), *affd.* 25 F.3d 1044 (5th Cir. 1994); *Dorsey Trailers, Inc.*, 327 NLRB 835 (1999); *Klein Tools*, 319 NLRB 674, 687 (1995)); *see also American Benefit Corp.*, 354 NLRB No. 129, slip op. at 11 (2010) (holding that “a generally worded management rights clause ... will not be construed as a waiver of statutory bargaining rights when it does not specifically make reference to a particular mandatory subject”); *Dorsey Trailers, Inc.*, 327 NLRB 835, 836 (1999) (distinguishing management rights provisions that make specific reference to the subject matter of rules).

Here, the management rights clause does not make specific reference to dress code rules, or to any substantive subject area of rules at all, and the parties stipulated that violations of the dress code can lead to discipline. Tr. 245:2-247:3 (stipulation).

Therefore, under settled Board law, the Employer was not privileged to make unilateral changes to the dress code even while the management rights provision was in effect.

**3. The Dress Code Policy Is a Mandatory Subject of Bargaining and the Employer Implemented the Policy Without Affording the Union an Opportunity to Bargain (Exceptions 17-20, 30, 31, 33, 35-37).**

An employee dress code is a mandatory subject of bargaining, and an employer violates Sections 8(a)(5) and 8(a)(1) when it unilaterally implements changes to a dress code. *Yellow Enterprise Systems, Inc.*, 342 NLRB 804, 827 (2004) (citing *Transportation Enterprises*, 240 NLRB 551, 560 (1979), *enfd. in relevant part*, 630 F.2d 421 (7th Cir. 1980)). Here, on November 19, 2009, the Employer informed the Union that, beginning January 1, 2010, pharmacists would be required to wear lab coats at all times and all employees would be required to wear business casual attire on tour days. The following day, November 20, 2010, the Employer sent a memo to all pharmacists announcing the change. Medco presented the lab coats policy as a change the Employer had already decided to implement, not a proposal to be negotiated with the Union. Tr. 355:3-8 (Webb); GC Ex. 8. This conclusion is supported by the unambiguous language of the November 20 memo, which states, “Effective January 1<sup>st</sup>, 2010, all Medco Pharmacists at the various operational sites throughout the country *will* be required to wear white lab coats as part of their day to day attire.” GC Ex. 8 (emphasis added).

The Employer argues that the ALJ failed to consider the totality of Medco’s conduct in finding that when Medco informed the Union of the changes in the dress code policy, it presented the Union with a *fait accompli*, had no intention of bargaining with

the Union and in fact refused to bargain after the Union demanded bargaining.

Exceptions Brief at 33. The Employer contends that the ALJ unduly focused on Agnew's statement that the Company did not believe it had a duty to bargain with the Union about the dress code. Exceptions Brief at 33. However, the Employer's claim that Agnew's statement is the lone indication of the Employer's refusal to bargain is without merit. A consideration of all the evidence clearly shows that the Employer did not bargain in good faith over the lab coats policy and in fact believed it had no duty to do so.

The Employer informed the Union of its intention to change the dress code policy the day before it made a general announcement to all of its employees. Tr. 353:15-355:12 (Webb).<sup>5</sup> The Employer admitted that it did not notify the Union of the policy change to bargain over the issue. Tr. 305:14-25, 306:1-2 (Shanahan). When the Union demanded bargaining in a timely manner, in an e-mail dated December 9, 2009, Tr. 356:16-357:10 (Webb); GC Ex. 9, Agnew responded by asserting that the Employer did not believe the dress code was a mandatory subject of bargaining, but was willing to "sit down with you again to discuss the upcoming change." GC Ex. 9. During his testimony, Shanahan

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<sup>5</sup> The Employer argues, incorrectly, that this practice is in accordance with the management rights clause under the Guild contract – namely, if the Union does not protest a newly-promulgated rule within 24 hours of being notified, the Employer is free to implement the rule and the Union loses the opportunity to challenge the rule later. Exceptions Brief at 32; *see also* Tr. 212:16-213:7 (Agnew makes same claim). In fact, the provision's plain language gives the Union the right to protest any rule it believes violates the collective bargaining agreement *at any time*, but also requires the Union to give the Employer 24 hours to respond before filing a grievance challenging the rule. Resp. Ex. 4; GC Ex. 7. Therefore, as the ALJ pointed out, the rule actually places a 24-hour burden on the Employer, not the Union. ALJD at 10. The Employer's misreading of the rule undermines its argument that it gave the Union sufficient notice and a reasonable opportunity to respond before implementing a change in terms and conditions of employment. *See* Exceptions Brief at 34 and cases cited therein.

reiterated that the Employer was unwilling to bargain over this issue. Tr. 305:24-306:6 (Shanahan).

