

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

**Oberthur Technologies of America  
Corporation**

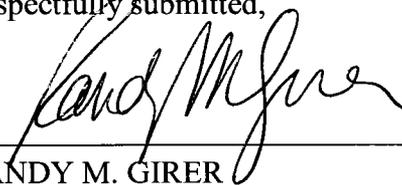
**and**

**Cases 04-CA-086325  
04-CA-087233  
04-RC-086261**

**Graphic Communications Conference  
International Brotherhood of Teamsters  
Local 14-M**

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

Respectfully submitted,



RANDY M. GIRER

Counsel for the Acting General Counsel  
National Labor Relations Board  
One Independence Mall, 7<sup>th</sup> Floor  
615 Chestnut Street  
Philadelphia, PA 19106

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## **Introductory Statement**

This case concerns Section 8(a)(1) and 8(a)(3) conduct by Oberthur Technologies of America Corporation (Respondent) during the course of an organizing campaign by Graphic Communications Conference, International Brotherhood of Teamsters, Local 14-M (Union). The Union filed a petition on July 30, 2012<sup>1</sup> in Case 04-RC-086261. The NLRB conducted an election on September 7. The Tally of Ballots showed 108 employees voting for and 106 against the Union. (GC 1[k])<sup>2</sup> The Union challenged the ballots of employees John Ditore, Scott Hillman and Birendra Sahijwana, and filed objections to the election. The challenges and objections were consolidated with the unfair labor practices. This case was tried in Philadelphia, PA before ALJ Raymond Green (ALJ) on November 28, 29 and 30, 2012 and January 2 and 3, 2013. On February 20, 2013, the ALJ issued a Decision and Order, correctly finding that Respondent violated Sections 8(a)(1) and (3) of the Act, sustaining the Union's challenges as to two employees (John DiTore and Ben Sahijwana), and finding that Respondent's unlawful conduct was sufficient to set aside the election.

## **Background**

### **Plant description**

Respondent is a manufacturing plant in Exton, Pennsylvania. The plant is part of a global concern, Oberthur Technologies, s.a., headquartered in Paris, France. Jean Francois Durand, known as "JFD", Vice President of Manufacturing for North America, is responsible for manufacturing at Exton. Anthony Ganci, finishing manager, reports to Durand. Finishing

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<sup>1</sup> All dates hereinafter are in 2012 unless otherwise noted.

<sup>2</sup> References to the Decision of the ALJ are identified by (ALJD) with the page number(s), and the line numbers included after the colon, in brackets. References to the transcript are identified by (T.) with the page number. Exhibits are identified as (GC) for General Counsel, (R) for Respondent and (U) for Union.

supervisors Frank Belcher, Jr. (third shift) and Roman Young (second shift) report to Ganci. Until December, Diane Ware was Human Resources Manager at Exton. (T. 98-103, 164-65, 379) (GC 14) Dennis Kane is the warehouse supervisor. (T. 492) (ALJD 2:[36-40])

Respondent manufactures credit, ATM and other secure identification cards or “Smart cards” including government identification cards. (GC 16) This is a secure facility. Employees must have an electronic badge to enter “SMAK” doors which lead to the production areas. All production occurs in the secure area behind the SMAK doors. There are non-work areas inside the SMAK doors (bathrooms) and outside the SMAK doors (cafeteria, locker rooms and bathrooms). The plant has two buildings connected by a breezeway, with a cafeteria located in the breezeway. (T. 26-33) (GC 9) (GC 12) In Building One, the raw materials of plastic sheets are received; the proofing department creates art work for the printing plates, using special inks as needed; and the plastic sheets are printed. In Building Two, the printed sheets are collated and tacked together. The cards are then cut to size, punched, stamped with special signature strips or holograms, counted, inspected, packaged and shipped. This is a 24-hour operation; there are three work shifts. (T. 33-42) (GC 9) (GC 12) (ALJD 2:[36-42])

#### **Union organizing drive and Respondent’s response**

In early 2012, the company was purchased by Advent. Respondent made various changes to hourly employees’ hours and wages. Employees sought the assistance of the Union. During the organizing campaign, some employees wore Union pins, stickers and T-shirts. Union representatives and employees distributed flyers, including mass distributions at the plant gate. During the course of the campaign, Union representatives asked employees to record any workplace incidents relating to the organizing drive. (T. 43-46, 116-17, 132, 156, 340) (GC 10)

