UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 12

HARTMAN AND TYNER, INC.
d/b/a MARDI GRAS CASINO AND
HOLLYWOOD CONCESSIONS, INC.

and

Cases 12-CA-072234, 12-CA-072238
12-CA-072245, 12-CA-072246
12-CA-072248, 12-CA-072251
12-CA-072254, 12-CA-072257
12-CA-072263

UNITE HERE! LOCAL 355, affiliated with UNITE HERE!

ACTING GENERAL COUNSEL'S BRIEF IN SUPPORT OF CROSS-EXCEPTIONS TO THE ADMINISTRATIVE LAW JUDGE'S DECISION

Pursuant to Section 102.46 of the Board's Rules and Regulations, Counsel for the Acting General Counsel, hereby submits the following Brief in Support of Cross-Exceptions to the Administrative Law Judge's Decision in the above captioned case.

I. Statement of the Case

On April 30, 2012, upon charges filed by UNITE HERE! Local 355, affiliated with UNITE HERE! (the Union), a complaint issued alleging that Respondent Hartman and Tyner, Inc. d/b/a Mardi Gras Casino and Respondent Hollywood Concessions, Inc. (collectively referred to as Respondent) have been engaging in unfair labor practices in violation of Section 8(a)(1) and (3) of the Act.[1] (GCX 1(a)-1(mm), 1(nn)). On June 25-28, 2012, a hearing concerning this matter was held before the Honorable George Carson II, Administrative Law Judge (herein called the "ALJ").

[1] Judge Carson's Decision and Recommended Order will be identified by "ALJD," page, and line. "GCX" refers to the Acting General Counsel's exhibits and "Tr." refers to the transcript.

On September 18, 2012, the ALJ issued his Decision finding that Respondent committed numerous violations of Section 8(a)(1) and (3) of the Act. More specifically, the ALJ concluded in his detailed and well-reasoned Decision that Respondent interrogated employees about their union sympathies and the union activities of other employees, threatened employees with unspecified reprisals because of their union activities, threatened employees with arrest for engaging in protected concerted union activities, informed employees that they were discharged for engaging in protected concerted union activities, and suspended three employees (Theresa Daniels-Muse, Tashana McKenzie, and Amanda Hill) and discharged those three plus five others (Sochie Nnaemeka, James Walsh, Dianese Jean, Alicia Bradley, and Steve Wetstein) because they supported the Union. (ALJD 27:1-15). On November 2, 2012, Respondent filed its Exceptions and Brief in Support of Exceptions. In addition to Cross-Exceptions and this Brief in Support of Cross-Exceptions, the Acting General Counsel is separately filing an Answering Brief to Respondent's Exceptions to Administrative Law Judge's Decision.

II. Argument

A. Respondent should be ordered to post the Notices to Employees in languages other than English, including Haitian Creole and other foreign languages as determined to be necessary by the Regional Director.

Although the ALJ's Recommended Order requires Respondent to post the Board's Notice to Employees, it does not require Respondent to post the Notice in English, Haitian Creole, and other languages as determined by the Regional Director to be necessary to fully communicate with employees at Respondent's Hallandale Beach, Florida facility. (ALJD 27-29). The posting of Notices in Haitian Creole is required in view of the composition of Respondent's workforce. Respondent employs a significant number of employees whose first language is Haitian Creole, as reflected by the fact that several witnesses at the hearing before Judge Carson needed the

assistance of an interpreter. (Tr. 111-112, 293-295, 314). In addition, there is likely to be a need for posting in other foreign languages, given the size of Respondent's work force of 600 employees, most of whom are involved in its casino operations, and because Respondent's facility is located in South Florida in the midst of a large population that includes many persons whose first language is not English, many of whom will be better able to understand the Notice to Employees if it is written in their first language than if it is only in English. Accordingly, it is urged that the Board grant cross-exception 1 and provide for posting of the Notices of Election in English, Haitian Creole, and other languages as determined by the Regional Director to be necessary to fully communicate with employees at Respondent's Hallandale Beach, Florida facility. *Associated Builders and Contractors*, 333 NLRB 955, 956 (2001); see also *Symphony Cleaners 44, Inc.*, 344 NLRB 684, 686, fn.2 (2005).

B. The Board Order should contain a standard electronic posting remedy.

The Board's standard electronic posting remedy was apparently inadvertently omitted from the recommended Order by Judge Carson, and is needed to fully remedy Respondent's unfair labor practices. *J. Picini Flooring*, 356 NLRB No. 9 (2010). Accordingly, cross-exception 2 should be granted.

