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March 19, 2013

**Hand Delivery**

National Labor Relations Board  
Office of the Executive Secretary  
1099 14<sup>th</sup> Street, N.W.  
Washington, D.C. 20570-0001

**Re: Oberthur Technologies of America Corporation and  
Graphic Communications Conference International  
Brotherhood of Teamsters Local 14-M  
Case Nos.: 04-CA-086325, 04-CA-087233, 04-RC-086261**

Dear Executive Secretary:

Enclosed, please find Employer's Exceptions to Administrative Law  
Judge's Decision and Memorandum of Law in Support.

Please date stamp the additional copy that is enclosed and return it with  
the messenger.

Thank you for your assistance with this filing.

Sincerely yours,



Kevin C. McCormick

KCM:lpb

Enclosures

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ORDER SECTION

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

OBERTHUR TECHNOLOGIES OF  
AMERICA CORPORATION

and

GRAPHIC COMMUNICATIONS CONFERENCE  
INTERNATIONAL BROTHERHOOD OF  
TEAMSTERS, LOCAL 14-M

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

**EMPLOYER'S EXCEPTIONS TO ADMINISTRATIVE LAW JUDGE'S DECISION  
AND MEMORANDUM OF LAW IN SUPPORT**

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## INTRODUCTION

The Employer, Oberthur Technologies of America Corporation (“Oberthur”), operates a facility in Exton, Pennsylvania which is engaged in the manufacture of credit card, debit card, smart cards, identification cards, and related products. On July 30, 2012, the Graphic Communications Conference, International Brotherhood of Teamsters, Local 14-M (the “Union”), filed a representation petition pursuant to which it sought certification as the bargaining representative for a majority of the individuals employed at Oberthur’s Exton facility.

Oberthur and the Union subsequently entered into a Stipulated Election Agreement which defined the petitioned-for unit as follows:

Included: All full-time employees employed by the Employer in litho printing, finishing card and sheet, ink, facilities janitorial, card auditing plastics, pre-press composition, QC [quality control], smart card embedding, screen making, screen printing, production expeditor, quality systems analyst, warehouse plastic, customer service manufacturing, and maintenance departments at its facility located at 523 James Hance Court, Exton, PA.

Excluded: All other employees, temporary and seasonal employees, confidential employees, guards and supervisors as defined in the Act.

[Decision, p. 3].

The representation election was held on September 7, 2012. Of the 229 eligible voters, 108 persons cast ballots for the Union, 106 persons cast ballots against representation, and three persons cast challenged ballots. The challenged voters were Scott Hillman, John DiTore, and Ben Sahijwana.

Following the election, the Union filed various objections centered on alleged conduct by Oberthur before and during the election. On October 22, 2012, a Consolidated Complaint was

issued in connection with two unfair labor practice charges filed by the Union concerning alleged conduct by Oberthur in the months prior to the election.

The ballot challenges, objections, and unfair labor practice charges were heard by Administrative Law Judge Raymond P. Green (the “ALJ”) on November 28, 29, and 30, 2012 and January 2 and 3, 2013. The ALJ decision was entered on February 20, 2013.

**AS PRESENTLY CONSTITUTED, THE NLRB DOES NOT  
HAVE THE CONSTITUTIONAL AUTHORITY TO  
ADJUDICATE THIS APPEAL.**

As recognized in *New Process Steel LP v. NLRB*, 130 S.Ct. 2635 (2010), the NLRB cannot legally function without three confirmed members. Moreover, as recently held in *Noel Canning v. NLRB*, \_\_\_\_\_ F.3d \_\_\_\_\_, 2013 WL 276024 (D.C. Cir., Jan. 25, 2013), the Presidential Recess Appointments to the NLRB were unconstitutional, and the NLRB lacked the required quorum beginning at least as early as January 4, 2012. Since the NLRB, at present, only has one confirmed member, it lacks the necessary quorum and, as a result, the NLRB does not have the constitutional authority to consider this Appeal at this time. Accordingly, Oberthur requests that the NLRB refrain from consideration of this Appeal until it has a validly appointed and confirmed quorum.

