

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
FIRST REGION**

In the Matter of

KENNAMETAL, INC.

and

UNITED STEELWORKERS, LOCAL 5518, affiliated
with UNITED STEELWORKERS OF AMERICA,
AFL-CIO, CLC

CASES 1-CA-46293
1-CA-46294

**COUNSEL FOR THE ACTING GENERAL COUNSEL'S ANSWERING BRIEF
TO RESPONDENT'S EXCEPTIONS TO THE DECISION OF THE
ADMINISTRATIVE LAW JUDGE**

Respectfully Submitted By,

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I. SUMMARY OF THE CASE

Respondent is a large, multi-national corporation operating dozens of facilities throughout the globe, including one in Lyndonville, Vermont, the location at issue in this proceeding. The Charging Party, United Steelworkers, Local 5518, affiliated with United Steelworkers of America, AFL-CIO, CLC (herein, “the Union”) represents a unit of about 80 production and maintenance workers at Respondent’s Lyndonville facility. A hearing in this matter was held before Administrative Law Judge Arthur J. Amchan (herein “the ALJ”) on February 8-10, 2011, at Greenfield, Massachusetts. Judge Amchan’s Decision and Recommended Order (herein, “the ALJ’s decision”) issued on April 12, 2011.¹

The ALJ’s decision found that Respondent violated the National Labor Relations Act by unilaterally implementing new and stricter safety disciplinary policies and practices.² The ALJ properly found that these policies altered the long established practice of progressive discipline, and converted virtually any significant safety violation or injury into just cause for discipline or discharge. In so doing, the new safety discipline policy materially modified the parties’ contract,

¹ References to the ALJ’s decision will be designated with “JD” followed by the page and line numbers. References to Acting General Counsel Exhibits are designated by “GC” followed by the Exhibit number. References to Respondent Exhibits are designated by “R” followed by the Exhibit number. References to the transcript are designated by “Tr.” followed by the page, and, where appropriate, line numbers.

² More precisely, the ALJ found that “Respondent violated Section 8(a)(5) and (1) with regard to the disciplinary policy reflected in the work instructions for corrective action regardless of whether it is deemed to be part of MBS (Management Based Safety) or a totally separate policy.” JD at 12:25-28. Herein, the *work instructions for corrective action*, contained in GC 32, are referred to as “the new Safety Discipline Policy”.

and this was done without providing the Union with notice of this change and an opportunity to bargain about it.³

Additionally, the ALJ properly and separately found that Respondent violated 8(a)(5) of the Act by failing and refusing to provide the Union with an opportunity to bargain over Respondent's global initiative, "Management Based Safety"(herein "MBS"), to the extent that MBS impacted terms and conditions of employment for unit employees, prior to implementation of MBS at the Lyndonville facility.⁴ The ALJ properly identified three specific ways that the MBS program unilaterally changed terms and conditions of employment for unit employees: 1) it required employees to sign off on "safety checklists" under threat of discipline; 2) it eliminated the meaningful involvement of the Union and the Joint Safety Committee from the investigation of injury accidents (referred to as "OSHA reportable accidents) as required by Article 16.07 of the current collective-bargaining agreement (herein "CBA"); and 3) it materially and

³ This finding stems largely from GC's post-hearing amendment to the complaint. Despite the timing of this allegation amendment, it is by far the most important finding, and issue, of this case. The Counsel for the Acting General Counsel's original complaint and theory of the case (as reflected in the opening statement, see Tr. 13), was premised on the idea that the changes to the safety disciplinary policies were encompassed by the Management Based Safety program that Respondent announced and began implementation of in February 2010. However, in the midst of the hearing, the Acting GC first learned of Respondent's contention that the genesis of the newly observed changes to safety disciplinary practices (all of which post-dated the announcement of MBS) was a *separate disciplinary policy, ostensibly implemented in March of 2009*. The document was first presented to Counsel for the Acting General Counsel in response to a subpoena on February 8, 2011. (See Tr.263, 378, 411, GC 32). As the record evidence makes clear, there was a great deal of confusion, including significant confusion among Respondent's own witnesses, as to the substance and contents of GC 32, the document setting forth the new Safety Discipline Policy. In any event, given the substance of GC 32, the lawfulness of the implementation of this new Safety Discipline Policy emerged as the critical issue in this case.

