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 REPLY BRIEF TO

RESPONDENT'S ANSWERING BRIEF TO

GENERAL COUNSEL'S EXCEPTIONS

TO THE DECISION OF THE ADMINISTRATIVE LAW JUDGE

Respectfully submitted,

Dated: April 12, 2013

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Pursuant to Section 102.46(h) of the Board's Rules and Regulations, Counsel for the Acting General Counsel (GC) files this reply brief to the Answering Brief (Respondent's Answering Brief) filed by Oberthur Technologies of America Corporation (Respondent) on April 2, 2013 in response to GC's Exceptions to the Decision of the Administrative Law Judge (ALJ).

(A) Respondent's Constitutional challenge to the Authority of the Board

Respondent reiterates its argument, set forth at page 2 in Respondent's Exceptions and Brief in Support (Respondent's Exceptions) that the National Labor Relations Board lacks authority to render a decision in this matter, citing *Noel Canning v. NLRB*, 705 F.3d 490 (D.C. Cir. 2013). Respondent requests that the Board refrain from consideration of the Exceptions.

GC respectfully disagrees with Respondent's assertion and requests that the Board render a decision in this matter. GC incorporates herein the arguments previously stated at page 8 in GC's Answering Brief to Respondent's Exceptions, filed April 3, 2013. (GC's Answering Brief)

(B) General Counsel's Exception 1

> GC excepts to (a) the failure to find that Respondent violated Section 8(a)(1) by implementing and enforcing a new policy prohibiting employees from discussing the Union in work areas; (b) the omission of a rescission remedy in the Order and Notice to Employees; and (c) the inclusion of the phrase "in the absence of a preexisting valid no-solicitation rule" in the Conclusions of Law, Order and Notice to Employees.

(1) Failure to find the violation as set forth in the Complaint

Respondent opposes GC's Exception 1(a) to the failure to find that Respondent violated Section 8(a)(1) by implementing and enforcing a policy prohibiting employees from talking about the Union, as alleged in the Complaint. (GC 2, subp. 5(a))[1] (ALJD 2:[9-10]; 12:[3-5]). Respondent asserts that the ALJ's holding (to which GC does not except) that Respondent told

[1] References to the Decision of the ALJ are identified as (ALJD) with page number, and line numbers listed in brackets after the colon. Transcript page numbers are identified by (T.). Exhibits are identified as (GC) for General Counsel, (R) for Respondent and (U) for Union.

employees that they could not talk about the Union except in non-work areas and during non-work times (ALJD 6:[46-47]), is but a semantic difference from the violation urged in GC's Exception 1(a) and alleged in the Complaint. Respondent also revives its Exception to the ALJ's finding of a Section 8(a)(1) violation, reiterating arguments at pp. 9-10 in Respondent's Exceptions.

GC respectfully disagrees with Respondent. As to GC's Exception 1(a), urging a broader finding and remedy than that found by the ALJ, GC stands by and incorporates herein the factual summary and legal argument set forth at pages 7 to 13 in GC's Brief in Support of Exceptions, filed March 20, 2013. As to Respondent's restated Exception to the finding of a Section 8(a)(1) violation, GC stands by and incorporates herein the factual summary and legal arguments set forth at pages 9 to 16 of GC's Answering Brief.

(2) Failure to order rescission

Respondent asserts that it is inappropriate and unnecessary for the Board to order, as sought by GC in its Exception 1(b), rescission of Respondent's unlawful policy prohibiting employees from discussing the Union in working areas and on working time. Respondent argues that (a) Respondent never disciplined any employee pursuant to its discriminatory policy and (b) the ALJ's Order, that Respondent cease and desist from telling employees not to talk about the Union in work areas or during working time, is a sufficient remedy. (ALJD 13:[23-24])

GC respectfully disagrees and urges the Board to order rescission.

(a) Respondent erroneously asserts that, because it refrained from disciplining its employees pursuant to its new no-talking policy, there is no need for a rescission remedy. Respondent is wrong. It is not relevant to the finding of a Section 8(a)(1) violation that no employees were disciplined pursuant to the unlawful policy. Nor is it relevant to the issuance of

an appropriate rescission remedy that no employees were disciplined pursuant to the policy. See *Alan Ritchey,* 359 NLRB No. 40, slip op. at 12-13 (2012). As in the instant case, the employer in *Alan Ritchey* promulgated and enforced a discriminatory rule prohibiting Union talk during worktime, but did not discipline employees pursuant to the rule. The Board found a Section 8(a)(1) violation and ordered rescission. Accord *Cogburn Healthcare Center,* 335 NLRB 1397, 1412 (2001), affd. in relevant part, 437 F. 3d 1266 (D.C. Cir. 2006) (Lack of discipline is irrelevant to finding of 8(a)(1) violation for promulgation of unlawful workrule); *Jennie-O Foods,* 301 NLRB 305, 314 (1991) ("Discipline involves violation of Section 8(a)(3); coercive rule maintenance and enforcement is a violation of Section 8(a)(1) -- with or without discipline.")

(b) Respondent claims that the ALJ's Order and Notice to Employees are sufficient to remedy the violation. GC respectfully disagrees. Respondent never informed employees that the unlawful no-talking policy had been rescinded. Supervisor Frank Belcher never retracted his directive to employees not to talk about the Union on the plant floor or on working time. (T. 376) Respondent presented no evidence that the policy was ever rescinded. GC respectfully excepts to the omission of a rescission remedy from the Order and Notice to Employees.