Starting around June 28, Respondent began its own campaign in reaction to the Union, including meetings, videos and leaflets. (GC 15) Respondent's leaflets were distributed by supervisors, in the work areas. (T. 355) Respondent's leaflets were also distributed in the cafeteria, displayed on each table in plastic holders, which Respondent ordinarily uses for work related distributions or notices (e.g. health and safety). (T. 48-50) (ALJD 6:[1-6])

### **Exception 1**

- (a) GC excepts to the failure to find that Respondent unlawfully implemented and enforced a new policy prohibiting employees from discussing the Union in work areas.
- (b) GC excepts to the failure to order a rescission remedy.
- (c) GC excepts to the inclusion of the words "in the absence of a preexisting valid no-solicitation rule" in the Conclusions of Law, Order and Notice.

### **Facts in support of Exception 1**

Frank Belcher:<sup>3</sup>

As the ALJ properly found, third shift finishing supervisor Frank Belcher, Jr. directed employees on several occasions not to talk about the Union on the plant floor. (ALJD 6:[5-44]) Belcher testified that this directive came directly from the Human Resources manager. (T. 365)

(i) Third shift meeting in June: As the ALJ properly found, Belcher admitted telling a group of 26 employees not to talk about the Union on the plant floor. (T. 365, 372) (ALJD 6:[33-44]) In his sworn affidavit,<sup>4</sup> Belcher stated:

I did tell employees during a production huddle in approximately June 2012 (I do not know the exact date) that I was instructed by the company to tell them that discussions about the Union or organizing had to take place in common areas, not work areas, so that production was not affected. I specified the common areas as the break room, parking

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<sup>3</sup> The ALJ inadvertently omitted Mr. Belcher's first name from the decision.

<sup>4</sup> Prehearing affidavits given to the General Counsel by supervisors while employed by the Respondent concerning matters within the scope of employment are non-hearsay admissions under FRE 801(d)(2). See *Fredericksburg Glass & Mirror*, 323 NLRB 165, 175-176 (1997).

area, bulletin board area, and the hallway. Present for this comment were all of the employees under my supervision. (GC 7, p.2) (ALJD 6:[33-44])

Belcher testified that finishing manager Anthony Ganci and human resources manager Diane Ware had instructed supervisors regarding when and where employees could conduct Union business. (T. 365-66, 372, 376-77)

(ii) July 25 incident: As the ALJ properly found, around July 25, Belcher told third shift employees that they could not talk about the Union on the plant floor. The employees were Kevin Connaghan, punch operator, Scott Grove, punch operator, Harvey Werstler, kitter, and Jerry Thompson, hot stamp operator. The employees, while performing their regular duties, were discussing Respondent's flyer which Belcher had distributed the previous evening. (GC 5) Their conversation lasted less than five minutes. (T. 53-57, 210-11, 227-30, 261-62, 269) Lead employee Nicole Dorsey overheard the conversation and immediately reported it to supervisor Belcher. (T. 57, 211, 230-31, 262-63, 269) (ALJD 6:[7-9])

Soon thereafter, as the ALJ properly found, Frank Belcher called Kevin Connaghan and Scott Grove to his office located off the punch room area. Belcher also pulled aside employees Harvey Werstler and Jerry Thompson, to speak with them in their work areas. The ALJ credited employee testimony that Belcher told both pairs of employees that they could not talk about union matters on the plant floor, and that talk about the Union should be limited to the non-work areas. The ALJ also credited the testimony of Connaghan, that Belcher instructed the employees to limit their conversations about the Union to breacktime. (T. 58-59, 80-81, 84-85, 212-15, 224-25, 231-32, 241-43, 263, 269) (ALJD 6:[11-18]; 6:[43-45])

- (iii) Belcher told Linda Thompson three times in July and August not to talk about the Union on the plant floor

The ALJ properly credited employee Linda Thompson, who testified without rebuttal that she heard Belcher tell employees on three occasions not to talk about the Union on the plant floor. (ALJD 6:[20-27]; 6:[43-44]) (a) In late July or early August, Belcher told employees in the tacking/lamination area that “the Union was not to be discussed in the workspace or on the work floor. That it was to be discussed outside the SMAK doors, in the hallway where the lockers are, in the cafeteria and outside the plant.” (T. 306-308) (b) A couple of weeks later, in the hallway, Belcher told Thompson, alone, that her husband, Robert Thompson, “was not supposed to be talking about the Union on the plant floor. He was supposed to be talking about the Union outside the SMAK doors.....” (T. 309-312) (c) In late August, during a break, Belcher told employees in the locker room “that we’re not supposed to be talking about the Union unless it is beyond the SMAK doors, in the hallway where lockers are, in the cafeteria and outside the plant.” (T. 313-14)