⁴ Because Respondent refused to provide to the Union any of the comprehensive documents related to MBS that were provided to the Counsel for the Acting General Counsel on the first day of hearing, the Union could not know with any precision what the various components were, how truly comprehensive the MBS program was, or the specific dates that the different components would "go LIVE". See GC 2, R 25, final page.

significantly altered the disciplinary policies and practices with respect to safety violations, and by extension, unilaterally altered the definition of just cause under the parties' CBA.⁵

Finally, the ALJ properly found that Respondent failed to provide information requested by the Union on July 16, 2010 concerning the new program.

II. SUMMARY OF EXCEPTIONS AND RESPONSE

Respondent has filed comprehensive Exceptions to virtually every significant finding and conclusion reached by the ALJ. The exceptions can be summarized as follows: Respondent excepts to the ALJ's findings and conclusion that the new Safety Discipline Policy unilaterally altered material and substantial terms and conditions of employment; excepts to the ALJ's findings that the allegation regarding the Safety Discipline Policy is not barred by 10(b); excepts to the ALJ's findings and conclusions that the three identified components of MBS altered terms and conditions of employment and were mandatory subjects of bargaining; excepts to the finding and conclusion that MBS contained a disciplinary element that was a factor in the discipline of employees Doug Noyes and Ken Wilkins; excepts to the ALJ's finding that the Union did not waive its right to bargain over the safety check lists/white boards, the involvement of the Union/Safety Committee in OSHA-reportable accident investigations, or the new Safety Discipline Policies or stricter enforcement of safety policies under MBS; argues that contract coverage is the appropriate

⁵ The manner in which MBS changed the safety disciplinary practices clearly overlaps with the central finding that Respondent unilaterally changed its safety discipline policies in violation of the Act.

standard for determining a violation of 8(a)(5) in this case; and excepts to what it views as the open-ended nature of the requirement under the language of the ALJ's proposed Notice to Employees. All of the exceptions for the issues identified above are based on the contention that the ALJ's findings or conclusions "are not supported by substantial evidence or are inconsistent with the law." Additionally, although Respondent does not make this point explicitly, Respondent's exception to the ALJ's findings that the Safety Discipline Policy was not posted outside the 10(b) period, is essentially an exception to several credibility determinations.⁶

The overwhelming majority of the ALJ's findings and conclusions are amply supported by the record evidence and applicable law, and Counsel for the Acting General Counsel's Brief in Support amplifies the appropriateness of the ALJ's findings and conclusions. The instant Brief is submitted by Counsel for the Acting General Counsel to address those arguments made by Respondent in its Brief in Support of Exceptions which were not fully addressed by the ALJ's Decision or Counsel for the Acting General Counsel's prior Brief in Support of the ALJD and to correct certain misstatements of facts or otherwise misleading assertions made by Respondent in its Brief in Support of Exceptions.

⁶ Respondent also excepts to the ALJ's finding regarding the Union's July 16, 2010 request for information concerning the implementation of the white boards and safety checklists. The legitimacy of these findings is substantiated both by the ALJ, and in Counsel for the Acting General Counsel's Brief in Support, and is not addressed herein.

III. RESPONDENT WAS NOT PRIVILEGED TO IMPLEMENT THE CHANGES TO THE SAFETY DISCIPLINARY POLICY, UNDER EITHER THE CONTRACT COVERAGE STANDARD, OR THE CLEAR UNMISTAKABLE WAIVER STANDARD, AND RESPONDENT HAS NO BASIS TO ARGUE THE ISSUE IS BARRED BY SECTION 10(B) OF THE ACT.

Respondent admits that the new Safety Discipline Policy was never negotiated with the Union, but defends that: a) the new Safety Discipline Policy does not create any new safety rules or procedures, or alter the just cause provision of the contract; b) Respondent was free to implement based on a “sound arguable basis” that Article 16.01 gave it that right, under the contract coverage standard; and c) an allegation premised on the new Safety Discipline Policy is barred by Section 10(b) of the Act. However, none of these arguments are availing.

A. The New Safety Discipline Policy Alters Terms and Conditions of Employment for Unit Employees, and Changes the Meaning of Just Cause under the Parties’ CBA.

