

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

OLYMPIC SUPPLY, INC. D/B/A ONSITE NEWS

and

Case 05-CA-076019

UNITE HERE! LOCAL 7

**ANSWERING BRIEF OF THE COUNSEL FOR THE
ACTING GENERAL COUNSEL**

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I. INTRODUCTION

Pursuant to a hearing held on August 27, 2012, Administrative Law Judge Michael A. Rosas, herein “ALJ”, issued a Decision and Recommended Order on September 28, 2012. On October 24, 2012, Deputy Executive Secretary Gary Shinnors issued an Order transferring the case back to the ALJ for consideration of the post-trial brief of Olympic Supply, Inc. d/b/a Onsite News, herein “Respondent.” On November 7, 2012, the ALJ issued a Supplemental Decision affirming his prior decision. On December 5, 2012, Respondent filed Exceptions to the ALJ’s Decision and Recommended Order. On December 17, 2012, the Charging Party UNITE HERE! Local 7, herein “Union,” requested an extension of time to file an Answering Brief to Respondent’s Exceptions. On December 18, 2012, Associate Executive Secretary Henry S. Breitenicher granted the Union’s request and the deadline for Answering Briefs was extended to January 2, 2013. This Answering Brief is filed in accordance with that deadline.

The preponderance of the credited record evidence proves that Respondent violated Section 8(a)(1) of the Act by threatening employees with stricter enforcement of work rules if they voted in favor of collective-bargaining representation by Union. These threats were made by General Manager London Perry during one-on-one conversations with two separate employees. Both conversations occurred in February 2012, prior to a decertification election held on March 9, 2012. The credited testimony of both employees proves Perry made statements implying that if employees supported the Union, they would be subjected to stricter rule enforcement. These statements violated Section 8(a)(1) of the Act.

The Acting General Counsel argues that the Board should adopt the ALJ’s credibility determinations and findings that Respondent violated the Act as alleged in the complaint.

II. UNCHALLENGED FINDINGS AND CONCLUSIONS

Under Section 102.46(b)(2) of the Rules and Regulations of the National Labor Relations Board, herein “Board Rules”, any exception to a ruling, finding, conclusion, or recommendation not specifically urged is deemed waived. Respondent did not specifically take exception to the ALJ’s credibility determinations. The ALJ found Kevin Wheeler fairly credible and found London Perry’s testimony to be fraught with evasiveness and inconsistencies. The ALJ also credited the prior sworn statement of Monae Whitehead.¹ Respondent’s failure to specifically urge an exception to these credibility determinations should result in the Board’s adoption of those determinations.

Respondent did not specifically urge any exceptions to ALJ Rosas’s determinations regarding Respondent’s business operations or Respondent’s relationship with the Union.

III. FACTS

A. Respondent’s Business Operations

Respondent operates retail and newspaper concessions at Baltimore Washington International Airport. (ALJD 2: 17; Tr. 13: 18-20). One of the newsstands at the airport, referred to as UL-6, is located in the portion of the airport accessible without passing through

¹ In his supplemental decision, the ALJ credited testimony in Whitehead’s pre-hearing sworn affidavit, which the ALJ suggested had been used to impeach her. Whitehead testified at hearing that she could not *recall* the entirety of her conversation with Perry. Counsel for the Acting General Counsel attempted to refresh Whitehead’s recollection by showing her a prior sworn statement, but her recollection was not refreshed. (Tr. 75). Accordingly, Counsel for the Acting General Counsel had Whitehead read a portion of the prior sworn statement into the record as a past recollection recorded under Federal Rule of Evidence 803(5). (Tr. 76-77). See *Ironwood Plastics, Inc.*, 345 NLRB 1244, fn. 22 (2005); see also *Central Bio-Analytical Laboratories, Inc.*, 177 NLRB 36 (1969) (admitting into evidence a pre-hearing affidavit as a past recollection recorded).

As Whitehead’s pre-hearing testimony was not inconsistent with her lack of recollection at the hearing, there technically was no impeachment. Nevertheless, the ALJ’s crediting excerpts from Whitehead’s pre-hearing sworn affidavit read into the record was entirely appropriate and Respondent has not taken exception to the ALJ’s crediting that testimony in any event.

any of the security checkpoints. (Tr. 43). Respondent maintains a workforce of roughly 32 employees at the airport. (ALJD 2: 18; Tr. 26: 13).