Anthony Ganci

The ALJ properly credited employee Efrain Marrero, who testified without rebuttal that in early July, at a departmental meeting for about 12-13 first shift stamping and punchroom employees, finishing manager Anthony Ganci stated that “he didn’t want any outside distractions coming in and onto the floor.” (T. 355-57) (ALJD 6:[29-31]; 6:[43-44])

Employees routinely engage in non-work related conversations, and Respondent has no rule prohibiting such conversations.

As the ALJ properly found, employees routinely and frequently talk during working hours and in work areas about non-work related matters. (ALJD 7:[1]) Employees have frequent interactions, as they often walk around the plant for work-related purposes. Employees work in

close proximity and talk to each other while working. Respondent had no rule against talking on the plant floor. (ALJD 6:[50]; 7:[1]) Respondent had never previously prohibited discussion of any particular topic.<sup>5</sup> (T. 59-62, 124-26, 213-14, 243-46, 276-78, 295, 315-16) Supervisor Belcher admitted that there is no policy against talking on the plant floor, and that employees could discuss anything they want, including non-work related matters. (T. 367-68)

The policy was never rescinded.

The new policy against talking about the Union was never rescinded. Frank Belcher never retracted the directive to employees not to talk about the Union on the plant floor. (T. 376) Respondent presented no evidence that this policy was ever rescinded.

**Argument in support of Exception 1**

- (a) GC excepts to the failure to find that Respondent unlawfully implemented and enforced a new policy prohibiting employees from discussing the Union in work areas.

The ALJ properly found that supervisor Frank Belcher told employees that they could not talk about the Union except in areas other than the work floor or on non-work time. (ALJD 6:[46-49]; 7:[1-5]) The ALJ properly stated in the Conclusions of Law that Respondent violated Section 8(a)(1) when its supervisors told employees that they could not talk about the Union in work areas or during work time.<sup>6</sup> (ALJD 12:3-5) GC does not except to these findings.

However, GC excepts to the failure to find the broader violation alleged in the Complaint, specifically the implementation and enforcement of a new policy prohibiting employees from

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<sup>5</sup> As the ALJ noted, employees had been told to talk less and work more on the plant floor, but had never been prohibited from talking. (T. 244, 277-78, 298-300) (ALJD 7:[51-52])

<sup>6</sup> The ALJ properly found that Belcher unlawfully told employees they could not talk about the Union *on work time* (as well as in work areas, as specifically alleged in the Complaint). This finding was based on the ALJ's crediting of employee Connaghan, who testified that Belcher told employees that they could talk about the Union only during their breaks. (T. 58-59) (ALJD 6:[13]) (ALJD 6:[46-48])

talking about the Union in work areas. (ALJD 2:[9-10]; ALJD 12:[3-5]). Complaint, subparagraph 5(a). (GC 2)

This is not merely a semantic difference. The totality of the record evidence supported the finding of a broader violation. The prohibitions against talking about the Union reflected a change in Respondent's policy. Frank Belcher testified that the directive not to talk about the Union on the plant floor came from the finishing manager, Anthony Ganci, and from human resources manager Diane Ware. (T. 365-66) As the ALJ found, Belcher repeated the new rule to employees in six discrete incidents: (a) a group of 26 employees at a production meeting; (b) Linda Thompson and other employees in the tacking/lamination area; (c) Linda Thompson and other employees in the locker room; (d) Linda Thompson alone; (e) employees Kevin Connaghan and Steve Grove; and (f) employees Harvey Werstler and Jerry Thompson. (ALJD 6:[7-45]) The ALJ also found that Anthony Ganci told a group of 12 or 13 employees that "he didn't want any outside distractions coming and onto the floor." (ALJD 6:[29-31]) Respondent had no pre-existing policy concerning talking in work areas. (ALJD 6[50] and 7[1]) (GC 7) (T. 367-68)

In these circumstances, the evidence supports a finding that Respondent actually created a new policy, and then implemented and enforced its new policy, prohibiting employees from discussion of the Union in work areas (or on work time, as the ALJ properly found). GC excepts to the failure to find the violation as alleged, and urges that this specific violation be added to the Conclusions of Law, and remedied in the Order and Notice to Employees.