The statement of facts and arguments provided in Counsel for the Acting General Counsel’s Brief in Support of the Decision of the ALJ demonstrate that the ALJ’s decision was amply supported by substantial evidence and consistent with the law, including the contention raised in Respondent’s Brief in Support of Exceptions, that the Safety Discipline Policy was not a mandatory subject of bargaining. The undisputed record reflects that, prior to February 2010, no employee was ever disciplined solely because they had had an accident resulting in injury. This is true even though there were instances in which a reportable incident occurred, and investigation followed and concluded that the accident was caused by an employee safety violation. In this regard, the contention made

by Respondent in its Brief in Support of Exceptions (at pp 8-9), that Bob Gordon received any discipline for putting his hand in a machine while cycling – a safety violation – is incorrect.⁷ This fact provides further support for the ALJ's conclusion that the new Safety Discipline Policy converted virtually any significant safety violation, *or injury*, into just cause for discipline or discharge.

Additionally, Respondent claims that nothing in the new Safety Discipline Policy purported to change the “just cause” standard or limit an arbitrator’s right to assess just cause. However, this claim is incorrect. Arbitrators universally apply the “7 factors” for determining just cause, one of which is whether an employee has been made aware of a rule or policy, and the penalty for breaking it. Respondent’s new Safety Discipline Policy unilaterally establishes specific definitions for serious and other types of safety violations, and prescribes specific penalties for each, supplanting the prior system of progressive discipline for one that is significantly accelerated. For the Board to adopt the view proposed by Respondent would establish the new Safety Discipline Policy as lawfully implemented. Against such a finding, it would be virtually impossible for an arbitrator to conclude that this “factor” in determining just cause favors an

⁷ See Tr. 423: 22-23, in which A. Morissette admits, “I do not know if a warning was actually issued or not.” See also A. Morissette’s testimony on cross, at 543, lines 7-8 and 17-18, “It does not appear that the supervisor issued a warning” and “It does not look like the supervisor had issued a warning,” in response to the queries about whether or not the supervisors followed her recommendation to discipline Gordon in the circumstance where he put his hand in a cycling machine. See also GC 39, the comprehensive record of corrective actions maintained by Union President Garfield, reflecting that Gordon was not disciplined for a safety violation in 2009.

employee.⁸ Accordingly, the ALJ properly concluded that the new Safety Discipline Policy materially modified the parties' contract.

B. The Contract Does Not “Cover” the Implementation of the New Safety Discipline Policy.

A significant issue not previously addressed by Counsel for the Acting General Counsel is Respondent's contention that “contract coverage” is the appropriate standard for determining whether a violation of the Act has occurred in the circumstances of this case. Although in *Provena St. Joseph Medical Center*, 350 NLRB 808 (2007), the Board confirmed the appropriateness of the “clear and unequivocal waiver standard” for determining whether an employer has violated 8(a)(5) by means of an allegedly unilateral action, the 1st Circuit and the D.C. Circuit are included among those Courts of Appeals that favor the “contract coverage” approach in determining the lawfulness of an employer's conduct. See *Bath Marine Draftsmen's Assn. v. NLRB*, 475 F. 3d 14, 25 (1st Cir. 2007); and *U.S. Postal Service v. NLRB*, 8 F. 3d 832, 837 (D.C. Cir. 1993). However, Respondent fares no better with respect to the implementation of the new Safety Discipline Policy under the contract coverage approach than it does under the unequivocal waiver standard.

Under the “contract coverage” standard, the Board should not find a violation of 8(a)(5) where the employer, relying on specific language negotiated between the parties and contained in their collective-bargaining agreement, has “a sound, arguable basis” for believing that it was privileged to take the unilateral

⁸ Moreover, to claim that the just-cause article gives Respondent the right to rewrite the rules that are the basis for just-cause discipline is the epitome of circular reasoning.

action at issue. Under this standard, the question turns not on whether there has been an unmistakable waiver of the right to bargain, but rather, whether the parties *have already negotiated about the particular subject matter that is in dispute*. If the answer is yes, then the Board should find that the issue is one that is best determined by an arbitrator; the waiver standard is immaterial. *Bath Marine Draftsmen's Assn.*, supra at 25.

