UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

NORQUAY CONSTRUCTION, INC.

and **Case 28-CA-023412**

THOMAS DeMOTT, an Individual

ACTING GENERAL COUNSEL'S BRIEF IN SUPPORT OF EXCEPTIONS

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I. INTRODUCTION

This case is about the Respondent's literal and figurative assault on union representative Thomas DeMott (DeMott), and the resulting adverse impact on employees' rights to engage in union activities. Specifically, on the morning of October 1, 2010,[1] DeMott and Chuck Harrison (Harrison), representatives of the Southwest Regional Council of Carpenters (the Union), walked up to the Respondent's construction trailer at a construction site in Phoenix, Arizona. They were on the jobsite to speak to Union-represented employees of a subcontractor performing work at the site and to ask Respondent's superintendent for information about any subcontractors performing carpentry-related work at the site. Notwithstanding the fact that the Union representatives had a contractual right to be on the jobsite at that time, Respondent's superintendent and project manager, Kenneth Scott Rankin (Rankin), wanted nothing to do with the Union. When DeMott and Harrison entered the trailer and introduced themselves, Rankin exploded in an obscenity-filled tirade against them and the Union. Specifically, Rankin expressed his displeasure at their presence, told them to obtain whatever information they desired someplace else, and ordered them to leave. As Harrison and DeMott went to the trailer door to exit, Rankin pushed DeMott in the back, and

[1] All dates hereinafter are 2010 unless otherwise noted.

then shoved him down the steps of the trailer. Not content with the physical attack, Rankin then called out to security guards to ensure that DeMott and Harrison immediately left the jobsite. The Administrative Law Judge (ALJ) properly found that by ordering the Union's representatives to leave the jobsite, Respondent violated Section 8(a)(1) of the Act; however, the ALJ failed to find that Respondent violated the Act by physically ejecting or causing physical harm to DeMott. It is respectfully submitted that such findings and conclusions are inconsistent and, as to the ALJ's failure to find that Respondent's violent acts toward employees' statutory representatives violated the Act, are contrary to the record evidence and extant caselaw.

More to the point, the record shows and the ALJ found that as a result of Respondent's violent acts, DeMott was injured and sought and received medical treatment on the same day at an urgent-care center, and has since continued to receive care from medical specialists. As a result of the injuries caused by Respondent's assault, DeMott has been unable to work since that time.

Factually, the ALJ found that Respondent, by Rankin, violently expelled DeMott from the construction trailer, pushed him down the stairway, and injured him; however, the ALJ's failure to find that Respondent's acts and conduct violated Section 8(a)(1) of the Act overlooks the fact that DeMott and Harrison visited Respondent's trailer in part to speak to employees of subcontractor Progressive Concrete Works, Inc. (Progressive), a Union-signatory employer, and that their violent expulsion by Respondent had a direct impact on employees' Section 7 rights. The record establishes that the access clause in the Union's collective-bargaining agreement with Progressive grants the Union the right to access Respondent's entire jobsite. Moreover, Respondent's unlawful no-solicitation rule, enacted

specifically to restrict Union representatives' access to the jobsite, does not entitle Respondent to trample the statutory rights at issue in this case. To the contrary, Counsel for the Acting General Counsel (General Counsel), based on the credible record evidence, requests that the Board find that Respondent violated Section 8(a)(1) of the Act, as alleged. Finally, the General Counsel requests the Board to order Respondent, in addition to posting and distributing a Notice to Employees, to make whole DeMott for the wages that he has lost and will lose as a result of the injury caused by Respondent's unlawful conduct; reimburse DeMott for medical expenses, pension obligations, and other expenses incurred by DeMott because of his inability to work; and make whole DeMott for all loses reasonably foreseeable as a result of its unlawful conduct.

II. FACTS

A. Background

In 2010, Respondent, a general contractor, secured a contract from the City of Phoenix to refurbish the Central Bus Station in Phoenix. Respondent performed work on the project, known as the "Central Station Refurbishments" (Central Station or the jobsite), in phases throughout 2010, and also hired various subcontractors to work on the project. One of these subcontractors, Progressive, began working on the project in about September. By October 1, Progressive had 12 employees working at the jobsite. (ALJD 2:29-31, 3:5-7; Tr.24-25, 72-74; GCX 3, 7)

During the initial phase of the project, Respondent operated out of a rented trailer located on the jobsite -- in what has been called the staging area. (ALJD 2:36-38; Tr. 74; GCX 6) Respondent's trailer was nothing out of the ordinary. It measured about 20 to 24 feet in length, eight feet in width, and had a three-foot wide entry door that was accessible by a metal

stairway that abutted the trailer. The stairway was surrounded by metal handrails and had four metal steps that rose to a square metal landing, about three feet wide and four feet long, positioned immediately in front of the doorway. The stairway landing was about three inches below the door, thus requiring one to step down about three inches from the door entry to the landing. Inside the trailer were two office areas: a lobby area into which the trailer door opened and a rear office area used by Rankin from August 2010 to August 2011. (ALJD 2:36-38, 2:40-45, 3:22-25; Tr. 79-80, 97-98)