Respondent's General Manager is London Perry.² (ALJD 2: 17; Tr. 13). Perry has held that title since August 4, 2008. (Tr. 13: 9). Reporting to Perry are four supervisors and three managers. (Tr. 14: 12). Respondent also employs sales associates, stock guys, magazine runners, and department heads. (Tr. 14: 16-19).

B. Union Representation

Since at least April 23, 2007, the Union has been the collective-bargaining representative of the following unit of Respondent's employees:

All regular full-time and regular part-time retail and food and beverage concession employees, including lead associates, sales associates, and stock associates employed by each of the Employers at Baltimore Washington International Airport; but excluding all other employees, clerical workers, security guards, managers, and supervisors as defined in the Act. (ALJD 2: 32; Jt. Exh. 1).

The most recent collective-bargaining agreement between the Union and Respondent was effective from April 23, 2007, through April 22, 2011. (ALJD 3: 2; Jt. Exh. 1).

On April 25, 2011, Selena Lumpkins, an employee of Respondent, filed a decertification petition with Region 5 of the National Labor Relations Board, herein "NLRB," which was assigned case number 5-RD-1500. (ALJD 3: 19; GC Exh. 1-A; Jt. Exh. 1). On May 5, 2011, the Regional Director for Region 5 of the NLRB approved a Stipulated Election Agreement in Case 5-RD-1500. (ALJD 3: 26). The date, hours and place of election were to be determined by the Regional Director following the disposition of any blocking unfair labor practice charge. (ALJD 3: 27; Jt. Exh. 1). On February 15, 2012, after the disposition of blocking unfair labor practice charges in Cases 5-CA-36588 and 5-CA-63228, and pursuant to the Stipulated Election

² Respondent admitted in its Answer that London Perry has been a supervisor of Respondent within the meaning of Section 2(11) of the Act and an agent of Respondent within the meaning of Section 2(13) of the Act.

Agreement in Case 5-RD-1500, Region 5 reopened the processing of the decertification petition. (ALJD 3: 32; Jt. Exh. 1). On March 9, 2012, the election was held in Case 5-RD-1500 and the Union lost the election by a count of 7 votes for the Union and 15 votes against. (ALJD 3: 38; GC. Exh. 1-L).

C. Conversation between Supervisor London Perry and Employee Kevin Wheeler

Kevin Wheeler has been employed by Respondent as a sales associate since July of 2011. (Tr. 39). He became a member of the Union in October of 2011 and began to take a leadership role within the Union starting in December of 2011. (ALJD 2: fn. 6; Tr. 40: 4-16).

On February 8, 2012,³ Wheeler filed a grievance with Perry alleging Wheeler's hours were reduced in violation of the seniority provisions of the collective-bargaining agreement. (ALJD 4: 21; Tr. 41; GC Exh. 4). On February 23, Wheeler was working his usual shift from 12:30 p.m. to 10:00 p.m. at store UL-6. (ALJD 4: 24; Tr. 43). During his shift, Wheeler attended a step one grievance meeting sometime around 2:00 p.m. in Respondent's stock room. (ALJD 4: 24; Tr. 42-44). Also attending the meeting were Perry and Union organizer Margaret Ellis. (ALJD 4: 24; Tr. 44). During the meeting, Ellis asked why Wheeler's hours were cut. (ALJD 4: 25; Tr. 44). Perry responded that Wheeler's hours were cut due to his tardiness. (ALJD 4: 29; Tr. 16, 44). The meeting ended after Perry refused to reinstate Wheeler's hours. (ALJD 4: 30; Tr. 45). At the time of the meeting, Wheeler had never been subjected to written discipline for his tardiness. (Tr. 17: 14-21).

After the meeting, Wheeler returned to work at store UL-6. (ALJD 4: 33; Tr. 45). Ellis followed Wheeler to the store and they discussed the grievance meeting. (ALJD 4: 33; Tr. 45). Shortly thereafter, Perry approached the two and stated that Wheeler was not supposed to be

³ All dates from this point forward shall be 2012, unless otherwise noted.

talking to the Union representative while on the clock. (ALJD 4: 34; Tr. 46). Wheeler moved behind the counter where the cash register is located and Perry followed. (Tr. 46).