(b) GC excepts to the omission of a rescission remedy.

Further, in connection with this Section 8(a)(1) violation, GC excepts to the omission from the Order and Notice to Employees of a rescission remedy. (ALJD 13:[20-24]; and Appendix). The record does not establish that the unlawful policy was ever rescinded. Belcher never rescinded his directives not to talk about the Union on the plant floor. (T. 376) GC excepts to the omission of a rescission remedy in the Order and Notice to Employees and urges that Respondent be ordered to rescind this policy and to notify its employees that it has done so.

(c) GC excepts to the inclusion of the words “in the absence of a preexisting valid no-solicitation rule” in the Conclusions of Law, Order and Notice.

Further as to remedy, GC excepts to the phrase “in the absence of a pre-existing valid no solicitation rule,” in the Conclusions of Law, Order and Notice to Employees. (ALJD 12:[3-4]; 13:[20-24]; and Appendix). This language referring to solicitations is unnecessary and irrelevant. There is no claim that Respondent interfered with employee solicitations or distributions (except as mentioned below in connection with Exception 2). The evidence established that employees frequently engaged in non-work related solicitations and distributions. The existence or non-existence of Respondent’s rules concerning solicitations are not relevant to the violation alleged, or to the finding of a violation. Even if the Respondent were to have presented evidence of a valid no-solicitation rule, this would provide no legal defense to the violation. Respondent violated the Act with the implementation and enforcement of an unlawful “no talking” rule.

The Board has distinguished between “union talk” and “solicitation.” *Opryland Hotel*, 323 NLRB 723, 729 (1997); *Fremont-Rideout Health Group*, 357 NLRB No. 158, Slip op. at 2, and Fn. 9 (2011); *Wal-Mart Stores*, 340 NLRB 637, 638-39 (2003), enfd. in relevant part 400 F.3d 1093 (8th Cir. 2005) (“[S]olicitation’ for a union is not the same thing as *talking about a union or a union meeting* or whether a union is good or bad.”) (emphasis in original).

The new policy was directed solely at employee speech. “Such rules are much broader than a non-solicitation rule and unduly interfere with employees’ right to engage in protected concerted activities.” *Stabilus*, 355 NLRB No. 161, slip op. at 27 (2010). An employer violates the Act when employees are forbidden to discuss unionization, but are free to discuss other subjects unrelated to work. *Jensen Enterprises*, 339 NLRB 877, 878 (2003); *Stabilus*, supra. Respondent presented no evidence that conversations about the Union interfered with productivity or plant discipline. By imposing a rule against talking about this one topic, Respondent violated Section 8(a)(1). *Sam's Club*, 349 NLRB 1007, 1009 (2007); *Austal USA, LLC*, 356 NLRB No. 65, slip op. at p. 2 and 29 (2010)

Accordingly it is respectfully urged that the Order and Notice to Employees be amended to address the specific Section 8(a)(1) violation. (See sample Notices, below.)<sup>7</sup>

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<sup>7</sup> *Jensen Enterprises*, 339 NLRB at 892:

WE WILL NOT establish and enforce a rule prohibiting our employees from talking about the Union during work time, while allowing other non-work-related discussions by our employees.

WE WILL notify our employees that we have no objection to them talking about the Union during work time, as long as we allow other non-work-related discussions by our employees.

*Opryland Hotel*, 323 NLRB at 726:

WE WILL NOT prohibit employees from discussing the Union during work time while permitting all other discussions.

WE WILL rescind the rule prohibiting employees from discussing the Union at work while permitting all other discussions.

*Waste Management of Arizona*, 345 NLRB 1339, 1342 (2005):

WE WILL NOT promulgate or enforce a discriminatory rule that prohibits employees from discussing the Union during working time....

WE WILL rescind the discriminatory rule prohibiting employees from discussing union matters at work, while permitting all other discussions.

## Exception 2

- (a) GC excepts to the factual finding that employee Sandra Smith testified that she used a company copying machine on July 31, 2012 to make copies of some union literature.
- (b) GC excepts to the failure to find that Respondent violated Section 8(a)(1) of the Act by prohibiting Sandra Smith from making copies of pro-Union flyers using its copying machine and by advising her to hand flyers to employees rather than placing them on a cafeteria table.

### Facts in support of Exception 2

The ALJ credited the testimony of employee Sandra Smith. (ALJD 8:4-10).

