UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 8

THE AMERICAN BOTTLING COMPANY, INC.
Respondent,

and Case No. 8-CA-39327

TEAMSTERS LOCAL UNION NO. 293,
Charging Party.
and

TEAMSTERS LOCAL UNION NO. 348,
Party to the Contract,
and

TEAMSTERS LOCAL UNION NO. 1164,
Party in Interest.

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

Dated: September 23, 2011

Submitted By:

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ATTORNEYS FOR THE AMERICAN BOTTLING COMPANY, INC.

The Respondent, The American Bottling Company, Inc. (hereafter "ABC"), by its attorneys, Krukowski & Costello, S.C., by Robert J. Bartel and Timothy C. Kamin, submits this Answering Brief to General Counsel's Exceptions to the Decision and Order of the Administrative Law Judge ("ALJ"). ABC submits that the ALJ properly declined to order the extraordinary remedies requested by the General Counsel, as there is nothing extraordinary about the Respondent's actions or the violations found in this case. General Counsel's Exceptions should be overruled.

I. EXTRAORDINARY REMEDIES ARE GENERALLY INAPPROPRIATE IN THIS VERY ORDINARY CASE.

Extraordinary remedies are deemed "extraordinary" because they are not properly applied in the typical majority of cases in which a violation of the Act has been found and the traditional Board remedies are sufficient, but rather are only applied in extraordinary cases. As the Board clearly stated in the very precedent cited by General Counsel, "[t]he Board may order extraordinary remedies when the Respondent's unfair labor practices are 'so numerous, pervasive, and outrageous' that such remedies are necessary 'to dissipate fully the coercive effects of the unfair labor practices found.'" *Federated Logistics,* 340 NLRB 255, 258 fn. 11 (2003), citing and quoting *Fieldcrest Cannon, Inc.*, 318 NLRB 470, 473 (1995). The Board has granted extraordinary remedies only where it is shown "that traditional remedies are so deficient here to warrant imposing the extraordinary remedies

requested by the General Counsel." *First Legal Support Services, LLC*, 342 NLRB 350, 350 fn. 6 (2004).

In the context of *Federated Logistics*, "numerous, pervasive and outrageous" unfair labor practices included a litany of hallmark violations of Sections 8(a)(1) and (3) against employees, including a threat of plant closure, unlawful withholding of a wage increase, discriminatory disciplinary warnings and suspensions of individual employees, threats of loss of benefits, unlawful promises of benefits, direct interrogation of employees, soliciting employees to conduct surveillance of other employees, and statements that selection of a union would be futile, among other violations. *See id.*, 340 NLRB at 257. Further, it was found that the employer took those actions in response to and in an effort to interfere with an initial organizing campaign and the employees' free choice in a pending representation election. *See id.*

Very much to the contrary in the instant case, the ALJ found that ABC engaged in violations of Section 8(a)(2) of the Act in voluntarily recognizing one of the three Teamsters Local Unions that previously represented ABC's employees at their former locations. The effects of these alleged acts upon the employees were that the employees continued to be represented by a Teamsters Local Union, and continued to have all the protections, wages and benefits of a contract with the Teamsters as they had at their former locations. While the ALJ found that these acts interfered with employees' rights to select a particular representative or no representative at all, these actions clearly did not intimidate or instill any fear in

employees that they will face any negative or unlawful treatment from ABC for the manner in which they exercise their Section 7 rights in the future. Under these circumstances, there is simply no reason to believe that any of the extraordinary remedies sought by General Counsel's Exceptions are necessary to achieve the remedial effect in this matter.

General Counsel takes exception to the ALJ's finding that General Counsel failed to demonstrate that these extraordinary remedies are necessary in this particular case, and General Counsel instead argues that it is entitled to "inferences" that such remedies are appropriate simply because violations have been found. However, the ALJ simply and properly applied the Board's holdings that *evidence* is required to support a demand for extraordinary remedies. Where, as here, the General Counsel has not "offered any evidence to show that the Board's traditional remedies are insufficient," the Board denies such requests. *Chinese Daily News*, 346 NLRB 906, 909 (2006). The ALJ properly found that there was no evidence in this case that it is so different from other Section 8(a)(2) cases – so extraordinary – that extraordinary remedies are necessary.

II. THE ALJ CORRECTLY DETERMINED THAT NOTICE READING IS NOT APPROPRIATE IN THIS CASE.

In addition to the lack of evidence that traditional notice posting somehow would be ineffective in this particular case, the underlying violations found in the case are not consistent with those in which the Board has ordered notice reading. For example, the Board has held that notice reading is appropriate where a high-

ranking official of the employer has personally engaged in discriminatory conduct toward employees and a reading by or in the presence of that high-ranking official is necessary to "dispel the atmosphere of intimidation he has created." *See Three Sisters Sportswear Co.*, 312 NLRB 853, 853 (1993). In this particular case, there is no evidence of intimidation or discriminatory actions taken against any employees that would instill an atmosphere of fear of reprisals in the future, much less by a high-ranking official.