At the counter, Perry told Wheeler that he had been late more than a couple of times. (Tr. 46: 8-9). Perry then told Wheeler that if he had a problem, he could talk with Perry, but if he went through the Union, Perry would have to be more strict. (ALJD 5: 2; Tr. 46: 10-12). Wheeler responded that if he were late, Perry should have written him up. (ALJD 5: 2; Tr. 46: 14-15). Wheeler also told Perry that he did not understand what he meant when he said if Wheeler went through the Union, he would have to be more strict. (ALJD 5: 2; Tr. 46: 16-18). Perry responded that he would be forced to be more strict and follow the rules of the Union, because the Union would make him do that. (ALJD 5: 5; Tr. 46: 20-22). The conversation ended when Perry reiterated that he would have to be stricter if the Union was in place and that he would rather be lenient. (ALJD 5: 6; Tr. 48: 2-7).

Perry's recollection of the conversation largely corroborated Wheeler's recollection. Perry testified that he told Wheeler he could no longer let employees be late and not document them. (Tr. 23: 7-12). He also told Wheeler he could not be as lenient as it pertains to the rules because it would show favoritism to an employee in the eyes of the Union. (Tr. 23: 7-12). Perry testified that he was telling Wheeler he had been lenient with employees in the past, but it was possible he would not be able to be as lenient in the future. (Tr. 23-24).

Perry testified that he never told Wheeler that he would more strictly enforce the rules if the Union were to win the decertification vote. (Tr. 35: 22-25). However, Perry did not deny that he told Wheeler he would have to be stricter if the Union was in place and that he would rather be lenient.

D. Conversation between Supervisor London Perry and Employee Monae Whitehead

Monae Whitehead has been employed by Respondent as a cashier for roughly two years. (Tr. 68: 17-21). At the time of the hearing, Whitehead was not, and had never been, a member of the Union. (Tr. 69: 7-9).

Whitehead testified that sometime in February 2012, she had a conversation with Perry outside of store UL-6. (ALJD 5: 12; Tr. 69-70). Whitehead initiated the conversation with Perry by telling him she was tired of the Union and did not want the Union. (ALJD 5: 12; Tr. 70). Perry responded that Respondent would have to go by the book. (Tr. 70). Whitehead testified that she understood Perry's comment to mean that if the employees were with the Union, things at the job would be different. (Tr. 70: 21-23).

Whitehead testified that she could not recall anything else from her conversation with Perry. (Tr. 71). Counsel sought to refresh Whitehead's recollection regarding her conversation with Perry by showing her the sworn statement she provided during the investigation of the charge in this matter. (Tr. 74). Whitehead identified the document as her sworn statement and she expressed concern over her understanding that the document was confidential. (ALJD 5: fn. 19; Tr. 74: 9-11). After reviewing the relevant portions of her affidavit, Whitehead testified that she could not recall any additional aspects of her conversation with Perry. (Tr. 75).

Whitehead proceeded to testify that she signed the sworn statement on March 28, 2012, and at the time she signed the statement she had personal knowledge of the events described therein. (Tr. 75-76). As such, Whitehead read into the record the following portion of her affidavit,

“On about mid-February 2012, I do not recall the exact date, I had a one-on-one conversation with Mr. Perry in the hallway of BWI Marshall Airport. Perry told me during this conversation that if the Union came in, he would have to start going by the book. He said he had been lenient with employees, but if the Union came in, then he would have to

start going by the book. I did not comment to Perry other than to say ‘Really.’.” (Tr. 76-77).

During cross-examination, Whitehead testified that she had not been “threatened” with “more stricter [sic]” enforcement of the work rules if she voted for the Union. (Tr. 77). However, Whitehead did not contradict or disavow any of her testimony elicited during direct examination. Additionally, Whitehead did not testify regarding her understanding of the term “threaten.”

After Whitehead’s testimony, Perry was called as a witness as part of Respondent’s case in chief. However, Perry did not address, dispute, or deny any of Whitehead’s testimony. Perry did not dispute or deny telling Whitehead that if the Union came in, he would have to start going by the book. Perry testified that he knew Whitehead and was in the courtroom during her testimony.⁴ (Tr. 89).