Smith, an auditor, supported the Union and wore Union insignia. On occasion, before work, she placed Union flyers on tables in the cafeteria. As part of her work duties, Smith routinely visited different parts of the plant. On July 31, Smith made copies of work forms (card destruction and worksheet forms). This was not a regular work duty; Smith voluntarily made copies to replenish supplies in her department, as needed. Smith worked in the finishing department in Building Two; however she passed through the breezeway (passing the cafeteria) to Building One, to use a less complex copy machine in the press room. She then returned to her work area with the copies. (T. 115-20, 129-30) (GC 17)

Smith did not at any point testify that she used Respondent's copy machine to make copies of Union materials. (ALJD 7:[39-4]) (T. 119-20) (GC 17) Respondent presented no evidence to establish that Smith made copies of Union materials on its copy machine.

Soon after her return to her work area, Supervisor Roman Young called Smith, alone, to his office. Young held up a colorful Union flyer and said: "You are not allowed to make copies of this on company property." Smith protested that she would not do that, adding that she did not know how to make color copies. She explained that she had copied work forms. Young brought up the topic of distribution of Union materials. He said: "The company would prefer you to hand

out the flyers by hand.” (T. 121) Smith replied that she was legally permitted to distribute flyers in the cafeteria. (T. 120-22, 136-37) (ALJD 7:[43-48]; 8[1-2]) (GC 17)

On August 2, in a statement about the incident (GC 17),<sup>8</sup> Smith wrote:

“On July 31, 2012, R. Young (Supervisor of 2<sup>nd</sup> shift) called me into the office & showed me the paper about the lawyer (K. McCormick) that the union gave out. He said that I am not allowed to make copies of this sheet on company copy machines. I told him I didn’t do that, but I did make copies for the floor – 100 worksheet papers & 50 Card Destruction papers. . . I then said I do have the copies of the Union Paper but I did not make them. He then told me that I should hand the papers to the people (in reference to me putting Union papers on the tables in the Cafeteria). I told him I am allowed to do that.” (GC 17) (T. 130-131, 156)

Smith was not disciplined or threatened with discipline in connection with this incident.

(ALJD 8:[4-6]) (T. 137)

### **Argument in support of Exception 2**

- (a) GC excepts to the erroneous factual finding that Sandra Smith testified that she used Respondent’s copying machine on July 31, 2012 to make copies of Union materials.

Smith did not at any point testify that she used Respondent’s copy machine to make copies of Union materials. (ALJD 7:[39-41]) Smith testified that, on July 31, she made copies of work forms (card destruction and worksheet forms). She returned to her work area with the copies. When supervisor Roman Young accused her of making copies of Union materials, Smith responded that she would not do that. She explained to her supervisor that she had copied work forms. (T. 115-22, 129-30, 136-37) (GC 17) (ALJD 7:[43-48]; 8[1-2]) (GC 17) The record contains no evidence that Smith made copies of Union flyer’s on Respondent’s copy machine. Respondent presented no such evidence.

The factual finding is erroneous, and accordingly, GC excepts.

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<sup>8</sup> Smith’s statement (GC-17) was received into evidence without objection. (T. 132)

- (b) GC excepts to the failure to find that Respondent violated Section 8(a)(1) by prohibiting Sandra Smith from using its copying machine to make copies of literature of behalf of the Union, and by advising her to hand flyers to employees rather than placing them on a cafeteria table.

The ALJ credited the testimony of employee Sandra Smith, but failed to find a violation of Section 8(a)(1), stating that the incident was trivial and non-coercive. (ALJD 8:4-10). (ALJD 7-8; 8:[9-10]) (Complaint, subparagraph 5(c). (GC 2) GC respectfully excepts.

The ALJ credited Smith's testimony that, on July 31, supervisor Young told her: "You are not allowed to make copies of this on company property....The company would prefer you to hand out the flyers by hand." (T. 120-21) Smith understood Young to be forbidding her from putting Union materials in the cafeteria. (ALJD 7:[43-49]; 8[1-2]) (T. 120-24) (GC 17)