The construction area was enclosed by a fence located about 100 feet from the trailer. (Tr. 97-98) A tall fence surrounded the staging area, which was accessible through a 20-foot opening in the fence. (ALJD 2:35-36) On October 1, there were no signs prohibiting trespassing on the fence or in the vicinity of the trailer. (Tr. 95; GCX 4)

On October 1, the Union and Progressive were parties to a collective-bargaining agreement (the CBA). The CBA's effective dates were from July 1, 2005, through June 30, 2008. (GCX 25) Section 502 of Article 5 of the CBA specified, however, that unless either party terminated the CBA by notifying the other party in writing within a yearly 60-day window period, the CBA renewed itself every year. (GCX 25, p. 8) The CBA also included, in Section 2620 of Article 26, an access provision that expressly authorized Union representatives to enter a project jobsite:

> **2620. Job Access of Union Representatives.** The business agent or special representative shall have access to the project during working hours and shall make every reasonable effort to advise the contractor or his representative of his presence on the project. He shall not stop or interfere with work of any workman without the permission of the Contractor or his representative.
> **2620.1** Where there is a security arrangement by the owner or the Contractor on a job or project which involves persons entering the project being checked

> through a guarded gate or a similar situation, arrangements for the business representatives to enter the project will be made.[2]

(ALJD 3:7-20; GCX 25, p. 32) The Union did not receive any notice of the CBA's termination from Progressive and understood the CBA to be in effect on October 1. (Tr. 205, 210)

As Union special representatives, DeMott and Harrison's duties included visiting jobsites to meet with general contractors and subcontractors and to speak with represented workers about, for example, whether these workers' dues were current. (Tr. 89, 135-36) When special representatives were at a project's jobsite where Union-represented workers were performing work, the representatives were instructed to interact with them, to see how they were doing, to check their dues' status, and to provide any services that may be necessary. (Tr. 212) Alan Cahill, the Union's Director of Organizing, determined which jobsites the special representatives would visit by giving them a "profile" of the contractor working on a particular project. (Tr. 211) This profile contained, at a minimum, the name of the general contractor on a project and any known information about the subcontractors working on the same project. (ALJD 4:3-14; Tr. 90-91, 211)

B. The Events of October 1

On f October 1, 2010, after visiting other jobsites that morning, DeMott and Harrison arrived at Central Station at about 11:30 a.m. (ALJD 4:16-19; Tr. 91-92) They intended to ask Respondent's superintendent whether other subcontractors were performing work on the project and the extent to which the project had been completed. If, for example, Respondent had not bid out carpentry-related work that remained to be performed on the project, DeMott would have given the superintendent a list of subcontractors who paid area standards and

[2] Contrary to the ALJ's findings, this provision does not specifically state that "Progressive" is the entity charged with making arrangements for union representatives to enter the project. (ALJD 3:16-17)

asked him to invite these subcontractors to bid on the remaining work. (ALJD 4:20-23; Tr. 89, 133, 203) After speaking with the superintendent, DeMott and Harrison then intended to talk to the Progressive employees on the jobsite. (Tr. 134, 153, 165-66, 203) Twelve Progressive employees were on the construction site at the time. (ALJD 4:16-17; Tr. 65-66; GCX 5)

Upon arriving at Central Station, DeMott and Harrison walked across a street in search of the construction trailer and saw some construction workers within a fenced area. (Tr. 93, 149) It was their normal practice to check in with the construction superintendent at the trailer for access to the site before they spoke to employees on site. (ALJD 7:41-43; Tr. 153, 166) As DeMott approached the fence, one of the workers stepped outside the fence and exchanged hellos with him. (Tr. 94) De Mott noticed that the worker, whom he did not know, was wearing a Local 408 sticker on his hardhat -- Local 408 being the local carpentry union in Phoenix, Arizona, which is affiliated with the Union. (Tr. 94) DeMott asked this worker where the trailer was, and the worker pointed in the direction of the trailer. DeMott thanked the worker and told him that he would talk to him later. (Tr. 94-95) DeMott and Harrison then walked approximately 100 feet through the open gate of a separately fenced area and reached the stairway of Respondent's construction trailer. (Tr. 95, 138) DeMott, who was ahead of Harrison, walked up the stairway to the landing and knocked on the closed door. Hearing no answer, DeMott pulled open the door and saw two young children watching television, both of whom pointed toward the other end of the trailer. (ALJD 4:33-35; Tr. 96-97) DeMott then saw a large man, Rankin, approximately six feet and two inches tall, open and emerge from a small office at the end of the trailer. DeMott asked Rankin if they could ask him a couple of questions, and Rankin invited them into the trailer office. (Tr. 98) De

Mott and Harrison walked to the office, where they stood next to the doorway. As DeMott and Rankin extended their hands toward each other, DeMott mentioned that his name was "Tom" and that he was with the "Southwest Region." (ALJD 4:36-40; Tr. 98-99) As soon as Rankin heard the words "Southwest Region," he pulled his hand away from DeMott's hand. Rankin yelled that he was tired of the "fucking Carpenter representatives" on his jobsite every day and twice on Sunday.[3] (ALJD 5:2-3; Tr. 99, 141, 154) DeMott told Rankin that Harrison and he were there to obtain information, but Rankin rudely responded that if they wanted information, they could check the Dodge Reports.[4] (ALJD 4:39-41; Tr. 100, 155, 195) DeMott asked Rankin if any subcontractors other than Progressive would be performing work at the jobsite. (Tr. 194) Rankin then screamed, about five times in rapid succession, to "get the fuck out of my trailer." (ALJD 5:10-13; Tr. 101, 141, 158, 197-98) Harrison told DeMott that they should "get out of here," turned around, and began walking toward the trailer door. As DeMott turned around, he told Rankin that they had a federal right to be on the project and that they should be able to talk to the workers on the project. (ALJD 5:14-15; Tr. 101-02, 196)