IV. ARGUMENT

A. Respondent’s Argument

As stated above, the ALJ credited Wheeler’s testimony and Whitehead’s prior sworn statement and Respondent failed to specifically urge an exception to these findings. However, even if Respondent implied an exception to the credibility determinations, the Board’s established policy is not to overrule an administrative law judge’s credibility resolutions unless the clear preponderance of all the relevant evidence convinces the Board they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), *enfd.* 188 F.2d 362 (3d Cir. 1951). The record evidence supports the ALJ’s credibility determinations and Respondent makes no argument to the contrary.

⁴ This fact is noted insofar as the ALJ, in describing the rule regarding sequestration of witnesses, noted that Respondent’s right to have a representative in the court room would not tie his hands when making difficult decisions of credibility, demeanor and the like. (Tr. 9).

Respondent's arguments in support of the exceptions urged lack merit. Respondent's arguments rely on conclusory testimony provided in response to Respondent's leading questions that Perry did not utter the *exact phrases* that are written in the complaint. However, the complaint does not allege a violation based on any one *exact phrase*. Rather, as the ALJ found and as is argued below, the totality of the record evidence supports the conclusion that Perry made statements to Wheeler and Whitehead that unlawfully implied more strict enforcement of the work rules if employees voted in favor of Union representation.

B. Legal Framework

Section 8(a)(1) of the Act provides that it shall be an unfair labor practice for an employer to "interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7." Section 8(c) of the Act provides that expressing of views, argument or opinion is not an unfair labor practice, if the expression contains no threat of reprisal or promise of benefit. However, prediction of effects of unionization must be carefully phrased on the basis of objective fact without any implication that an employer may or may not take action solely on its own initiative for reasons unrelated to economic necessities and known only to it. *NLRB v. Gissel Packing Co., Inc.*, 395 U.S. 575, 618, 71 LRRM 2481, 2497 (1969).

In *Miller Industries Towing Equipment, Inc.*, 342 NLRB 1074 (2004), the Board affirmed the administrative law judge's holding that an employer violated Section 8(a)(1) of the Act by threatening employees with stricter enforcement of rules if they selected the union. In that case, a supervisor told employees that if there was a union, the employer would not be as lenient and would have to enforce the break times more strictly. *Id.* at 1084. In finding a violation, the judge noted that the supervisor's statement evidenced his intent to inform employees that if they were unionized they would have to work under stricter work rules. *Id.*

In *Schaumburg Hyundai, Inc.*, 318 NLRB 449 (1995), the Board held an employer violated Section 8(a)(1) of the Act when the employer's owner threatened employees with stricter enforcement of work rules. During a meeting, the owner informed employees that he had no problem with the union and would sign a contract if the employees selected a union to represent them. *Id.* However, the owner went on to state that if he "signed the papers," the shop would be run "strictly by union rules." *Id.* While making those statements, the owner held a union contract in his hand. *Id.* The Board, citing the *Gissel* factors described above, held the statements violated Section 8(a)(1) of the Act and noted that the owner's act of waiving a contract in front of employees was not sufficient to constitute objective evidence supporting his prediction that employees would suffer adverse consequences if they voted in favor of a union. *Id.* at 450.

In *DHL Express, Inc.*, 355 NLRB 1399 (2010), the Board found the employer violated Section 8(a)(1) of the Act when a supervisor threatened an employee with stricter enforcement of the employer's policy on tardiness. In that case, an employee had arrived 5 minutes late for his shift. *Id.* at 1402. At some point thereafter, the employee was discussing the union with his supervisor when the supervisor said he did not mark the employee down as tardy, but that if the union won, the supervisor would not be able to be as flexible. *Id.* The Board, in finding a violation of Section 8(a)(1), held that the supervisor's statement predicted potential negative actions the employer might take in regard to tardiness if the union was selected and the statement failed to meet either of the *Gissel* standards. *Id.* at 1400.