Young's actions violated Section 8(a)(1). Absent a policy forbidding non-business-related use of the copy equipment, it would be protected activity for Smith to make copies of Union materials.<sup>9</sup> Young's sole concern was his (erroneous) belief that Smith was engaging in Union activities. His remarks were aimed at chilling Smith in the exercise of her Section 7 rights. See e.g. *Champion Intern. Corp.*, 303 NLRB 102, 110 (1991) (Employer violated Section 8(a)(1) for disciplining employee for copying union materials on copy machine, in absence of any practice of prohibiting personal use of equipment); *Gallup*, 334 NLRB 366 (2001), enfd. 62 Fed. Appx. 557 (5<sup>th</sup> Cir. 2003) (unpub.) (Employer violated Section 8(a)(1) by changing rule to prohibit personal use of copy machine.) Cf. *NLRB v. Burnup & Sims*, 379 U.S. 21 (1964) (An employer violates Sec. 8(a)(1) by disciplining an employee based on a good-faith but mistaken belief that she engaged in misconduct in the course of protected activity.)

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<sup>9</sup> Respondent does have a basic right to regulate use of company property. However, an employer may not use that right to discriminatorily restrict pro-union activities. *Union Carbide Corp. v. NLRB*, 714 F.2d 657 (6th Cir. 1983); *Hussmann Corp.*, 290 NLRB 1108 (1988).

Young told Smith that Respondent preferred that she distribute Union materials only by hand. The implication (as alleged in the Complaint) is that she should not distribute them in any other manner. Smith understood this to be a prohibition of distribution of Union flyers in the cafeteria.(GC 17) Such a prohibition violates Section 8(a)(1). Smith did not mention distribution of Union materials; supervisor Young injected that topic into the conversation. Respondent had no rule prohibiting distribution of non-work related materials in the workplace or cafeteria. Employees routinely engaged in non-work related distributions in work and non-work areas. Prohibiting employees from distributing Union materials in work areas, while tolerating non-work-related distributions, violates Section 8(a)(1). Cf. *Dico Tire*, 330 NLRB 1252, 1257 (2000) (Employer violates Section 8(a)(1) by disparately enforcing non-solicitation rule, where employees routinely engage in non-work related solicitations); *Flexsteel Industries*, 311 NLRB 257 (1993); *Keco Industries*, 306 NLRB 15 (1992).

Although it is true that, as the ALJ noted, Smith was not disciplined or threatened with discipline (ALJD 8:[4-5]), the conversation with Young was nonetheless coercive. Smith was called alone into her supervisor's office. She was a known Union supporter. She was accused of using Respondent's copy machine to make copies of Union literature (activity which would be protected in the absence of a rule forbidding it), and told to distribute the literature by hand. The fact that Young said that Respondent "preferred" distribution by hand does not make the statement any less coercive. From the perspective of the employee, this interaction was aimed at chilling Smith in the exercise of her rights. The incident was not trivial to the employee involved. Accordingly it is respectfully urged that the Board find that Respondent violated Section 8(a)(1) of the Act as alleged in the Complaint, and order all appropriate remedies.

### **Exception 3**

GC excepts to the inadvertent omission of a Section 8(a)(1) violation from the Order and Notice to Employees.

The ALJ properly found that Respondent violated Section 8(a)(1) by telling employees that bonuses, wage increases, promotions and transfers were being put on hold until after the election. (ALJD 9:[33-36]) This violation is included in the Conclusions of Law, which state that Respondent violated the Act “by notifying employees of the aforesaid freeze policy.” ( ALJD 9:[33-36]). However, the violation was inadvertently omitted from the Order and Notice to Employees. (ALJD 12 and Appendix) GC excepts to the omission of this Section 8(a)(1) violation in the Order and Notice to Employees.<sup>10</sup>

### **Exception 4**

- (a) GC respectfully excepts to the failure to grant a remedy for Respondent’s withholding and delay in granting of spot bonuses, because of the Union.
- (b) GC respectfully excepts to the omission of a rescission remedy as to this Section 8(a)(1) violation.

### **Facts in support of Exception 4**

#### **Spot Bonus Program**

Around 2007, Respondent implemented a spot bonus program for hourly employees. (T. 395) Employees are awarded bonuses for extra work or hours, for noticing errors, for covering for another employee, etc. Most bonuses in 2012 ranged from \$50 to \$150. (GC 3) Spot bonuses have routinely been granted monthly or bimonthly, since the start of the program. (T. 65, 165-67) (ALJD 8:[45-49])

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<sup>10</sup> For example, the Notice to Employees could include language such as:  
WE WILL NOT tell you that you will not receive promotions, wage increases or spot bonuses because of the Union or because of the NLRB election.