DeMott, who was about six steps behind Harrison, followed Harrison as the latter walked toward the trailer door. Rankin, in hot pursuit, put his hands on DeMott's shoulder, and, shaking his finger, told DeMott that he would kick his ass, and then pushed him, although DeMott did not fall at that time. DeMott steadied himself from the push, turned halfway, and when he saw that Rankin was in his face, told Rankin not to "fucking touch"

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[3] In August 2010, Union representatives—but not DeMott or Harrison—went to the construction trailer weekly and engaged Rankin in 15 or 20 minutes of desultory conversation each time. These Union visits, which Rankin considered to be a nuisance, increased to twice per week in September 2010. (ALJD 3:28-31; Tr.27-29)

[4] The Dodge Reports were nationwide area listings of construction work to enable contractors to bid on construction jobs. The Dodge Reports did not provide the names of subcontractors on specific projects. (ALJD 5:33-34)

him. (ALJD 5:15-17; Tr. 102-03, 142, 196) DeMott did not make any physical contact with Rankin or ball up his fists at him. (Tr. 104)

DeMott then turned back toward the trailer door and continued walking toward it until he reached it. Because of the difference in height between the bottom of the half-open trailer door and the landing, DeMott put his right hand on the door jamb to steady himself. While DeMott stood in the doorway, and before he was able to step down onto the landing, Rankin grabbed DeMott's right bicep and shoved him in the back. (ALJD 5:18-20; Tr. 104-05) This was not a gentle nudge out the door. DeMott's derriere crashed into the landing, and as he caromed down the steps and unsuccessfully tried to grab the handrail, his neck and left hand hit and bounced off one of the upright rails. At the bottom of the steps, DeMott's feet hit the dirt, but the force of the shove continued to propel him forward until he landed on his face.

When DeMott looked up, Rankin shouted at him from the doorway area that he would "kick his ass." (ALJD 5:20; Tr. 105-06) DeMott, who feared that Rankin would make good on his threat, and Harrison, who from the bottom of the steps had observed Rankin push DeMott down the stairs, walked approximately thirty feet to the fence and exited through its open entrance. (Tr. 106, 143-43) Immediately after Rankin shoved DeMott down the stairs, Rankin also yelled for help to two City of Phoenix transit security guards who were about 100 feet away. The security guards joined Rankin, who told one of them that he wanted to ensure that DeMott and Harrison left the property. (ALJD 5:20-22; Tr. 43-44, 143-44)

Once DeMott and Harrison left the property, DeMott remained near the open entrance, telephoned his supervisor Cahill, and told him that he had been shoved down a set of stairs. (Tr. 107-08, 211)[5] After retrieving his camera from his vehicle, DeMott returned to the open

[5] The record evidence shows that, contrary to the ALJ's findings, DeMott and Harrison did exit the fenced area that enclosed the trailer after Rankin expelled them from the trailer. (ALJD 5:24-25; Tr. 107)

entrance and took a photograph of his bloodied finger and several photographs of Rankin, the trailer, and the municipal guards. (Tr. 108, 111; GCX 4; GCX 9, p. 2) City of Phoenix Police officers then arrived on the scene, several of whom spoke to Rankin and DeMott separately. DeMott asked the police officers to arrest Rankin for assault and told them that he wanted to file a police report. (ALJD 5:25-27; Tr. 109, 202)

While police officers interviewed Rankin, Cahill and the Union's Administrative Assistant, William Martin (Martin), arrived at the jobsite and joined DeMott and Harrison. DeMott told them that Rankin had pushed him down the stairs and that he had told a police officer that he wanted Rankin arrested for assault. (Tr. 112-113) DeMott also told Cahill that he needed medical treatment. (Tr. 201, 203-04) DeMott and Cahill then returned to the Union's office so that DeMott could fill out a workers' compensation incident report for the Union. Because DeMott was in a lot of pain, which was increasing, Cahill handed him a piece of paper with two addresses for Concentra, an urgent-care facility, and told him to go to one of them. (Tr. 114, 211-12; GCX 11)

DeMott went to Concentra, where he reported sharp, severe pain of the posterior neck and lower back that worsened with direct pressure or any movements. (ALJD 5:30-31) At Concentra, a doctor prescribed pain medication restricted DeMott's work status to "no work activity," and diagnosed him with lumbar pain. (Tr. 116- 17, 127; GCX 12, 19)