A brief meeting took place the following day between Bill Webb, Mark Small, and Rich Lauro, members of the Union's labor committee, and Shanahan and Agnew for the Employer. At the beginning of the meeting, Shanahan stated that "they were not there to bargain, that they didn't feel this was something they had to bargain over, and furthermore, that they didn't bargain without their legal counsel present." Tr. 358:1-5, 366:17-368:10 (Webb); GC Ex. 16.<sup>6</sup> The Union representatives explained their concerns about the lab coat requirement, and Shanahan expressed his willingness to explore short sleeve coat designs. Tr. 358:9-359:19, 372:9-25 (Webb). Shanahan did not give a clear yes or no answer as to whether pharmacists would be disciplined for removing their lab coats. He simply said it was not the Employer's intention to be the "white coat police." Tr. 373:7-374:1 (Webb). When Webb stated that he did not feel pharmacists should have to wear lab coats every day, Shanahan immediately responded that the Employer's position would not change. Tr. 330:10-331:20 (Shanahan).

The meeting ended after about 15 minutes, Tr. 208:18-21 (Agnew), and the lab coats policy went into effect as scheduled on January 1, 2010. When the Union attempted to discuss the issue further during a regular labor-management meeting on

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<sup>6</sup> Shanahan gave totally contradictory testimony on this point, casting significant doubt on his overall credibility. First, in response to a question inquiring whether the Employer "communicated to the union that the company had no intention of bargaining," Shanahan answered, "That was stated to them in the meeting." But only moments later, Shanahan claimed he did not "make it clear that [Medco] wasn't there to bargain." Tr. 307:19-309:2 (Shanahan).

February 18, 2010, the Employer declined to discuss the issue because the Union had filed a grievance. Tr. 365:3-17 (Webb).

Medco takes the position that, after one 15-minute meeting at which the Employer stated it was not bargaining, the parties bargained to impasse on the lab coats policy. This contention is absurd, particularly in light of the fact that the Employer never notified the Union that it believed there was an impasse. Tr. 121:3-9 (Agnew). Among the factors the Board considers in determining whether impasse exists are whether the parties acted in good faith over the course of negotiations, the length and duration of negotiations, and the parties' beliefs regarding the state of negotiations. *Wayneview Care Ctr.*, 352 NLRB 1089 (2008).

Here, the Employer presented the lab coats policy as a *fait accompli* over which it had no obligation to bargain, wrongly claimed that the policy was not a mandatory subject of bargaining, and stated at the outset of the meeting that it was not bargaining. These facts hardly demonstrate good faith, and undoubtedly establish the reasonableness of the Union's belief that Medco had refused to bargain. Moreover, the parties could not possibly have reached impasse on even this relatively small issue during one 15-minute meeting, particularly where Shanahan stated from the outset that the Employer's position would not change and failed to give the Union a clear answer about how the Employer would enforce the lab coats policy. The Union expressed its continued willingness to bargain even after the policy went into effect by placing the matter on the agenda of the February 18 labor-management meeting, but Medco refused to discuss it. In sum, the totality of Medco's conduct clearly demonstrates that when Medco informed the Union of

the changes in the dress code policy, it presented the Union with a *fait accompli*, had no intention of bargaining, and in fact believed it had no duty to bargain with the Union over the matter.

### **III. CONCLUSION**

For the foregoing reasons, the Employer's exceptions should be overruled, Judge Kocol's decision should be affirmed unmodified, and his recommended order should be adopted.

DATED: October 26, 2010

Respectfully submitted,

**GILBERT & SACKMAN**  
A LAW CORPORATION

By s/ Michael D. Weiner

*Attorneys for Charging Party*

## DECLARATION OF SERVICE

I, the undersigned, am over the age of eighteen years and not a party to this action. My business address is GILBERT & SACKMAN, A LAW CORPORATION, 3699 Wilshire Blvd., Suite 1200, Los Angeles, CA 90010. On October 26, 2010, I served the following document:

**CHARGING PARTY UNITED STEEL, PAPER AND FORESTRY,  
RUBBER, MANUFACTURING, ENERGY, ALLIED INDUSTRIAL AND  
SERVICE WORKERS INTERNATIONAL UNION, AFL-CIO, CLC,  
LOCAL 675'S ANSWERING BRIEF TO RESPONDENT'S EXCEPTIONS  
TO THE DECISION OF THE ADMINISTRATIVE LAW JUDGE**

Pursuant to Section 102.114(i) of the Board's Rules and Regulations, I served the above document by sending it by electronic mail, addressed as follows:

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I served the above document by depositing a copy in a sealed envelope with postage paid for overnight delivery, in a deposit box regularly maintained by UPS in Los Angeles, California, addressed as follows:

Hon. William G. Kocol  
Administrative Law Judge  
National Labor Relations Board Division of Judges  
901 Market Street, Suite 300  
San Francisco, CA 94103-1779

I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct and was executed by me in Los Angeles, California on October 26, 2010.

s/ Michael D. Weiner