Accordingly, the obvious first step under this standard is to look at the language of the collective bargaining agreement to determine whether the specific issue in dispute is covered by the contract. Importantly, the dispute must be specifically covered by the clause or clauses relied on by an employer in assessing a contractual right. Respondent points to Article 16 of the contract, which it contends is “comprehensive in scope” to claim that “the bargaining issue with regard to safety has been exhaustively covered.”⁹ However, a close reading of Article 16 reveals that it *does not cover* disciplinary policies. Article 16 includes no reference to disciplinary processes, progressive discipline, or even the prospect of discipline for safety violations anywhere. To the contrary, Article 16.07 states that “[t]he Function of the Safety Committee shall be to advise the Employer concerning Safety and Health, *but not to handle grievances*.” (Emphasis added.) This language makes clear that to the extent that Article 16 “covers” safety-related matters, the parties specifically agreed that such “coverage” would *exclude grievable disciplinary issues*. Accordingly, Respondent cannot show that Article 16 of the contract “covers” the new Safety Discipline Policy at issue in this proceeding, such that it had a “sound arguable

⁹See Respondent’s Brief in Support of Exceptions, at 15.

basis” for believing its action with respect to the new Safety Discipline Policy was authorized by the parties’ agreement.

Additionally, Respondent acknowledges that the contract does not contain any specific language regarding the heretofore undisputed past practice of progressive discipline.¹⁰ The only other language that Respondent refers to as potentially bearing on the on the contract coverage standard is the language of Article 6, the “Discipline and Discharge” article which states, that “the right to discharge, suspend or otherwise discipline employees shall continue in the Employer, provided, however, that no such action shall be taken without just cause.” However, Respondent does not contend, and has never contended, that it relied on Article 6 as a basis for implementing the new Safety Discipline Policy. Accordingly, Respondent can not now plausibly claim Article 6 provided a sound arguable basis to believe that it could implement this policy, due to the mere fact that it has not made such a claim for the past 16 months. Moreover, to claim that in agreeing to the just cause article, the parties intended to give Respondent the right to rewrite the rules for determining whether just cause for discipline has been established, is the epitome of circular reasoning.

As previously argued, nor does the contract language, or past practice of the parties respecting safety policies and practices, reflect the requisite unequivocal waiver of the right to bargain.¹¹

¹⁰ See Respondent’s Brief in Support, at 25.

¹¹ See Counsel for the Acting General Counsel’s Brief in Support of the Decision of the ALJ, and JD, at p. 13:1-24.

C. The ALJ Discredited that the Safety Discipline Policy was Posted Outside the 10(b) Period, Leaving Respondent with no Plausible Basis to Contend that the New Safety Discipline Policy was Lawfully Implemented.

Respondent argues that 10(b) bars a finding that Respondent violated 8(a)(5) in unilaterally implementing the New Safety Discipline Policy.¹² However, the ALJ *specifically discredited* the testimony of Amy Morissette and Rick Brighenti that a complete copy of new Safety Discipline Policy had been posted by Respondent in September 2009.¹³ This assertion regarding a complete posting of the new Safety Discipline Policy is the cornerstone of Respondent's argument that the issue is barred by 10(b). Respondent's observations regarding the ALJ's assessments of the facts are insufficient to overturn these credibility determinations under *Standard Drywall Products*, 91 NLRB 544 (1950), *enfd.* 188 F.2nd (3^d Cir. 1951). Accordingly, given that the Safety Discipline Policy is a mandatory subject of bargaining, that Respondent acknowledges it was implemented unilaterally, and that there is no credible evidence to establish that the Union knew or should have known of its posting outside the 10(b) period, the ALJ's findings and conclusion regarding the new Safety Discipline Policy should be affirmed.

IV. RESPONDENT'S USE OF THE CHECKLIST AND WHITE BOARDS WERE PROPERLY FOUND BY THE ALJ TO BE MANDATORY SUBJECTS OF BARGAINING, IMPLEMENTED IN VIOLATION OF 8(A)(5).

Respondent excepts to the ALJ's finding and conclusion that the newly imposed obligation on employees to initial the whiteboards was a mandatory

¹² See Respondent's Brief in Support, at 26.

¹³ JD at 5: 5-15; JD 5-6: n. 7; Tr. 652

subject of bargaining. In so doing, Respondent minimizes the impact of employees of certifying the “pre-flight checklist,” by the claim that it takes less than five minutes to complete. However, it is not the amount of time required to complete the check-list certification that triggers the impact on terms and conditions. Rather, it is the new requirement of an attestation regarding subjective factors, such as whether or not an employee has been properly trained, or whether or not an activity “causes pain” that gives this feature of MBS its status as a mandatory subject.¹⁴ This is particularly true in light of the new Safety Discipline Policy, because, as the ALJ properly found, consideration as to whether or not an employee was “properly trained” is a factor in determining the level of discipline following an injury accident.