Although the ALJ did not mention DeMott's pain and suffering beyond his "severe musculoskeletal pain" immediately following his October 1, fall, the record shows that Rankin's attack drastically debilitated DeMott. Before the attack, DeMott was fully able to perform his work duties and participate in chores and normal home activities. After the attack, DeMott could hardly walk and could barely make it to his home's second-floor

bathroom; his wife had to help him with most everything he did. (ALJD 5:30-31; Tr. 126-27) Given that DeMott's work activities included attending meetings and talking to workers, the pain resulting from the attack was a significant blow to DeMott. (Tr. 135-36)

It was necessary for DeMott to seek additional medical treatment in his efforts to recuperate from the injuries. (ALJD 6:3-4) More specifically, on October 11, the earliest date on which he could obtain an appointment, DeMott met with specialist Bogdan Anghel, M.D. (Tr. 124) DeMott reported to Dr. Anghel that a contractor had pushed him off a flight of stairs and that he had hurt his back and neck as a result. (GCX 19) Dr. Anghel, who diagnosed DeMott with lumbar and cervical contusions, recommended a course of physical therapy and that DeMott not work during the treatment period. (GCX 19) The injuries suffered by DeMott at the hands of Rankin continued to cause him pain and limit his activities for months. DeMott's last day of work for the Union was on October 1, the day he was attacked by Respondent. In February 2011, the Union informed him that a position was no longer available for him. (ALJD 6:6-7; Tr. 131)[6]

III. ANALYSIS

A. The ALJ Erred in Finding That DeMott's and Harrison's Purpose in Visiting Respondent's Trailer Did Not Relate to the Exercise of Employees' Section 7 Rights.

An employer violates Section 8(a)(1) of the Act by denying access to a jobsite to non-employee union representatives seeking to communicate with employees of a subcontractor where the subcontractor's employees are represented by the union and where the subcontractor and union have an agreement containing a union-access or union-visitation

[6] Contrary to the ALJ's finding, DeMott did not file a workers' compensation claim with the California Department of Workers' Compensation. Respondent told him to fill out workers' compensation forms, and DeMott complied. It was Respondent's workers' compensation carrier, Liberty Mutual, who released DeMott from workers' compensation in about February 2011. (Tr. 125, 130, 187-88)

clause. *CDK Contracting Co.*, 308 NLRB 1117, 1117 (1992); *Wolgast Corp.*, 334 NLRB 203 (2001). Here, the ALJ agreed that the CBA gave the Union a right of access to the jobsite, but the ALJ nonetheless found that because the objective of De Mott and Harrison in visiting the trailer was limited "to glean from Rankin information about Respondent's subcontracting plans," this objective "did not relate to the exercise of employees' Section 7 rights and did not, therefore, provide any Section 7-protected basis for accessing the trailer." (ALJD 7:32-38)

Although one objective of the Union representatives' visit to the trailer was admittedly to determine whether subcontractors in the Union's craft other than Progressive were or would be performing work at the jobsite and to encourage Respondent to fill any such openings from a list that they would later present to Respondent, the ALJ ignored credible evidence that establishes that another of the Union representatives' objectives was to speak with Progressive employees. In fact, DeMott testified that on the morning of October 1, at the jobsite, after he asked a Progressive employee where the trailer was located, DeMott told the employee that he would "talk to [him] later,," obviously referring to a time a bit later after DeMott went to the trailer. (Tr. 94-95) DeMott also testified that after speaking to Rankin about subcontracting, DeMott intended to speak with the Progressive workers and would have done so if Rankin had not obstructed him by pushing him down the stairway. (Tr. 134, 203) Similarly, Harrison testified that he was unable to ask anything about Progressive because he did not have the opportunity to do so before Rankin went into a "rant" and ordered them off the jobsite. (Tr. 157, 165-66) This is consistent with Harrison's and Cahill's testimony that Union special representatives not only have a practice of talking to the employees of Union-signatory subcontractors when such employees are working on site, but that representatives

are instructed to talk to these employees to greet them, check their dues, and provide any service that would be necessary. (Tr. 166, 212) The evidence is overwhelming that but for Respondent's unlawful ejection of the Union's agents from the jobsite, they would have met with and conferred with the employees of the signatory contractor on the jobsite. By ejecting DeMott and Harrison from the trailer and inflicting bodily injury upon DeMott as Rankin did so, Respondent denied them access to the jobsite and thus prevented them from communicating with any Progressive employees. As a result, Respondent violated Section 8(a)(1) of the Act. *See CDK Contracting*, 308 NLRB at 1117.

B. The ALJ Mistakenly Concluded that Respondent Had an Exclusionary Property Interest in Its Construction Trailer.

It is respectfully submitted that the ALJ erred by finding that Respondent was free to deny access to its construction trailer to DeMott and Harrison, in a nondiscriminatory manner, because there was no evidence that Progressive or any other subcontractor had been invited to perform work at or in the construction trailer and because the City of Phoenix had allowed Respondent the exclusive use of a staging area where Respondent had placed its trailer at the jobsite. (ALJD 7:15-19) Such a finding fails to take into account the plain language of the CBA's access clause, which states:

> **2620. Job Access of Union Representatives.** The business agent or special representative shall have access to the project during working hours and shall make every reasonable effort to advise the contractor or his representative of his presence on the project. He shall not stop or interfere with work of any workman without the permission of the Contractor or his representative.