While General Counsel argues that a notice reading is "more effective" than the posting of a notice, this is irrelevant even if it may be true. If the analysis were that simple, the Board would order notice reading in *all* cases. As it stands, the Board holds that this "extraordinary" remedy is to be applied only in extraordinary cases in which it is necessary because of "numerous, pervasive and outrageous" violations by the employer. *See Federated Logistics,* supra. It is to be applied when there is evidence presented that the traditional posting of a notice will be insufficient in this particular case in comparison with ordinary cases. *See Chinese Daily New; First Legal Support Services,* supra. There is no such evidence in this case.

III. THE ALJ PROPERLY DECLINED TO ORDER VARIOUS ACCESS REMEDIES.

The ALJ correctly applied Board standards when he determined that access remedies allowing the two other Teamsters Local Unions access to Company facilities, Company bulletin boards and "equal time" to address employees in the

facility were inappropriate and unnecessary in this case. (ALJD at 20-21.) The Board orders such extraordinary "access" remedies in cases in which egregious violations have interfered with the employees' communications with one another or with a labor organization, creating obstacles to such communication. *See, e.g. Blockbuster Pavilion*, 331 NLRB 1274, 1276 (2000). This is not such a case.

The ALJ correctly pointed out that the authority for such remedies cited by General Counsel, *John Singer, Inc.*, 197 NLRB 88 (1972), involved an employer's interference with employee support for a very recently certified union that had demonstrated majority status in a Board representation election. *Id.* at 88. (ALJD at 21.) In this case, Locals 293 and 1164 have enjoyed a membership relationship of many, many years with their complements of employees that had transferred to Twinsburg, and there was no evidence presented that this long relationship of support had been eroded in the slightest by the events of the past few months. Officials for both Local Unions testified at the hearing, but neither Local Union gave any indication or provided any evidence that they had lost any support of their longtime members who are now working at Twinsburg.

At the time of the violations found, nearly all of these employees were current members of Teamsters Local 293, 348 or 1164 – and members of the International Brotherhood of Teamsters. They knew the representatives of their respective Local Union, had a long established relationship with that Union, were free to attend union member meetings, were on the Union's mailing lists, etc. This is not a case of employees trying to establish a relationship with a previously unknown labor

organization. ABC posed and poses absolutely no obstacle to communication between any of the Local Unions and employees.

The ALJ found that ABC provided unlawful access to Teamsters Local 348 in violation of Section 8(a)(2). (ALJD at 18 – 19.) However, there was absolutely no evidence presented that ABC engaged in any violations that interfered with the other Local Unions' access to employees – actual members of the Local Unions – or that ABC interfered with any of the employees' ability to communicate with any labor organization of their choice. To the contrary, the undisputed evidence presented at trial demonstrated that Teamsters Locals 293 and 1164 never requested similar access and were never denied similar access. (Transcript at 332-333, 583.) Further, the evidence at trial indicated that Charging Party's Local 293's stewards did speak on behalf of Local 293 at one of these so-called "captive audience" meetings. (Transcript at 153-154, 159 164, 166-167.)

While the union in *John Singer*, supra, had just demonstrated majority support in an election, in this case all evidence indicated that Locals 293 or 1164 *never* enjoyed majority support at the new Twinsburg location. General Counsel provides no authority for the position that an extraordinary remedy is appropriate to attempt to preserve *minority* support for a labor organization.

IV. NOTICE MAILING, RAISED FOR THE FIRST TIME IN EXCEPTIONS, SHOULD BE REJECTED AS UNTIMELY AND WAIVED.

"A contention raised for the first time in exceptions to the Board is ordinarily untimely and, thus, deemed waived." *Yorkaire, Inc.*, 297 NLRB 401, 401 (1989),

enfd. 922 F.2d 832 (3d. Cir. 1990); *International Union of Operating Engineers Local 513,* 355 NLRB No. 25, 1 (2010). The ALJ correctly noted that no issue or argument was raised before the ALJ regarding mailing of a notice to any employee. (ALJD at 21, fn. 28.) In its Brief in Support of Exceptions, General Counsel expressly acknowledges that it did not raise this argument before the ALJ. (GC Brief at p. 6.) There is no reason why General Counsel could not have presented all of its demands for remedies and supporting arguments to the ALJ in a timely fashion. As such, that argument is untimely and should be deemed waived.

CONCLUSION

There is simply no evidence in the record indicating that the traditional remedies ordered by the ALJ – which already include withdrawal of recognition of Local 348, voiding the contract between Local 348 and ABC, reimbursing employees for all dues withheld, and a traditional notice posting in the workplace – will not fully remedy the found violations and leave every employee and every labor organization in the exact same position as before the found violations took place. Therefore, the ALJ properly declined to order any of the requested extraordinary access remedies sought by General Counsel. General Counsel's untimely argument for additional remedies never requested before the ALJ should be deemed.

For all the reasons set forth above, the Exceptions filed by General Counsel should be overruled and the ALJ's findings and conclusions regarding same should be affirmed.

Dated at Milwaukee, Wisconsin this 23rd day of September, 2011.

KRUKOWSKI & COSTELLO, S.C.

/s/ Robert J. Bartel
By:_____
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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on September 23, 2011, the following documents were sent to the following individuals via electronic mail:

1. Respondent's Answering Brief to General Counsel's Exceptions to the Decision of the Administrative Law Judge.

2. Certificate of Service.

E-Mail Only

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Dated at Milwaukee, Wisconsin, this 23rd day of September, 2011.

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