Additionally, given the relationship of the safety checklist to potential discipline, Respondent cannot successfully argue that the requirement to certify the checklists via the white boards is “covered” by the contract, for the same reasons described in analyzing the lawfulness of the new Safety Discipline Policy.

V. RESPONDENT’S ACTIONS IN ELIMINATING THE UNION FROM MEANINGFUL INVOLVEMENT IN THE INVESTIGATION OF OSHA REPORTABLE ACCIDENTS IS UNLAWFUL UNDER THE CONTRACT COVERAGE STANDARD, AND UNDER THE CLEAR AND UNMISTAKABLE WAIVER STANDARD.

Respondent raises a number of Exceptions to the ALJ’s findings that MBS cut the Union/Safety Committee out of the process for investigations.¹⁵

¹⁴ See GC 2, specifying May 5, 2010 as the target date to begin using the pre-flight check list under MBS.

¹⁵ See Respondent’s Exceptions 1, 15, and 29.

Respondent's primary argument is that the Union/Safety Committee was not excluded from investigating injury/accidents. In support of this, Respondent points to the testimony of Safety Committee member and Grievance Chair John Eastman, who, after testifying regarding the Safety Committee's post-MBS exclusion from investigations, admitted that he was never "told" that he couldn't investigate the OSHA-reportable accidents that have occurred since MBS.¹⁶

However, this assertion misses the point, borders on the absurd, and is insufficient to overturn the ALJ's findings to the contrary. To begin, the record amply supports the ALJ's conclusion that the Joint Safety Committee, and the Union have been completely excluded from any meaningful involvement in the investigation of OSHA-reportable accidents since the implementation of MBS.

A review of the timeline of critical events is helpful here. On February 2, 2010, MBS is announced, and certain parts are implemented. At that time, Respondent targeted April 9, 2010 as the date on which supervisors were to begin using the MBS based "Incident Analyzer Tools" and "Root Cause Analysis" procedures to investigate accidents.¹⁷ On August 24, 2010, Doug Noyes suffered the first recordable-injury accident following the April 9 deployment of the "Incident Analyzer" and Root Cause-Incident Analyzer Assistance Tools.¹⁸ The Union/Safety Committee did not participate in the investigation of the Noyes incident, contrary to years of past practice, and was not involved in the creation

¹⁶ See Respondent's Brief in Support of Exceptions, at 21.

¹⁷ See GC 2, R 25 final page.

¹⁸ See GC 24, listing the reportable incidents from 2009 and 2010.

of any accident investigation document form.¹⁹ Instead, on about August 30, a document was posted on the bulletin board entitled “Incident Reporting Form,” announcing the apparent results of the investigation of the Noyes incident and stating that Noyes was to be suspended.²⁰

On October 27, 2010, a second post-April 9 incident occurred, when unit employee Ken Wilkins suffered a reportable injury/accident, severely lacerating several fingers. By October 28, 2010, Supervisor Tim Morissette, together with other management representatives, had completed an electronic “Problem Solving Report,” “Incident Investigation Form,” and “Root Cause Analysis” without any input or participation from the Union/Safety Committee, using forms and records that are part of the new MBS procedures and tools.²¹ The information gathered in Supervisor T. Morissette’s investigation is later considered in the decision to terminate Wilkins. Consistent with Eastman’s testimony, the Union/Safety Committee was not provided copies of any of these documents prior to action being taken against the employees, nor did the Committee participate in any way in their creation.

Article 16.07 of the contract *requires* that “all OSHA reportable accidents requiring medical attention with the potential for lost time **will be investigated by no less than 2 members (one each from Union and Company)** of the Safety

¹⁹ Notably, Respondent did not enter any accident investigation form of any type for Noyes into the record.

²⁰ GC 11. Notably, Brighenti testified that this document was “incorrectly” posted, and admitted that GC 11 was one of the first, if not *the* first use of this form. (Tr. 80: 11-13; Tr. 78:18-24).

²¹ GC 13-14; 2; 42, p. 12-14.