(ALJD 3:7-14). This language grants union representatives access to the entire "project" and is thus not limited to any partial area of the project such as a specific construction area or trailer. Even the City-of-Phoenix contract cited by the ALJ, which is entitled "Project

Specifications and Contract Documents / Central Station Refurbishments," makes plain that the "project" refers to all phases and areas of the project. (GCX 7) Because the CBA granted contractual access to the Union to the entire project, including the construction trailer in the staging area, Respondent denied access to the project to DeMott and Harrison and thereby violated Section 8(a)(1) by escorting them out of the trailer and inflicting bodily injury upon DeMott by pushing him down the trailer's stairway. Respondent's effort to carve out a staging area is merely an artifice. The record fails to show that the ALJ's general conclusions in this regard are supported by the record. To the contrary, they appear to be based on Respondent's mere assertions, which are contrary to the record evidence summarized above.

C. The ALJ Erred in Finding that DeMott and Harrison Forfeited Their Contractual Right of Access by Failing to Follow Respondent's Access Restrictions.

The ALJ held that the no-solicitation notice posted on the outside of the trailer door served as a reasonable and nondiscriminatory restriction on DeMott's and Harrison's right to access the trailer. It is respectfully submitted that the ALJ erred in so finding.

In this regard, the record shows that Respondent's notice, posted outside the trailer door (affixed to which was Rankin's business card containing his company cell-phone number and his e-mail address) (ALJD 3:35-41), was not only overly-broad, as discussed further below, but was also a discriminatory restriction on employees' rights under the Act. As to the notice itself, it stated:

NO
HIRING
ON-SITE
ABSOLUTLY NO
SOLICITATION
W/O
APPOINTMENT

From such a notice, and without regard to the terms of the CBA, the ALJ concluded that DeMott and Harrison were required to make an appointment with Respondent before accessing the trailer, and as a result of failing to do so before entering the trailer, DeMott and Harrison forfeited their right to access the trailer. (ALJD 8:14-19)

In making such a finding, the ALJ failed to take into account that the no-solicitation notice was both discriminatory and unreasonable. The right of access of DeMott and Harrison did not depend on, nor was it controlled by, the no-solicitation notice's terms. The ALJ's finding, itself, is based on a flawed premise, i.e., that the trailer was located in an area of the jobsite that was somehow separate and apart from the part of the jobsite covered by the CBA. Again, such a finding appears to be based on Respondent's argument, not the facts.

Moreover, the evidence shows that Respondent promulgated and maintained its no-solicitation notice in a discriminatory manner in violation of Section 8(a)(1) of the Act. Although Rankin self-servingly testified that he placed this notice on the trailer door because he was being interrupted by labor companies, waste management companies, and equipment rental companies, as well as by visits from Union representatives, the record shows that Rankin's hostility toward and desire to stop Union-related visits was what motivated Respondent to post such a notice. Rankin admits as much. More specifically, in an e-mail that he sent on November 19 to Evelyn Beck (Beck), Respondent's Project Coordinator, Rankin states that he "further told them [referring to DeMott and Harrison] that [Respondent] had posted a sign requesting there be no solicitation in order to discourage the senseless visits." (Tr. 36, 64; GCX 5) Rankin did not write any other reason in the e-mail for his decision to post the no-solicitation notice. To make the sign's purpose crystal clear, Rankin reminded DeMott and Harrison during their October 1 discussion that the no-solicitation

notice was on the door. (Tr. 35) Rankin, therefore, clearly meant the sign to apply to Union visits. Respondent's admission supports a finding that the posting, and maintenance, of such a rule was unlawful.

Because Rankin promulgated the no-solicitation rule in response to Union activity and to prevent the Union from accessing the trailer and, as a result, the jobsite, thereby preventing the Union from communicating with its represented employees, Respondent violated Section 8(a)(1) of the Act. In the circumstances presented, the record fails to show that DeMott and Harrison were obliged to surrender their right to access the jobsite, including the construction trailer.

Moreover, the no-solicitation notice contained unreasonable terms inconsistent with the right of access set forth in the CBA. While it is true that notwithstanding a union's right to access a jobsite pursuant to a contractual access clause covering subcontractor's employees, an owner of or entity responsible for the jobsite has the right to "promulgate reasonable rules applicable to visits to the jobsite by both union business agents and other visitors," *CDK Contracting Co.*, 308 NLRB 1117, 1117 n.1 (1992), Respondent in the instant case went beyond what the Board has found to be permissible. For example, in Peck/Jones Construction, 338 NLRB 16, 16 (2002), which involved a jobsite at a major airport, the Board found reasonable rules requiring union business agents to be accompanied onto the jobsite by escorts as well as to sign in at an entry gate. In the instant case, requiring Union representatives to make an appointment before they could open the trailer door swallows -- and is contrary to -- the contractual right of access described in the CBA. Rankin could refuse to answer the telephone or e-mail or simply be too busy to pay attention to either. The right of access would no longer reside with the Union but with Respondent.

Because the no-solicitation notice contained unreasonable terms inconsistent with the right of access described in the CBA, DeMott's and Harrison's failure to abide by the notice's terms did not curtail their contractual right of access to the construction trailer. Respondent therefore violated Section 8(a)(1) by denying access to the trailer to DeMott by escorting him out of the trailer and inflicting bodily injury upon DeMott by pushing him down the trailer's stairway.