Employees learn about spot bonuses through Respondent's postings in two locations: (1) A bulletin board in the cafeteria, displaying the employee's name and photograph, date of bonus, name of supervisor or lead employee who recommended it, and the basis for the award. Until July, these postings were updated every month or two. (2) Respondent also announces bonuses on a TV monitor located in the production area.

A supervisor or lead employee recommends a bonus by completing a "Spot Award Notification and Approval Form." (GC 3) (T. 387-90) Human resources manager Diane Ware testified that lead employees can recommend spot bonuses. The cafeteria bulletin board, where employees learn about new bonuses, shows that lead employees routinely recommend spot bonuses. (T. 167-68, 391-93, 478-79) Respondent's documents established that lead employees have recommended spot bonuses, and that these bonuses were subsequently awarded to employees. (GC 3, pp. 27, 62-70, 72)

Impact of Respondent's unlawful policy on spot bonuses

As the ALJ properly found, Respondent violated Section 8(a)(1)(3) of the Act by implementing a policy in August 2012, putting wage increases, bonuses, promotions and transfers on hold pending the NLRB election. (T. 190-91) (GC 6)

HR Manager Ware admitted that, pursuant to this policy, spot bonuses were delayed. (T. 480) As the ALJ properly found, pursuant to Respondent's unlawful policy, spot bonuses recommended and approved prior to the election were delayed, and were not paid until after the election. (ALJD 8:[35-41]) Respondent's records showed that the impact on spot bonuses began in July. Bonuses previously were approved quickly: three weeks or less from recommendation to

payment. However, in July, Respondent began to delay in approving and paying bonuses. The time from recommendation to payment increased to a range of 58 to 100 days.<sup>11</sup>

From June/July until November, Respondent announced no new spot bonuses on the bulletin board. This was the longest period during which no new bonuses were announced. Until that point, Respondent had usually posted new spot bonuses every month or two. In November, just days before the hearing, Respondent suddenly posted new bonuses. (T. 69-71, 174-75, 247-49, 256-58, 260-61) (GC 3) (GC 4) (GC 26)

No bonuses were recommended in August, and only one in September (three weeks after the election).<sup>12</sup> (GC 3) (GC 26)

It is possible that lead employees or supervisors may have refrained from recommending spot bonuses pursuant to Respondent's unlawful policies. Ware testified that she was not aware of any such situations. (T. 176-77)

At least one employee may have been denied a bonus pursuant to the unlawful policy.

The evidence established that one employee might have qualified for a spot bonus, and that this bonus may not have been recommended, because of Respondent's unlawful policy.

On August 6, Linda Thompson, a tacker on the third shift, noticed spots on a "JIF" (a set of plastic sheets which have been tacked together). She notified lead employee Tom Abernathy.

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<sup>11</sup> Of the 34 bonuses granted from June to October, sixteen bonuses were delayed in payment until after the election. (GC 3) (GC 26) (T. 477-78) Three bonuses paid on September 21 (two weeks after the election) had been recommended in July and approved in July (Phethsarath) or August (Jennings, Husain). Thirteen bonuses were paid on October 5; of these, seven had been recommended in June and approved in August (Lambert-Dowlin, Karpeh, Friel, Lewis-Edwards, Marrero, Willmont, Hall); one was recommended and approved in July (Corle); four were recommended in July and approved in August (Lloyd, Prince, Wetterau and Deprospero); and a bonus for Phethsarath was approved in July. (T. 727-28)

<sup>12</sup> As the ALJ noted, the evidence (personnel action forms (GC 3)) showed that Borkee Phethsarath was nominated for two bonuses in August. (ALJD 8:[50-51]) Respondent provided no evidence that these two bonuses were ever paid.

She told Abernathy about the problems with the JIF, and asked him whether this meant that she could get a spot bonus. Abernathy replied that “he could not give out any spot bonuses, any gift cards or any raises, because of the Union. He couldn’t even give anybody that would deserve a raise, a five cent raise.” He told Thompson that this information came from management. (T. 303-306)

At home, Thompson recorded the conversation. (T. 322-23, 340-41, 684-85) She wrote:

“Aug 6 – Went back to tacking. The jiff I was doing had spots on it, so I showed Amy and she told me to put it on hold until Tom came in. When Tom came in, I went over to him and told him what I found. Then I asked for a gift card or spot bonus. He told me he could not give out spot bonuses, gift cards or even a 5¢ raise for someone who deserves it, because management said no, because of the Union issue.” (R. 1)

Abernathy has effectively recommended spot bonuses in the past, and these bonuses have been paid to employees. (GC 3) (GC 26) (T. 167-68, 391-93, 478-79)

Respondent never informed employees that the policy had been rescinded.