Committee and the Department Supervisor.”²² This requirement had been implemented since at least 2003, by the practice of having Safety Committee members jointly investigate and prepare the official record of any accident, along with the Supervisor, in the form of an “Accident/Occupational Illness Report.”²³ Importantly, the format of the form specifically calls for the participation of the Safety Committee members, by inclusion of a line for the “Safety Team Member Signature” on the second page, and by inclusion of both the Safety Committee and the Union on the “distribution” list at the end of the form.²⁴ Such meaningful participation in injury accident investigation is precisely what was intended when the Union first sought the addition of this language to the collective bargaining agreement during the negotiation of the 1989 contract.²⁵ Clearly, it does not suffice to claim that the Union was *not prohibited* from conducting some type of after-the-fact investigation. What is required is that Union/Safety Committee continues to participate meaningfully in the only investigation *that matters*, i.e., the one that is recorded to show OSHA compliance, the one that is maintained in Respondent’s records, and importantly, post MBS, the one that is relied upon in determining management and/or the employee’s level of accountability, if any. If the practice in implementing Article 16.07 has been that the Union meaningfully

²² GC 4, p. 27-28.

²³ Example is GC 17. Not coincidentally, this form is also OSHA compliant. Brighenti testified unequivocally that there is an accident report maintained for purposes of OSHA compliance for every accident that occurs at the facility. Tr. 50. No other pre-MBS accident reports forms were introduced by Respondent. Clearly, the form used in GC 17 is the official accident form that was in use for years, if not decades, prior to MBS.

²⁴ The Safety Committee is designated “Safety Cte.” on this form. (GC 17).

²⁵ GC 22; Tr. 134-135, (Gammell).

participated in the creation of the official record of all injury accidents, then the Union was entitled to participate meaningfully in the same kind of investigations, even after MBS. Thus, the ALJ properly identified the Union and Safety Committee's exclusion from the accident investigation process as a material and substantial change to unit-employees' terms and conditions of employment under MBS.

Additionally, Respondent fares no better under the contract coverage standard in connection with the exclusion of Union/Safety Committee members from accident investigations. Applying the first step under this standard, a review of the CBA for "coverage" of the disputed issue, reveals that there is simply no language that Respondent can point to that would privilege it to have implemented without bargaining, the MBS based changes to the investigatory process in the manner that occurred here. As noted above, there is contract language that bears on accident investigations that has been negotiated between the parties. However, as noted, this language spells out the specific requirement that Union/Safety Committee members be included in the investigation of all OSHA recordable accidents. Respondent has not, and indeed cannot claim that the language of Article 16.07 privileged it to implement the MBS based "investigatory tools" that excluded the Union/Safety Committee's involvement in the official investigation of such reportable incidents. Accordingly, under the contract coverage standard, Respondent was not privileged, with the implementation of MBS, to exclude the Union from meaningful involvement in the

investigation of injury accidents. The ALJ's findings in this regard are supported in fact and in law.

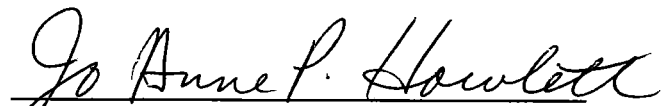
Nor, as argued in Counsel for the Acting General Counsel's Brief in Support, can Respondent effectively argue that such language waived the right of the Union to negotiate such changes. Accordingly, Respondent cannot offer any persuasive basis to overturn the ALJ's conclusion and findings with respect to the impact of MBS, and its new investigatory processes on existing terms and conditions of employment.

VI. CONCLUSION

For all of the foregoing reasons, as well as those advanced in Counsel for the Acting General Counsel's Brief in Support of the Decision of the Administrative Law Judge, and by the Administrative Law Judge in his Decision, it is respectfully submitted that Respondent's Exceptions be dismissed in their entirety, and that the ALJ's findings, conclusions, and recommended Order be affirmed by the Board.

Dated at Boston Massachusetts this 2nd day of June, 2011.

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CERTIFICATE OF SERVICE

I hereby certify that I served a copy of the **Counsel for the Acting General Counsel's Answering Brief to Respondent's Exceptions to the Decision of the Administrative Law Judge** on the parties listed below, by electronic and/or regular mail, on this 2nd day of June, 2011.

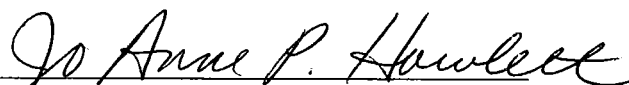
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