D. The ALJ Erred by Refusing to Find That Rankin's Assault on DeMott Violated Section 8(a)(1) of the Act.

An employer violates Section 8(a)(1) of the Act by assaulting a union representative in the presence of one or more employees under circumstances where an onlooker would likely infer from the assault that the employer would also retaliate in some fashion against an employee who supported the union. *Batavia Nursing and Convalescent Inn*, 275 NLRB 886 n.2, 891 (1985).

Here, Rankin assaulted DeMott in the presence of Harrison, an employee of the Union, and prevented them from engaging in lawful representational activities. DeMott subsequently told Union employees Cahill and Martin, as well as police officers and medical personnel, that Rankin or a representative of the Respondent had assaulted him. It is likely that all of these employees further disseminated news of the assault and that individuals who heard about the assault would be chilled from supporting the Union or any union.

Moreover, it is not required that employees of Respondent heard about the assault. See *H. R. McBride Construction Company*, 122 NLRB 1634, 1635 (1959) (holding that "even assuming absence of knowledge by the [r]espondent's employees of such other assaults, we nevertheless find that the violence and threats of violence employed by the Respondent violated Section 8(a)(1) of the Act because it was destructive of the rights guaranteed

employees in Section 7 of the Act.); *Anchor Rome Mills, Inc.*, 86 NLRB 1120, 1121 (1949) (same). The narrow conclusions drawn by the ALJ in this matter run contrary to the teachings of *H.R. McBride Construction*, and would erode and interfere with the relationship between employees and their collective-bargaining representatives. There can be little serious doubt that news of Respondent's egregious assault on the Union's agents made its infamous way around the Union hall, the labor community, and the jobsite. In the circumstances presented, by Rankin's assault on DeMott, Respondent violated Section 8(a)(1) of the Act.

E. The ALJ Erred by Holding that the No-Solicitation Notice Was Not Overly Broad.

Even though the no-solicitation notice prohibits all solicitation on the jobsite without an appointment, the ALJ held that the no-solicitation notice was not overly broad. The ALJ argued in part that "a reasonable reading of the notice justifie[d] and inference that it applied only to individuals seeking to meet with occupants of the construction trailer." (ALJD 8:24-34) This inference is unjustified. The first part of the notice specifically states that there is no hiring "on-site," which reasonably would lead prospective job seekers to understand that they cannot apply for a job anywhere on the project property, including, but not limited to, the construction trailer. The language of the no-solicitation notice does not, moreover, limit itself to prohibiting solicitation inside the trailer. Anyone passing by the trailer, including employees, reasonably would believe that solicitation was banned at all times without approval by Respondent through an appointment.

Employers may ban solicitation in working areas during working time but may not extend such bans to working areas during nonworking time. See, e.g., *Restaurant Corp. of America v. NLRB*, 827 F.2d 799, 806 (D.C. Cir. 1987) ("an employer may not generally prohibit union solicitation ... during nonworking times or in nonworking areas.") (citing

NLRB v. Babcock & Wilcox Co., 351 U.S. 105, 112-113 (1956); *Republic Aviation Corp. v. NLRB*, 324 U.S. 793, 797-798 (1945)). As written, the Respondent's rule bars solicitation during non-working time. See also *In re Teletech Holdings, Inc.*, 333 NLRB 402, 403 (2001) (any distribution rule that requires employees to secure permission from their employer prior to engaging in protected concerted activities on an employee's free time and in non-work areas is unlawful).

F. The ALJ Erred by Failing to Find That Respondent Violated the Act by Summoning Security Guards to Escort Union Representatives Off Respondent's Job Site.

The ALJ found that "after Rankin forcibly expelled DeMott from the construction trailer, he told a security guard to make sure the two union representatives got off the property." (ALJD 8:36-39) On this basis, the ALJ found that Respondent had violated Section 8(a)(1) of the Act by directing a security guard to escort DeMott and Harrison off the jobsite. (ALJD 9:9-10) The ALJ correctly noted that although no employee other than Union employees DeMott and Harrison were present to hear Rankin's order, the Board holds to the principle that acts of unions and their agents can be protected under the Act. *Golden Stevedoring Co., Inc.*, 335 NLRB 410, 414 (2001).

Rankin admitted that before Rankin told the security guard to ascertain that DeMott and Harrison had left the jobsite, Rankin called or yelled out to the security guards by name, both of whom were about one block away. (Tr. 43-44) The ALJ did not find specifically find that Rankin had called out to the guards. Therefore, the General Counsel requests that the Board also find that Respondent violated Section 8(a)(1) of the Act by summoning security guards to the jobsite to escort Union representatives off Respondent's jobsite.

G. Because the Respondent Injured DeMott, a Make-Whole Remedy Is Appropriate.

When Rankin pushed DeMott down the trailer steps on October 1, the fall injured DeMott. Although the record does not reflect whether DeMott suffered a new injury or aggravated or exacerbated an existing injury, it is clear that the fall caused injury to him. As the ALJ found, DeMott "experienced severe musculoskeletal pain" immediately following the October 1 fall, and he received additional medical treatment after seeking treatment at an urgent care facility. (ALJD 5:30-31;6:2-5) As discussed below, such harm was a foreseeable consequence of Respondent's unlawful conduct.