**FOR THE REASONS SET FORTH BELOW,  
THE ALJ’S DECISION MUST BE REVERSED.**

In the event the NLRB refuses to refrain from adjudicating this Appeal until it has a validly appointed and confirmed quorum, Oberthur submits that the ALJ’s decision must be reversed, and in support, offers the following:<sup>1</sup>

**Exception 1: The ALJ Applied the Incorrect Standard In Assessing the Challenges to the Ballots Cast By John DiTore and Ben Sahijwana, as the ALJ Failed to Apply the *Desert***

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<sup>1</sup> The fact that Oberthur is making this argument shall in no way be considered a waiver of its position that, at present, the NLRB does not have a quorum or the legal authority to consider this Appeal.

**Palace Analysis, Under Which DiTore and Sahijwana Were Expressly Within the Scope of the Unit.**

The standard for making determinations as to the inclusion or exclusion of workers from a bargaining unit was set by the Board in *Desert Palace, Inc. d/b/a Caesars Tahoe*, 337 N.L.R.B. 1096 (2002). In adopting the three-prong test recognized by the D.C. Circuit in *Associated Milk Producers, Inc. v. NLRB*, 193 F.3d 539 (D.C. Cir. 1999), the Board explained that:

[T]he Board must first determine whether the stipulation is ambiguous. If the objective intent of the parties is expressed in clear and unambiguous terms in the stipulation, the Board simply enforces the agreement. If, however, the stipulation is ambiguous, the Board must seek to determine the parties' intent through normal methods of contract interpretation, including the examination of extrinsic evidence. If the parties' intent still cannot be discerned, then the Board determines the bargaining unit by employing its normal community-of-interest test.

337 N.L.R.B. at 1097.

In assessing the challenges to the ballots cast by DiTore and Sahijwana, the ALJ never cited to or applied the *Desert Palace* standard. Instead, the ALJ limited his analysis to the issue of whether DiTore and Sahijwana are professional employees and, after concluding that they are, held that “they cannot, in the absence of a *Sonotone* election, be included in the stipulated unit as a matter of law.” [Decision, p. 5].

In reaching that conclusion, the ALJ simply bypassed the initial inquiry of whether DiTore and Sahijwana are in fact within the scope of the bargained for unit. Application of the *Desert Palace* standard plainly indicates that these two individuals are within the scope of the agreed upon unit. The ALJ acknowledged that the Stipulated Election Agreement defines the unit as follows:

Included: All full-time employees employed by the Employer in litho printing, finishing card and sheet, ink, facilities janitorial,

card auditing plastics, pre-press composition, QC [quality control], smart card embedding, screen making, screen printing, production expeditor, quality systems analyst, warehouse plastic, customer service manufacturing, and maintenance departments at its facility located at 523 James Hance Court, Exton, PA.

[Decision, p. 3].

The ALJ explicitly found that DiTore and Sahijwana “are employed in the Company’s quality control department under the supervision of Joe Blossic.” [Decision, pp. 3-4]. That finding is amply supported by the evidence in the record, as DiTore testified that “I’m in the quality department” and that he is supervised by Blossic. [Tr., 588, 590]. Sahijwana likewise testified that he is in the quality control department and is supervised by Blossic. [Tr. 609-629].

In light of the ALJ’s findings that the stipulated unit included “[a]ll full-time employees employed by the Employer in . . . QC [quality control]” and that DiTore and Sahijwana are employed in the quality control department, the first-step of the three-step *Desert Palace* inquiry compels a finding that DiTore and Sahijwana are within the scope of the agreed upon unit. 337 N.L.R.B. at 1097. The Board held in *Desert Palace* that where the terms of the stipulation are “clear and unambiguous,” the Board “simply enforces the Agreement.” *Id.* Here, the stipulation unambiguously encompasses all employees in the quality control department, which necessarily includes DiTore and Sahijwana.<sup>2</sup>

**Exception 2: Because DiTore and Sahijwana Are Properly Within the Bargaining Unit, the ALJ’s Conclusion That They Are Professional Employees Compels The Holding of a New Election Held in Accordance with *Sonotone*, Rather Than Simply Sustaining the Challenge to Their Ballots.**

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<sup>2</sup> While the ALJ did not reference *Desert Palace* in the Decision, he did make a finding that, in the event DiTore and Sahijwana are not professional employees, they were still “ineligible to vote” because “they do not share a community of interest” with the other unit employees. [Decision, p. 5]. That finding was erroneously reached because, as explained in *Desert Palace*, where the terms of a stipulation are unambiguous the community of interest test is not applied in determining the scope of the unit. 337 N.L.R.B. at 1037.