C. Respondent should be required to publicly read the Notice to Employees in view of its egregious and widespread unfair labor practices that are intended to destroy the Union's organizing campaign.

In view of Respondent's numerous, widespread and egregious unfair labor practices intended to destroy the Union's organizing campaign, as found by the ALJ, the Board Order should require a responsible representative or representatives of Respondent, in the presence of a Board agent or Board agents, to read the Notice to Employees in English, Haitian Creole, and other foreign languages deemed necessary to fully communicate with Respondent's employees,

at a meeting or meetings of its employees on work time at its Hallandale Beach, Florida facility, to insure the widest possible audience. In the alternative, this requirement should require a responsible representative or representatives of Respondent to be present for the public reading of the Notice to Employees by a Board agent or Board agents. (ALJD 27-29).

As found by the ALJ, this case involves organizational activity among Respondent's casino employees. (ALJD 3:21-22). As soon as Respondent found out about the organizing campaign, Respondent engaged in numerous violations of Section 8(a)(1) and (3) of the Act. As the ALJ found, vice-president Dan Adkins, the highest ranking official of Respondent violated the Act by including informing Amanda Hill, union organizer, that she was discharged because of her protected concerted activity. (ALJD 9:38-51, 40:1-4). Hill was discharged, along with Theresa Daniels-Muse, Tashana McKenzie, Alicia Bradley, and Dianese Jean for participating in the delegations that the ALJ found to be protected under the Act. (ALJD 26:48-51). Respondent also discharged employee union activists James Walsh, Sochie Nnaemeka, and Steve Wetstein, in violation of the Act. (ALJD 14:9-10,18:39-40, 23:3-5).

The Board has ordered extraordinary remedies when Respondent's unfair labor practices are "so numerous, pervasive, and outrageous" that the remedies are necessary "to dissipate fully the coercive effects of the unfair labor practices found." *Fieldcrest Cannon, Inc.*, 318 NLRB 470, 473 (1995), enfd, in part, 97 F.3d 65 (4th Cir. 1996). The public reading of the Notice to Employees is an "effective but moderate way to let in a warming wind of information and, more important, reassurance." *United States Service Industries, Inc.*, 319 NLRB 231, 232 (1995), enfd. 107 F.3d 923 (D.C. Cir. 1997), quoting *J.P. Stevens & Co. v. NLRB*, 417 F.2d 533, 540 (5th Cir. 1969). Imposing such a remedy gives the Board assurance of the Respondent's "minimal acknowledgment of the obligations that have been imposed by the law…The employees are

entitled to at least that much assurance that their organizational rights will be respected in the future." *Federated Logistics and Operations*, 340 NLRB 255, 258, n. 11 (2003). If the Respondent is required to have an employer representative that they view as personifying the company itself, the employees will be assured that Respondent will respect their rights. See *United States Service Industries, at 232.* Moreover, in an organizing drive such as the one in this case, there is a greater psychological impact from having a representative read the notice to employees rather than just a traditional notice posting. For these reasons, cross-exception 3 has merit and should be granted.

D. The ALJ erred by failing to include in his recommended remedy and order that Respondent is required to reimburse the unlawfully discharged technicians for any excess federal and state income taxes they may owe from receiving a lump-sum backpay award and to submit the appropriate documentation to the Social Security Administration so that when backpay is paid to the unlawfully discharged technicians it will be allocated to the appropriate calendar quarters.

The ALJ recommended that Respondent be ordered to make the technicians whole for any loss of earning or other benefits suffered as a result of their unlawful discharges by paying them backpay and interest. However, the ALJ's recommended remedy and order fails to take into account the potential adverse tax consequences that may result due to the receipt of a lump-sum payment of backpay. Furthermore, the ALJ's recommended remedy and order fails to address the possible adverse consequences that might result if backpay is not allocated to the appropriate calendar quarters when reported to the Social Security Administration.

The Board has broad powers under Section 10(c) of the Act, 29 U.S.C. Sec. 160(c), to fashion remedies, including affirmative orders, that will effectuate the policies of the Act. *NLRB v. Strong Roofing & Insulating*, 393 U.S. 357, 359 (1969); *Teamsters Local 115 v NLRB*, 640 F.2d 392, 399 (D.C. Cir. 1981). Making workers whole for losses suffered on account of an unfair labor practice is part of the vindication of the public policy which the Board enforces.