As to the fact that DeMott suffered an injury as a result of Respondent's assault, DeMott took photographs after the fall that show his bloodied hand and finger. Within a few hours after Rankin pushed him, DeMott's back and neck pain worsened, and he sought medical treatment at an urgent care center. The doctor at the urgent care center diagnosed him with lumbar pain, and when he sought treatment from a specialist, Dr. Anghel, soon thereafter, the doctor diagnosed him with a lumbar and cervical contusion. Even without the diagnoses, DeMott's pattern of pain establishes a correlation between the push and his injuries. There was no intervening event that would have caused DeMott to seek medical attention at the urgent care center on that day or that would have caused DeMott's increased pain.

The increased pain gravely and negatively affected DeMott's ability to engage in daily life and work activities. His reports of pain to Concentra, to Dr. Anghel, and to physical therapists demonstrate that his pain increased in both scope and intensity after October 1. Whether the extent of DeMott's injuries suffered on October 1 are such that he should have returned to work, if at all, after one day, one month, or one year, is best left for a compliance proceeding. A fair reading of the medical reports shows, however, that DeMott's pain

increased exponentially after October 1, and that the only event that could have caused such pain was Rankin's battering of DeMott on October 1. The fact that Respondent's assault resulted in injury to DeMott, and that such injuries were a foreseeable consequence of Respondent's egregious conduct, is established by the record.

Where an employer's unfair labor practice causes injury to an employee, a make-whole remedy is appropriate, including back pay for the period of time that the employee is unable to work. See. e.g., *Graves Trucking, Inc.*, 246 NLRB 344 (1979), *enfd. as modified*, 692 F.2d 470 (7th Cir. 1982) (awarding a make-whole remedy to a union steward who was violently choked by a supervisor, including lost pay from the day the employee was rendered unable to work due to physical injury until a reasonable period after he is able to return to work, which the Court of Appeals limited to two years).

Moreover, in this case, a make-whole order does not end at backpay. Rather, Respondent is responsible not only for backpay, but the make-whole costs associated with all foreseeable harm caused by its actions. See *Freeman Decorating Co.*, 288 NLRB 1235, n. 2 (1988) (acknowledging possibility of make-whole remedy for employee allegedly disabled by being forcibly removed from the employer's site, including backpay for his period of disability and costs for medical and rehabilitation treatment that would have been covered by employer's insurance); *Greyhound Taxi Co.*, 274 NLRB 459 (1985), remanded sub nom. *Wakefield v. NLRB*, 779 F.2d 1437 (9th Cir. 1986), on remand 279 NLRB 1080 (1986) (make-whole remedy awarded to employee included backpay for the period of physical and psychological injuries sustained from employer's physical assault and termination); *Becton-Dickinson Co.*, 189 NLRB 787, 789 (1971) (make-whole remedy awarded to employee who lost consciousness and suffered an acute anxiety reaction due to employer's unlawful

harassment where evidence proffered at the administrative hearing was sufficient to infer that harassment to which respondent unlawfully subjected employee did induce or, in any event, substantially contribute to the employee's anxiety reaction).

The Act provides a statutory remedy designed to aid in achieving the public policy embodied in the Act. See, e.g., *Int'l Brotherhood of Operative Potters, AFL-CIO v. NLRB*, 320 F.2d 757, 761-62 (D.C. Cir. 1963) ("[t]he Act itself treats back pay, once awarded under Section 10(c) of the Act, as a debt owed to the Board as agent for the injured employees; the Board, and the General Counsel in particular, is a publicly created attorney for the employee in this particular context.") (citing *Nathanson v. NLRB*, 344 U.S. 25, 27-28 (1952)).

In achieving the public policy embodied by the Act, Congress has granted the Board broad remedial powers designed to restore discriminatees to the position they were in prior to the commission of the unfair labor practice. See, e.g., *H. W. Elson Bottling Company*, 155 NLRB 714, 715 (1965), enfd. as amended 379 F.2d 223 (6th Cir. 1967) ("[t]hus, 'depend[ing] upon the circumstances of each case', the Board must 'take measures designed to recreate the conditions and relationships that would have been had there been no unfair labor practice.'") (quoting *Local 60, United Brotherhood of Carpenters and Joiners of America, AFL-CIO v. NLRB*, 365 U.S. 651, 657 (1961)).

It is appropriate for the Board to order that Respondent make whole DeMott not only in terms of backpay, with interest, but also for medical and injury-related costs. losses, and expenses incurred as a result of Respondent's assault.

The Board has demonstrated its willingness to hold employers responsible for violations of the Act that are proximate and foreseeable results of the employer's action. See generally *Sure-Tan, Inc. v. NLRB,* 467 U.S. 883 (1984) (requiring payment of at least six

months of backpay to employees who left the United States where employer had contacted immigration authorities to retaliate against these employees' union activities). For example, in addition to the types of remedies related to physical and mental injuries in the cases cited above, the Board has required respondent employers to make unions and their representatives whole for any and all legal, representational, and related costs arising from arrests unlawfully initiated by a respondent, as well as to take other remedial action in such cases, including notifying the appropriate law enforcement and court authorities of the illegality of the arrests and to seek the expungement of associated records. See generally *Roger D. Hughes Drywall*, 344 NLRB 413 (2005); *Schear's Food Center*, 318 NLRB 261, 267 (1995); *K Mart Corp.*, 313 NLRB 50, 58 (1993); *Baptist Memorial Hospital*, 229 NLRB 45, 46 (1977), affd. 568 F.2d 1 (6th Cir. 1977).