Once it is recognized that DiTore and Sahijwana are within the scope of the bargaining unit under the express terms of the stipulation, the ALJ's decision to sustain the challenge to their ballots cannot stand. As the ALJ implicitly recognized in concluding that professional employees "cannot, in the absence of a *Sonotone* election, be included in the stipulated unit as a matter of law," [Decision, p. 5], professional employees can be included in a unit which includes nonprofessionals provided that the *Sonotone* voting procedure is utilized. See *Sonotone Corp.*, 90 N.L.R.B. 1236 (1950).

By simply sustaining the challenges to the votes cast by DiTore and Sahijwana, the ALJ deprived these employees of their right under *Sonotone* to decide whether they wish to be included in the unit. Assuming *arguendo* that the ALJ correctly concluded that DiTore and Sahijwana are professionals, the appropriate remedy is to order a proper *Sonotone* election in which these two employees have an opportunity exercise their right to choose whether or not to be part of the bargaining unit.

**Exception 3: Assuming *Arguendo* That DiTore and Sahijwana Are Professional Employees by Virtue of their Status as Engineers, The Bargaining Unit Cannot Be Certified Because a Third Engineer Was Included in the Bargaining Unit and Voted Without Challenge.**

The determinative factor underlying the ALJ's conclusion that DiTore and Sahijwana are professional employees was the fact that each is employed as an engineer and holds an engineering degree. [Decision, p. 5]. The ALJ based his decision to sustain the challenges to the ballots cast by these two employees on the grounds that, absent a *Sonotone* election, a unit cannot "as a matter of law" contain professional and nonprofessional employees. [*Id.*].

Should the Board conclude that the ALJ was correct in finding the engineers to be professional employees, then the results of the election cannot stand, and the Union cannot be certified as the bargaining representative of the unit as present constituted. This is the case

because uncontroverted testimony at the hearing revealed that a third engineer – Khalid Husain – was included within the stipulated unit and voted without challenge. [Tr., p. 161, 162]. Ricky Putnam, the Union Organizer, admitted that he knew Husain was an engineer, listed on the Excelsior List, but did not challenge his right to vote in the election. *Id.* Diane Ware also testified that another engineer voted in the election, without challenge Tr., p. 197, 513. John DeTore also admitted that Husain had an engineering degree [Tr., p. 597], as did Joseph Blossic, who added that Husain worked as an engineer in the Graphics Department. [Tr., p. 694]

The ALJ's finding that engineers cannot lawfully be included in the unit dictates that certification of a bargaining representative for the unit as presently defined would expressly violate Section 9(b)(1) of the Act. *See* 29 U.S.C. § 159(b)(1). This impropriety is particularly pronounced in this case given that, in light of the present vote tally and the ALJ's order that the ballot cast by employee Scott Hillman be opened and counted, it is quite possible that Husain cast the deciding vote in favor of the Union.<sup>3</sup>

In sum, if the ALJ's finding that DiTore's and Sahijwana's status as engineers rendered them ineligible to participate in the election is allowed to stand, then that finding necessarily dictates that Husain was likewise ineligible. If the ALJ's finding as to DiTore and Sahijwana is affirmed, then given that Husain was allowed to vote, and indeed may have cast the decisive ballot, the results of the election must be set aside and a new election must be ordered.

**Exception 4: The ALJ Erred in Concluding that John DiTore and Ben Sahijwana Are Professional Employees.**

As noted *supra*, the basis for the ALJ's decision regarding the ballot challenges to DiTore and Sahijwana was his conclusion that each is a professional employee within the meaning of

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<sup>3</sup> The initial tally of ballots was 108 for the Union and 106 against representation. [Decision, p. 1]. In the event that Hillman voted against representation, the margin in favor of the Union would be a single vote, not including the challenged ballots of DiTore and Sahijwana.