Phelps Dodge Corp. v. NLRB, 313 US 177, 197 (1941). In applying its authority over backpay orders, the Board has not used rigid formulas but has availed itself of the freedom given it by Congress to attain just results in diverse, complicated situations. *Id.* at 198. Moreover, the Board has periodically updated and reformed these remedies to more perfectly respond to new "devices and stratagems for circumventing the policies of the Act." *See id.* at 194. Indeed, the Supreme Court has commanded the Board to "draw on enlightenment gained from experience" in crafting new remedies designed to undo the effects of unfair labor practices. *Fibreboard Paper Prods. Corp. v. NLRB*, 379 U.S. 203, 216 (1964).

Both a tax component in backpay and employer notification of social security are appropriate Board remedies. Section 10(c) of the National Labor Relations Act authorizes the Board to devise remedies to reinstate the status quo ante in order to effectuate the policies of the Act. That is, under the Act, the respondent should as nearly as possible restore discriminatees to the situation that would have obtained but for the unlawful discrimination. However, the current Internal Revenue Code hinders the NLRA's make-whole objective by taxing a discrimination award more heavily than it would have had the plaintiff earned the wages and benefits in due course. *See United States v. Cleveland Indians Baseball Co.*, 532 U.S. 200, 220 (2001) (finding that for tax purposes backpay is income the year it is actually paid, even if for Social Security benefits purposes backpay is allocated to the years it should have been paid). *See also* Rev. Rul. 75-64, 1975-1 C.B. 16; Rev. Rul. 57-55, 1957-1 C.B. 304.

To redress this unfairness, several courts, as well as the EEOC, now allow a discriminatee to request a "gross up" of their backpay award in order to offset the increased tax liability incurred by virtue of receiving the backpay in one lump sum. *Sears v. Atchison, Topeka & Santa*

Fe Ry., Co., 749 F.2d 1451, 1456 (10th Cir. 1984) (holding that courts have equitable power to grant a gross up); *Eshelman v. Agere Sys., Inc.*, 554 F.3d 426, 441-42 (3d Cir. 2009) (same); *O'Neill v. Sears, Roebuck & Co.*, 108 F. Supp. 2d 443, 446-447 (E.D. Pa. 2000) (finding that compensation for adverse tax consequences was necessary to comply with make-whole doctrine of the ADEA); s*ee Powell v. N. Ark. Coll.*, No. 08-CV-3042, 2009 WL 1904156, at *2–3 (W.D. Ark. July 1, 2009); *Van Hoose*, EEOC Decision No. 01990455, 2001 WL 991925, at *3 (Aug. 22, 2001). A district court in the Eleventh Circuit also relied on *Sears* in finding that it could include a tax component in a lump-sum backpay award. *EEOC v. Joe's Stone* C*rab, Inc.*, 15 F. Supp. 2d 1364, 1380 (S.D. Fla. 1998). However, the court did not do so because the plaintiff had not provided enough evidence to calculate what the tax component should be. *Id.*

In order to fully vindicate the purposes and policies of the Act, the Board should follow suit, and routinely require a respondent to reimburse a discriminatee for any negative tax consequences from receiving a backpay award in one lump sum.

Backpay awards also may result in a decrease in a discriminatee's social security benefits. Currently, the burden to notify the Social Security Administration of backpay awards and proper allocation rests on the discriminatee. However, the discriminatee often does not have the information necessary (i.e. corporate address, employer identification number, the period of time the backpay covers, etc.) to make such a request. It therefore is more appropriate that the respondent be given the responsibility to ensure that, for the purposes of social security, the discriminatee's backpay is allocated to the calendar quarters the discriminatee would have received the backpay absent the respondent's unlawful conduct. Accordingly, whenever the

Board awards backpay, it should routinely include an order for the respondent to report the backpay to the Social Security Administration.

Here, unless the ALJ's recommended remedy and order is modified to include provisions requiring that Respondent reimburse the technicians for any excess tax liability and submit the necessary paperwork to the Social Security Administration to ensure that backpay is allocated to the appropriate quarters, the technicians may not be made whole. Thus, the Board should modify the recommended remedy and order accordingly, and grant cross-exceptions 4 and 5.

III. Conclusion

For the reasons set forth above, Counsel for the Acting General Counsel respectfully urges the Board is urged to grant the Acting General Counsel's cross-exceptions in their entirety.

DATED at Miami, Florida, this 16th day of November, 2012.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that Acting General Counsel's Brief in Support of Cross-Exceptions to the Administrative Law Judge's Decision in the matter of Hartman and Tyner, Inc., d/b/a Mardi Gras Casino and Hollywood Concessions, Inc., Case 12-CA-072234, et al., was electronically filed with Executive Secretary of the National Labor Relations Board and served by electronic mail upon the below-listed parties on this 16th day of November, 2012.

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