The type of remedy sought by the General Counsel in the instant case is well within the Board's power to grant affirmative relief:

> The instant reimbursement order is not a redress for a private wrong. Like a back pay order, it does restore to the employees in some measure what was taken from them because of the Company's unfair labor practices. In this, both these types of monetary awards somewhat resemble compensation for private injury, but it must be constantly remembered that both are remedies created by statute--the one explicitly and the other implicitly in the concept of effectuation of the policies of the Act--which are designed to aid in achieving the elimination of industrial conflict. They vindicate public, not private, rights. For this reason it is erroneous to characterize this reimbursement order as penal or as the adjudication of a mass tort.

Virginia Electric Co. v. Labor Board, 398 U.S. 533, 543 (1943) (a case involving the issue of whether the Board had the authority to order a company to reimburse employees for checked-off dues in a company-dominated-union situation). Moreover, the Board has been entrusted with "broad discretionary power" to remedy unfair labor practices. See *Fibreboard Paper Products Corp. v. NLRB*, 370 U.S. 203, 216 (1964) ("[t]he relations of remedy to policy is

peculiarly a matter for administrative competence. In fashioning remedies to undo the effects of violations of the Act, the Board must draw on enlightenment gained from experience."); *Frontier Hotel & Casino*, 318 NLRB 857 (1995), enf. denied in part sub nom. *Unbelievable, Inc. v. NLRB*, 118 F.3d 795 (D.C. Cir. 1997) ("Section 10(c) . . . by its plain meaning, contemplates the exercise of broad discretion by the Board in fashioning a range of remedies suitable to remedy various unfair labor practices, as long as they 'effectuate the policies of the Act.'").

Furthermore, Board law does not limit an employee's back pay remedy to situations where that alleged discriminatee's own employer committed the unfair labor practices. This situation is no different from ones in which, for example, an employer interferes with a former employee's job opportunities because of that employee's union or other concerted activities. See, e.g., *California Gas Transport, Inc.*, 347 NLRB 1314, 1322-23 (2006) ("[a]n employer may not, for the purposes of punishing an employee for exercising Section 7 rights or engaging in union activity, seek to prevent another employer from hiring the employee.") Similarly, an employer or union violates the Act when it blacklists an employee, thereby preventing the employee from obtaining employment elsewhere. See, e.g., *Longshoremen, ILA Local 1418 (Lykes Bros. Steamship Co.)*, 104 NLRB 720 (1953), enfd. 212 F.2d 846 (5th Cir. 1954) (ordering a make-whole remedy to an employee for any loss of pay suffered because of a union's blacklisting). Finally, an employer is liable when it directs another employer to discharge or otherwise affect the working conditions of the latter's employees. *Dews Construction Corp.*, 231 NLRB 182, 183 n. 4 (1977) ("[a]n employer violates the Act when it directs, instructs, or orders another employer with whom it has business dealings to discharge, layoff, transfer, or otherwise affects the working conditions of the latter's

employees because of the union activities of said employees.") (citing *Georgia-Pacific Corporation*, 221 NLRB 982, 986 (1975); *Fabric Services, Inc.*, 190 NLRB 540, 541-543 (1971)).

Where, as here, the Respondent's unfair labor practice resulted in DeMott's injury, inability to work, and the need to obtain medical care and incur other healthcare expenses, the proper make-whole remedy is a back pay for the period of time that DeMott that is prevented from working and the reimbursement of DeMott's medical and healthcare costs, plus interest. Such a remedy is squarely within the Board's discretionary powers and would effectuate the purposes of the Act.

IV. CONCLUSION

Based on the above and the record evidence as a whole, the General Counsel requests that Board find that Respondent violated Section 8(a)(1) of the Act as alleged. Because Respondent's unfair labor practices injured DeMott or exacerbated an existing injury, a make-whole remedy for DeMott is warranted. Therefore, the General Counsel requests that the Board order that Respondent make whole DeMott for lost wages during the period of time that he has been and will be unable to work as a result of his injuries and for out-of-pocket expenses related to the injury as discussed above; to cease and desist from its unlawful conduct; and to post and distribute an appropriate Notice to Employees, and order such other relief as may be necessary and appropriate to effectuate the purposes of the Act.

Dated at Phoenix, Arizona, this 17th day of January 2012.

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CERTIFICATE OF SERVICE

I hereby certify that a copy of ACTING GENERAL COUNSEL'S EXCEPTIONS AND ACTING GENERAL COUNSEL'S BRIEF IN SUPPORT OF EXCEPTIONS in NORQUAY CONSTRUCTION, INC., Case 28-CA-023412 was served by E-Gov, E-Filing, E-Mail, and regular mail on this 17th day of January 2012, on the following:

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