Section 2(12) of the Act. [Decision, p. 5]. That conclusion, however, was erroneous, because neither DiTore nor Sahijwana meet the Act's definition of a professional employee. The ballots of DiTore and Sahijwana should therefore be opened and counted.

The Act provides the following definition of professional employee:

(a) any employee engaged in work (i) predominantly intellectual and varied in character as opposed to routine mental, manual, mechanical, or physical work; (ii) involving the consistent exercise of discretion and judgment in its performance; (iii) of such a character that the output produced or the result accomplished cannot be standardized in relation to a given period of time; (iv) requiring knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction and study in an institution of higher learning or a hospital, as distinguished from a general academic education or from an apprenticeship or from training in the performance of routine mental, manual, or physical processes; or

(b) any employee, who (i) has completed the courses of specialized intellectual instruction and study described in clause (iv) of paragraph (a), and (ii) is performing related work under the supervision of a professional person to qualify himself to become a professional employee as defined in paragraph (a).

29 U.S.C. § 152(12).

The ALJ made a finding that the work performed by DiTore and Sahijwana was predominately intellectual and varied in character, but he made no finding as to the second or third prongs of the Act's definition of professional employees. [Decision, p. 5]. Instead, in concluding that DiTore and Sahijwana are professional employees, the ALJ chiefly relied on the fact that these employees hold positions designated as "engineer," as he cited the Board's decision in *Westinghouse Electric Corp.*, 163 N.L.R.B. 723 (1967) as standing for the proposition that the characteristics of engineering work "are typical of the work which Section 2(12) . . . defines as professional." [Decision, p. 5].

The ALJ's reliance on *Westinghouse Electric* is misplaced, as the work performed by DiTore and Sahijwana is not comparable to the positions which were under consideration in that case. The engineers in *Westinghouse Electric* were engaged in the installation, servicing and repair of steam engines. 163 N.L.R.B. at 723. Oberthur does employ engineers who perform such traditional engineering duties, and who would presumably qualify as professional employees, but those employees are employed in a separate engineering unit that was not included within the stipulated unit. [Decision, p. 4]. In contrast to the employees at issue in *Westinghouse Electric*, DiTore and Sahijwana do not perform traditional engineering duties, but rather perform a quality control function directed toward increasing efficiency in the production process. This distinction was succinctly explained by DiTore at the hearing:

- Q. Okay. And I take it that there are other engineers working at this facility.
- A. Yeah.
- Q. But you're not associated with them doing anything?
- A. No, I'm not associated with them.
- Q. So what are the other --
- A. I'd say they're more like what I would call like a process engineer that they're there to support different machines. Could be that they're there to implement new products that come into the plant. So if you get a new part design in the plant, in France they may go through some development, then it gets handed over to the local engineers. And they do that. I don't touch any of that.
- Q. Okay. So you're job --
- A. I'm out of that completely.
- Q. Okay. Those guys would be involved in --
- A. The technical stuff of making it work.
- Q. Your job, as opposed to that, is making the manufacturing process --
- A. More efficient, not in the detail engineering of it.

[Tr., pp. 588-89].

The work performed by DiTore and Sahijwana is more analogous to that considered by the Board in *Loral Electronics Systems*, 200 N.L.R.B. 1019 (1972). In *Loral Electronics*, the Board was faced with the issue of whether quality assurance engineers were professional

employees under Section 2(12). In that case, the job duties of the employees at issue included “utilizing engineering designs to decide the most efficient manufacturing procedures.” *Id.* at 1021. DiTore and Sahijwana both explained that this exact function formed the core of their positions. [Tr., pp. 588-89, 632]. The Board explained in *Loral Electronics* that although the functions of a quality assurance engineer involved “considerable technical expertise in assisting the Employer to operate efficiently and achieve timely contract performance, the “character of the work required of them as a group falls short of that required of professional employees.” 200 N.L.R.B. at 1021.