In finding a violation of the Act in *DHL Express*, the Board distinguished *International Baking Co. & Earthgrains*, 348 NLRB 1133 (2006). *DHL Express, Inc.*, 355 at FN. 5. In *International Baking Co. & Earthgrains*, during a meeting with employees, a human relations

director informed employees that if they were even 5 minutes late getting to work, unfortunately under a union contract, if there was a disciplinary procedure in that union contract, the employer would not have the luxury of deviating from it because the employer would end up with union grievances as a result. *International Baking Co. & Earthgrains*, 348 at 1135. In finding the director's statements lawful, the Board noted that the statements implied that potential changes would be a result of a negotiated collective-bargaining agreement. *Id.* In *DHL Express, Inc.*, the Board found *International Baking Co. & Earthgrains* distinguishable because the statements in that case did not follow immediately after excusing an employee's minor tardiness and thus did not contain the same implied threat of stricter enforcement if a union was selected. *DHL Express, Inc.*, 355 at FN. 5.

C. Unlawful Threats Made to Kevin Wheeler

The statements Perry made to Wheeler on February 23 contained the same implied threats that were found unlawful in the cases cited above. Similar to the unlawful statements in *DHL Express, Inc.*, Perry's statements were made immediately following a meeting where Wheeler's tardiness was discussed but was not the result of any discipline. In the conversation that followed, Perry told Wheeler that he would potentially not be able to allow employees to be late without documenting them and stated he would have to be stricter if the Union were in place. Just as in *DHL Express, Inc.*, Perry's statements implied that if Wheeler supported the Union, he would face stricter enforcement of the tardiness policy than he previously experienced. Considering these statements were made roughly two weeks before the March 9 decertification election, the statements further implied that employees would be subject to stricter rule enforcement if employees voted in favor of representation by the Union. *See also Miller Industries Towing Equipment, Inc.*, 342 at 1084.

Perry's statements also failed to satisfy either of the *Gissel* factors described above. First, Perry did not carefully phrase his statements on the basis of objective fact. Unlike the situation in *International Baking Co. & Earthgrains*, Perry did not cite to any objective evidence, such as the provisions of a prior or proposed collective-bargaining agreement, which would force him to enforce the work rules more strictly if the Union represented the employees. *See also Schaumburg Hyundai, Inc.*, 318 at 450. As such, and considering the second *Gissel* factor, Perry's statements implied that he would more strictly enforce work rules on his own initiative. Such an implication is more pronounced when one considers the fact that at the time Perry made his statements, the employees were already represented by the Union. Presumably then, the Union had tolerated Perry's prior leniency and Perry gave no indication that the Union would cease to tolerate that leniency if the employees supported the Union. Thus, the only logical implication of Perry's statements would be that if the employees voted in favor of Union representation, Perry would take it upon himself to more strictly enforce the work rules.

Based on the foregoing argument and the reasoning of the ALJ's decision, the Board should affirm the ALJ's finding that Respondent violated Section 8(a)(1) of the Act by threatening employees with stricter enforcement of work rules if they supported the Union through Perry's statements to Wheeler.

D. Unlawful Threats Made to Monae Whitehead

The statements Perry made to Whitehead in mid-February conveyed the same unlawful implied threat of stricter rule enforcement if employees supported the Union as those made to Wheeler. Just as with the statements Perry made to Wheeler, the statements made to Whitehead failed to satisfy the *Gissel* factors.

Whitehead testified that Perry told her if the Union came in he would have to start going by the book. (Tr. 76-77). Perry also told Whitehead that he had been lenient with employees, but if the Union came in, he would have to start going by the book. (Tr. 76-77).

Whitehead's past recollection recorded should be credited first, because Respondent failed to contradict or rebut Whitehead's testimony and, second, because Whitehead testified against the interest of her Employer. Respondent was on notice that its failure to sequester Perry, who served as Respondent's representative and as a witness, may be considered when making credibility determinations. (Tr. 9). This is especially noteworthy as Perry was present in the courtroom when Whitehead testified about statements Perry made. Perry himself testified immediately after Whitehead and he failed to deny or rebut any of the statements Whitehead attributed to him. As such, Whitehead's testimony stands uncontradicted in the record and should support a finding that Respondent violated Section 8(a)(1) of the Act. *See Mark Lines, Inc.*, 255 NLRB 1435 (1981) (finding a violation of Section 8(a)(1) where General Counsel's evidence offered through witness of 'less than impressive credibility' was not rebutted and therefore confirmed by uncontradicted proof).

The closest Perry came to rebutting Whitehead's testimony was when he answered "absolutely not" to the following question during direct examination: "Did you tell any employees that there would be stricter enforcement of the work rules if they voted for the Union?" However, Perry failed to testify about his conversation with Whitehead and never denied that he told Whitehead that if the Union came in, he would have to start going by the book.