HR Manager Diane Ware testified that the policy was rescinded sometime after the election, but admitted that employees were never informed of any rescission. (T. 191) Even after the election, employees were told that the policy was still in place. Warehouse employee Albert Anderson testified without rebuttal that supervisor Dennis Kane told four warehouse employees after the election “everything was going to be on the freeze” while Respondent was negotiating with the Union. (T. 492-94) This testimony, elicited by the Union without objection by GC, is not alleged in the Complaint, but is relevant to show that the policy was not rescinded.

#### **Argument in support of Exception 4**

(a) GC excepts to the failure to order a make-whole remedy as to “spot bonuses.”

Respondent admitted and the ALJ properly found that Respondent’s unlawful policy impacted on employees’ wage increases and “spot bonuses.” (ALJD 8-9; 9:[32-34]).

The ALJ properly ordered a remedy for Respondent’s admitted delay and withholding of wage increases. (ALJD 12:[32-52]).

However the ALJ did not order a remedy in connection with spot bonuses, stating that it would be speculative to determine who, if anyone, might have been recommended and approved for a spot bonus, and that the degree of prejudice to any employee would be slight. (ALJD 13:[3-11]). GC excepts.

The record evidence established that spot bonuses were routinely granted every month or two. The ALJ correctly found that bonuses, which had already been promised or decided prior to the election, were delayed pending the election, but ultimately were paid after the election.

However, at least one spot bonus, which might have been recommended for employee Linda Thompson by lead employee Tom Abernathy, was not recommended or awarded because of Respondent’s unlawful policy. Thompson testified that when she caught a costly production error and brought it to the attention of the lead employee, Abernathy responded that “he could not give out any spot bonuses, any gift cards or any raises, because of the Union. He couldn’t even give anybody ... a five cent raise.” (T. 305) The evidence established that Abernathy has the authority to recommend spot bonuses, and has effectively done so in the past.

Respondent did not refute the evidence concerning a spot bonus for Thompson. The ALJ did not address this undisputed evidence.

The remedy may possibly include a spot bonus for Linda Thompson. Further, it is entirely possible that other lead employees or supervisors might have recommended additional spot bonuses, were it not for Respondent's unlawful policy.

GC respectfully urges that the question of ascertaining the total impact of the violation, including identification of employees affected, or the amounts of money involved, be left to compliance proceedings. There is no dispute that employee spot bonuses were affected, and accordingly the order of a remedy is appropriate. Moreover, a bonus of \$50 may not be considered slight from the perspective of the employee who was overlooked because of Respondent's unlawful policy. See e.g. *SNE Enterprise*, 347 NLRB 472, at Fn. 7 (2006), enfd. 257 Fed. Appx. 642 (4<sup>th</sup> Cir. 2007) (unpub.) (Violation where employer did not consider employees for a wage increase, because of the Union's petition for an election).

*SNE Enterprises* is instructive. There, the Board ordered the employer to perform all wage reviews that it did not conduct because of the pending election petition, and to make whole all employees who would have received general wage increases but for the Respondent's unlawful refusal to perform wage reviews. It is respectfully urged that a similar remedy is appropriate for the spot bonuses. In compliance, it can be ascertained whether there were employees such as Thompson who might have been recommended for a spot bonus, but for Respondent's unlawful policy. The exact amount of backpay can also be ascertained in compliance proceedings.

Accordingly, it is respectfully requested that Respondent be ordered to make whole its employees for any loss of earnings, with interest, which they may have suffered by reason of its unlawful policy of withholding spot bonuses, with the identity of affected employees and specific amounts of backpay to be determined in compliance proceedings.

- (b) GC excepts to the omission of a rescission remedy as to this Section 8(a)(1) and (3) violation in the Order and Notice.

Finally, it is respectfully requested that the Respondent be ordered to rescind its unlawful policy placing “on hold” its employees’ wage increases, promotions, transfers and spot bonuses because of the Union or because of the NLRB election, and to notify its employees in that it has done so. Respondent’s employees were never informed that this unlawful policy, which delayed and suspended their wage increases and spot bonuses, has ever been rescinded. (T. 191) Even after the election, supervisors were telling employees that everything was “frozen.” (T. 492-94) In these circumstances, the affirmative rescission remedy is appropriate.