In light of the Board’s holding in *Loral Electronics*, the quality control duties of DiTore and Sahijwana are insufficient to convey professional employee status notwithstanding the fact that each has the word “engineer” in their job titles. The ALJ’s finding to the contrary was erroneous, and the ballots of both DiTore and Sahijwana should be opened and counted. Further, because neither DiTore and Sahijwana is properly considered a professional employee under Section 2(12), use of the *Sonotone* voting procedure was not required, and no rerun election is necessary to achieve compliance with *Sonotone*.

**Exception 5: The ALJ Erred in Concluding That Oberthur Restricted Discussion of the Union in Violation of Section 8(a)(1).**

The ALJ found that Oberthur violated Section 8(a)(1) of the Act as a result of his finding that supervisor Frank Belcher instructed employees “that they could not talk about the Union to other employees except in areas other than the work floor or on non-work time.” [Decision, p. 6]. The ALJ concluded that this restriction was “overly broad and would prohibit employees from talking about the Union at times and places which would not interfere with either their own work or the work of others.” [Decision, p. 6]. The ALJ’s conclusions are inherently contradictory, as he simultaneously found that the limitation applied only to the work floor

during work time and that such a limitation would interfere with employee communications at times that and places that which would not affect work performance. The finding that that the limitation articulated by Belcher would interfere with communications outside of working time is particularly unwarranted in light of the ALJ having credited a portion of Belcher's affidavit in which he testified that he specifically informed employees that "the break room, parking area, bulletin board area, and the hallway" were among the non-work areas in which they were free to discuss any issues they chose. [Decision, p. 6].

The Board has recognized that an employer has a right to require employees to work during working time. *See Our Way, Inc.*, 268 N.L.R.B. 394, 394 (1983) ("Working time is for work' is a long-accepted maxim of labor relations."). In the instant case, the testimony revealed that Belcher's statements regarding talking during work time were limited in their scope to activities on the work floor during work hours, and did not extend to hallways, break rooms, or other areas of Oberthur's facility. [Decision, p. 6]. This limitation extended no further than was minimally necessary to permit plant operations to continue unhindered. *See F.P. Adams Co. Inc.*, 166 N.L.R.B. 967 (1967) (reversing ALJ's finding that no solicitation rule violated Section 8(a)(1) where rule was limited to working time, was promulgated in the interest of serving production and order, and was not part of an ongoing pattern of unfair labor practices). Given the narrow scope of the instruction limiting solicitation, as well as the fact that no employee was disciplined (or even threatened with discipline) for violating Belcher's directive, there was insufficient evidence to support a finding that Oberthur's conduct amounted to an unfair labor practice.

**Exception 6: The ALJ Erred in Concluding that Oberthur Violated Section 8(a)(1) and (3) by Freezing Bonuses and Wage Increases During the Period of Time Leading Up to the Election.**

The only other unfair labor practice charge sustained by the ALJ relates to Oberthur's temporary suspension of its wage increase and spot bonus procedures during the period immediately preceding the election. [Decision, p. 9].

Testimony at the hearing established that Oberthur had a practice of awarding certain pay increases and/or bonuses to employees at its Exton, Pennsylvania, facility. [Tr., pp. 165-67]. One such program, a spot bonus program, began around 2007-2008 and was put in place to recognize individual contributions made by employees who went above and beyond their normal duties. These spot bonuses were, by their nature, discretionary and could be awarded if an hourly employee worked overtime or discovered an error before the product left the facility. The award of any spot bonus and the amount of such a bonus is "very discretionary." [Tr., p. 166].

Another payroll practice that Oberthur utilizes involves the award of a skill-level increase to an employee who switches from one position to another that is more difficult to perform. [Tr., p. 179]. Under this program, the employee would receive wage increases over the course of 18 months to two years in increments of three to four months provided that the employee was continuing to perform his job duties at an acceptable level and had not received any disciplinary action. [Tr., pp. 182-85]. As with the decision of whether to award a spot bonus, a decision to grant a skill-level increase, as well as the specific timing of the implementation of any skill-level increase, is discretionary.