Although Whitehead answered in the negative to Respondent counsel's questions of whether the Respondent had "threaten[ed]" her, and General Manager London Perry

testified at various places in the record that he had not “threaten[ed]” employees, there was no record evidence that controverted Whitehead’s account of what Perry actually said to her. It should be noted that the word “threat” is a term of art in the Board’s jurisprudence and in unfair labor practice pleadings and that there is a special meaning in this context apart from common parlance. In *Beverly Health & Rehabilitation Services*, 339 NLRB 1243, 1256 (2003), an administrative law judge considered whether a witness’ affidavit testimony that her supervisor had not made any specific “threats” was inconsistent with her trial testimony that the supervisor had made statements about insurance benefits that constituted an unlawful threat under the Board’s case law. In an aspect of his decision summarily affirmed by the Board, the administrative law judge observed that the “word threat ... [o]rdinarily ... carries a somewhat menacing connotation and it is not clear that the affiant would consider a statement about a change in insurance benefits to be the kind of overtly hostile behavior commonly associated with a threat.”

The same is true here, where Whitehead declined to characterize General Manager Perry’s statements that he had previously been lenient but would have to go “by the book” if the Union were in place as a “threat,” although numerous Board cases have drawn this conclusion on virtually identical facts. Whitehead had approached Perry out of exasperation that the Union had visited her home. In this context she would not be expected to perceive Perry’s prediction of more rigorous rules enforcement if the Union were involved as something hostile, but the statement’s reasonable tendency to coerce is not negated. *See e.g. Olney IGA Foodliner*, 286 NLRB 741, 748 (1987) *enfd.* 870 F.2d 1279 (7th Cir. 1989) (threats possibly intended as “friendly advice” found violative);

Southwire Co., 282 NLRB 916, 917-18 (1987) (supervisor's friendly suggestions violative because of reasonable tendency to coerce).

It is also noteworthy that Whitehead testified against the interest of her current employer. As stated previously, the Board has held that the testimony of current employees which contradicts statements of their supervisors is likely to be particularly reliable because these witnesses are testifying adversely to their pecuniary interests. *Flexsteel Industries, Inc.*, 316 NLRB 745 (1995). This presumption should be especially strong in this case where Whitehead testified adversely to her supervisor, Perry, who was seated in the courtroom at Respondent's table during her testimony. Whitehead's fear of testifying in front of Perry was evident based on her concern regarding the confidentiality of her affidavit and her demeanor on the witness stand. This fear resulted in Whitehead's inability to recollect the entirety of her conversation with Perry and necessitated the use of Whitehead's affidavit as a past recollection recorded.

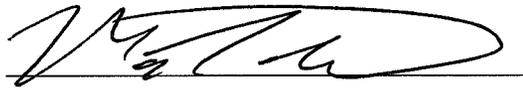
Once Whitehead's testimony is credited, it follows that Respondent violated Section 8(a)(1) of the Act by Perry's statements. Informing employees that Respondent would go "by the book" was an implied threat that Respondent would be stricter with the employees if they supported the Union. *Hoffman-Taff, Inc.*, 135 NLRB 1319, 1325 (1962). Perry did not carefully base his statements on any objective evidence when making his statements to Whitehead and his statements implied that he would strictly enforce the work rules on his own accord. As such, Perry's statements failed to satisfy the *Gissel* factors.

Based on the foregoing argument and the reasoning of the ALJ's decision, the Board should affirm the ALJ's finding that Respondent violated Section 8(a)(1) of the Act by threatening employees with stricter enforcement of work rules if they supported the Union through Perry's statements to Whitehead.

V. CONCLUSION

Counsel for the Acting General Counsel respectfully urges that the Board should affirm the ALJ's findings and conclusion and adopt his proposed remedial order.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'M. J. Turner', is written over a horizontal line.

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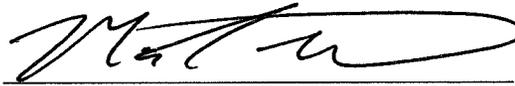
Dated this 2nd day of January, 2013

CERTIFICATE OF SERVICE

This is to certify that on January 2, 2013, copies of the Answering Brief of the Counsel for Acting General Counsel were served by e-mail on:

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