The Union filed its representation petition on July 30, 2012. Recognizing the obligation to maintain the status quo in the period preceding the impending election, on August 1, 2012, Oberthur Director of Human Resources Diane Ware sent out a memorandum to all supervisors and managers advising the recipients that because of the Union organizing campaign, all increases, promotions, transfers and spot bonuses were to be put on "hold," as they could be perceived as if we were trying to 'buy' an employee's 'no' vote. [G.C. Ex. 6]. Ware then

advised that any employee waiting for an increase be advised that: “During this period, we have to keep the status quo on all issues related to wages, transfers and promotions.” [*Id.*]. Ware also advised that the managers and supervisors should not say things like “it’s because of the union,” or “your promotion will be processed once we vote the union down.” [*Id.*].

Ware testified at the hearing that she later informed the managers that all of the delayed increases and spot bonuses would be approved retroactively after the election. [Tr., p. 190-192]. Ware further testified that all of the employees who had their increases and spot bonuses delayed were paid their increases after the Union election. [Tr., p. 720, 725, 728].

As explained by Ware, all of the employees who were already on an approved progression pay plan received the increases according to that schedule without any delay. [Tr., p. 195]. The only employees affected by the August 1, 2012, memorandum were those who had been recommended for a spot bonus and/or those recommended for a skill increase during the campaign period. [Tr., p. 196]. In total, three employees had their progression increases delayed and approximately 15 had their spot bonuses delayed. All received these increases directly after the Union election. [G.C. Ex. 25, 26].

In finding that this conduct constituted an unfair labor practice, the ALJ summarily disregarded the dilemma raised by Oberthur’s need to avoid giving either the impression “that it was bribing employees to vote against unionization or that it was punishing them for being in favor of unionization.” The ALJ’s conclusion that Oberthur violated the Act by suspending pay increases and bonuses during the campaign period and restoring them after the election is at odds with settled Board precedent. [Decision, p. 9].

Oberthur’s decision to delay processing discretionary spot bonuses and skill increases, during the campaign, cannot be considered an unfair labor practice. It is settled law that an employer’s decision to implement unscheduled pay increases prior to an election constitutes a

violation of Section 8(a)(1). *See, e.g., Idaho Candy Co.*, 218 N.L.R.B. 352, 352 (1975) (“We agree with the Administrative Law Judge that Respondent violated Section 8(a)(1) of the Act by announcing and granting a wage increase prior to the election . . . .”); *cf. N.L.R.B. v. Exchange Parts Co.*, 375 U.S. 405, 409 (1964) (“The danger inherent in well-timed increases in benefits is the suggestion of a fist inside the velvet glove. Employees are not likely to miss the inference that the source of benefits now conferred is also the source from which future benefits must flow and which may dry up if it is not obliged.”).

Thus, a decision by Oberthur to grant pay increases to the employees at issue in the lead up to the election would have resulted in a violation of the Act. The only available course of action was that taken by Oberthur, namely maintaining the status quo until after the election took place. Indeed, the Board has recognized that even where a pay increase was *scheduled prior to any organizing activity*, the decision to stay the implementation of that increase prior to a representation election does not constitute an unfair labor practice. In *Uarco Inc.*, 169 N.L.R.B. 1153 (1968), the employer had a practice of granting annual wage increases which were implemented at the beginning of each April. When the employer became subject to a representation petition and an election was scheduled to take place in May, the employer informed the employees in the petitioned-for unit that it was postponing the regular increases “to avoid the appearance of vote-buying by the company.” *Id.* at 1153. The Board concluded that the employer’s announcement concerning the withholding of the annual increases was not “coercive in nature or created an atmosphere which prevented the exercise of free choice in the election.” *Id.* at 1154. The Board expressly noted that the employer had communicated that “the sole purpose of its announcement postponing the expected adjustments in wage rates and benefits for the employees involved was to avoid the appearance that it sought to interfere with

their free choice in any elections which might be directed.” *Id.* The Board therefore overruled an objection based on the postponement of the wage increases and certified the election results.

The same principle was recognized in *Wal-Mart Stores, Inc.*, 349 N.L.R.B. 1007 (2007). Upon the filing of a representation petition, the employer announced that merit increases would be “frozen, put on hold” to avoid the appearance of an attempt to influence employees’ votes. *Id.* at 1012. The Board reversed an ALJ’s finding, which had been based on the employer’s failure to make explicit that the increases would be reinstated regardless of the results of the election, that this conduct constituted an unfair labor practice. *Id.* at 1012-13. The Board explicitly held that there are no required “magic words” when staying pay increases during the lead up to an election. *Id.* at 1013.

The ALJ’s decision that Oberthur violated Section 8(a)(1) by refraining from making *discretionary* pay increases in the weeks prior to the election, notwithstanding the Board’s recognition in *Uarco* that an employer may delay a *definitively scheduled* pay increase pending an election to avoid the appearance of impropriety, is untenable. This is particularly so in that the contrast drawn by the ALJ between this case and the Board’s decision in *Noah’s Bay Area Bagels*, 331 N.L.R.B. 188 (2000), amounts to a finding that Oberthur’s delay of wage increases and bonus payments pending the election was unlawful because Oberthur failed to use the proper language in explaining the rationale for its decision. [Decision, p. 10]. It was just such a “magic words” requirement which was rejected by the Board in *Wal-Mart Stores*. Because Oberthur adopted its “hold” on bonuses and wage increases for the purpose of avoiding an impression that it was improperly interfering with the election process, and because all compensation that was placed on hold was ultimately paid out to the employees after the election was held, Oberthur’s conduct did not violate Section 8(a)(1) or (3) of the Act.

**Exception 7: The ALJ Erred in Concluding that Oberthur Violated Section 8(a)(1) and (3) by Notifying Employees of the Hold on Bonuses and Wage Increases Pending the Occurrence of the Election.**

In addition to finding that Oberthur's "hold" on pay raises and bonuses constituted an unfair labor practice, the ALJ made a corresponding finding that Oberthur "violated Section 8(a)(1) and (3) by notifying employees of the aforesaid freeze policy." [Decision, p. 12]. Because the policy of staying wage increases and bonuses until after the election was not, for the reasons discussed *supra*, a violation of the Act, it necessarily follows that notifying employees of the policy was not itself a violation of the Act.

**Exception 8: The ALJ Erred in Sustaining Objection Number 5.**

Of the eight objections to the election advanced by the Union, the only objection sustained by the ALJ was Objection Number 5, which concerned Oberthur informing certain unit employees of the "hold" on pay increases and bonuses until the election. [Decision, p. 12]. The ALJ articulated the proper nine-factor standard for evaluating the Union's objection, but wholly failed to evaluate the applicable factors which, viewed together, reveal that Objection Number 5 is without merit. [Decision, p. 11].

As noted by the ALJ, the Board explained in *Taylor Wharton Harsco Corp.*, 336 N.L.R.B. 157 (2001), that:

[T]he proper test for evaluating conduct of a party is an objective one--whether it has "the tendency to interfere with the employees' freedom of choice." *Cambridge Tool Mfg.*, 316 NLRB 716 (1995). In determining whether a party's misconduct has the tendency to interfere with employees' freedom of choice, the Board considers: (1) the number of incidents; (2) the severity of the incidents and whether they were likely to cause fear among [\*\*7] the employees in the bargaining unit; (3) the number of employees in the bargaining unit subjected to the misconduct; (4) the proximity of the misconduct to the election; (5) the degree to which the misconduct persists in the minds of the bargaining unit employees;

(6) the extent of dissemination of the misconduct among the bargaining unit employees; (7) the effect, if any, of misconduct by the opposing party to cancel out the effects of the original misconduct; (8) the closeness of the final vote; and (9) the degree to which the misconduct can be attributed to the party. See, e.g., *Avis Rent-a-Car*, 280 NLRB 580, 581 (1986).

*Id.* at 158.

As a preliminary issue, the nine-factor analysis is premised on the assumption that the employer action at issue is in fact “misconduct,” as that term is incorporated into each of the factors. For the reasons discussed *supra* in connection with Exception 6, Oberthur’s decision to place a “hold” on pay increases and bonuses pending the election was not a violation of Section 8(a)(1) or (3), nor was it “misconduct.”

Assuming *arguendo* that Oberthur’s adoption of the “hold” was improper, it nevertheless does not provide a valid basis for an objection so as to set aside the election. Indeed, after citing the nine-factor test, the ALJ simply failed to engage in any analysis of the individual factors, and instead based his decision to sustain the Objection chiefly on the fact that he had found Oberthur’s conduct decision to be a violation of Section 8(a)(1) and (3). [Decision, p. 11]. That foundational decision, however, was erroneous, and an evaluation of the nine factors reveals that the conduct underlying Objection Number Five was not in fact objectionable.

As to the first factor, the implementation of the “hold” was not part of a pattern of unfair labor practices, but simply a response to the need to avoid the appearance of “vote buying” or other impropriety in the period leading up to the election. [G.C. Ex. 6]. As to the second factor, the implementation of the hold can hardly be said to have been “likely to cause fear among the employees in the bargaining unit” in that the hold was not accompanied by any threats or other conduct violative of the Act. With regard to the third factor, the record evidence revealed that only a handful of employees, out of nearly 230 persons in the unit, were actually affected by the

hold. [G.C. Ex. 25, 26]. As to the fourth factor, the hold was put into effect on August 1, 2012, more than a month prior to the September 7 election. [G.C. Ex. 6]. As to factor five, there was no evidence in the record from which it could be concluded that the hold persisted in the minds of the bargaining unit employees through the date of the election. With regard to factor six, the ALJ found only that the relatively few employees who were informed of the policy by Oberthur in turn disseminated the information themselves to an unspecified number of unit employees. [Decision, p. 11]. Indeed, of nine factors, only one (factor eight) weighs in favor of sustaining the objection.

In sum, Objection Number 5 is duplicative of the unfair labor practice charge addressed supra in Exceptions 6 and 7. The ALJ's decision to sustain the objection was erroneous for the same reasons as was the decision that Oberthur's conduct constituted an unfair labor practice, in that the ALJ disregarded the Board's recognition in *Idaho Candy* and similar cases that the granting of wage increases in the critical period before an election is itself an unfair labor practice. Oberthur properly decided to delay the payment of wage increases and bonuses until after the representation election. Under the Board's decision in *Wal-Mart Stores*, Oberthur's conduct was in conformity with the requirements of the Act, and under the nine-factor test articulated in *Taylor Wharton Harsco Corp.* the conduct was not objectionable.

### **CONCLUSION**

In light of the foregoing, Oberthur respectfully requests that the Board reverse the ALJ's findings that Oberthur violated Section 8(a) of the Act by restricting employee communications and by suspending wage increases and bonuses during the period prior to the election. Oberthur further requests that the Board reverse the ALJ's decision to sustain Objection Number 5.

With regard to the challenges made to the ballots cast by John DiTore and Ben Sahijwana, Oberthur requests that the Board reverse the ALJ's finding that DiTore and

Sahijwana are professional employees and direct that the ballots be opened and counted. In the alternative, Oberthur requests that the Board set aside the election and direct that a new election be held in the stipulated unit in accordance with the *Sonotone* voting procedure.

Dated: March 19, 2013

WHITEFORD, TAYLOR & PRESTON, L.L.P.



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

OBERTHUR TECHNOLOGIES OF  
AMERICA CORPORATION

and

GRAPHIC COMMUNICATIONS CONFERENCE  
INTERNATIONAL BROTHERHOOD OF  
TEAMSTERS, LOCAL 14-M

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

**PROOF OF SERVICE**

I am counsel to Respondent Oberthur Technologies of America Corporation in the instant proceeding. I am over the age of eighteen years and not a party to the proceeding; my business address is Seven Saint Paul Street, Baltimore, Maryland 21202.

On March 19, 2013, I caused the following documents to be served:

**Employer's Exceptions to Administrative Law Judge's Decision  
and Memorandum of Law in Support**

by Federal Express overnight delivery and by electronic mail to:

Randy M. Girer  
Counsel for the Acting General Counsel  
National Labor Relations Board  
Region Four  
615 Chestnut Street, 7<sup>th</sup> Floor  
Philadelphia, Pennsylvania 19106-4413

and

Thomas H. Kohn, Esquire  
Markowitz & Richman  
123 South Broad Street, Suite 2020  
Philadelphia, Pennsylvania 19109

Counsel for the Union.

Executed on March 19, 2013.

I declare under penalty of perjury under the laws of the State of Maryland that the foregoing Proof of Service is true and correct.



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