(3) GC's Exception to the wording of the remedy

Respondent argues that GC "elevates form over substance" in its Exception 1(c) to the wording of the Conclusions of Law, Order and Notice, in connection with Respondent's discriminatory no-talking policy.

GC respectfully disagrees. The Notice to Employees, consistent with the Conclusions of Law and Order, states:

> We will not tell employees, in the absence of a valid no-solicitation rule, that they cannot talk to each other about the Union or union affairs in the facility[2] or during work time.

In *Ishikawa Gasket America,* 337 NLRB 175, 176 (2001), affd. 354 F.3d 534 (6th Cir. 2004), the Board reiterated the proposition that remedial notices should be drafted in plain, straightforward, layperson language that clearly informs employees of their rights and the violations of the Act found. Here, the phrase "in the absence of a valid no-solicitation rule" is unnecessary and confusing. Respondent violated Section 8(a)(1) by issuing a discriminatory "no talking" policy. There is no question of a "no solicitation rule," valid or invalid. Where (as Respondent acknowledges) there was no pre-existing no-solicitation rule, nor (as the ALJ found) any pre-existing "no talking" rule, the reference to a "no solicitation" rule is unnecessary. See pages 12-13 in GC's Brief in Support of Exceptions (and incorporated herein). The phrasing is also confusing. The addition of the clause does not further the *Ishikawa* goal of informing employees clearly and plainly about their rights and the nature of Respondent's violation: a discriminatory no-talking rule. What Respondent mischaracterizes as "form over substance" is GC's prosecutorial mandate to ensure that Respondent's violations are appropriately remedied, including clear and specific communication to the affected employees via the Notice.

(C) General Counsel's Exception 2

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

(a) Respondent opposes GC's Exception 2(a) to the mistaken factual finding that Sandra Smith testified that she used Respondent's copying machine to make copies of Union

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[2] The Conclusions of Law and Order use the phrase "in work areas" instead of "in the facility." ALJD 12:[5] and 13 [24]).

materials. (ALJD 7:[39-41]) GC respectfully disagrees with Respondent. GC stands by and incorporates herein the factual summary and legal argument at pp. 14-15 in GC's Brief in Support of Exceptions.

(b) Respondent opposes GC's Exception 2(b) to the failure to find a violation as alleged in the Complaint. (GC 2, subp. 5(c)) Respondent cites in support the ALJ's description of the incident as "trivial" and "non-coercive," and his comment at trial that "this episode is not going to make it to Law and Order." (ALJD 8:[9]) (T. 436) Respondent disputes GC's "bald assertion" that supervisor Roman Young's sole concern was his belief that Smith was engaging in Union activities. Respondent argues that there is no record evidence concerning employee use of its copying machine, and that the incident was not coercive, citing supervisor Young's directive to Smith that Respondent "preferred" that she distribute Union materials by hand.

GC respectfully disagrees with Respondent. GC stands by and incorporates herein the factual summary and legal argument at pp. 14-17 in GC's Brief in Support of Exceptions. This incident occurred against a backdrop of Section 8(a)(1) violations which, on July 31, had already occurred: Respondent's unlawful directives to employees in June and July not to talk about the Union in working areas or on working hours. Against this backdrop, supervisor Young targeted an employee to question her about suspected use of company equipment to copy Union materials. Respondent claims that Young's concern was Smith's absence from her work area. However Young's testimony belies this claim. He questioned Smith only about her alleged copying of Union materials. (T. 434-436) He did not ask the logical question if his concern had been her absence from her work station: "Why are you out of your work area?" or "Where were you?" Respondent's argument that there can be no violation, without evidence regarding past use of the copy machine, must also be rejected. Supervisor Young testified that he was not aware of

any policy as to whether employees could, or could not, use the equipment. (T. 434-35) Young did not ask whether Smith had used the copying machine (a logical question if such use were prohibited or problematic); he questioned only whether she had copied Union materials. (T. 434, 435) In these circumstances, where the supervisor questioned the employee only about suspected Union activities, the incident was coercive and violated Section 8(a)(1).

Respondent counters that the incident was non-coercive because, when Young told Smith that her employer preferred distribution of Union materials by hand, Smith responded by stating her understanding that she had the right to distribute Union materials in the cafeteria. (T. 120-22, 136-37) (GC 17) The fact that an employee felt emboldened to respond to a supervisor's coercive questioning does not cure the violation or make the incident any less coercive from the perspective of a reasonable employee, working on a plant floor where supervisors were telling employees not to talk about the Union in the plant or on working time.

GC respectfully urges the Board to find a Section 8(a)(1) violation as alleged.

(D) General Counsel's Exception 3

> GC excepts to the inadvertent omission from the Order and Notice to Employees of the conclusion that Respondent violated Section 8(a)(1) by telling employees that bonuses, wage increases, promotions and transfers were on hold or "by notifying employees of the aforesaid freeze policy."

Respondent opposes a remedy for its violation of Section 8(a)(1), by telling employees that bonuses, wage increases, promotions and transfers were on hold or (as phrased in the Conclusions of Law) by notifying employees of its freeze policy. (ALJD: 9:[33-36]; 12[11-12]; 13:[17-35]) Respondent claims the relief is superfluous and redundant.

GC respectfully disagrees. The violation is not remedied where it has been omitted from the Order and Notice to Employees. GC stands by and incorporates herein the argument at page

18 in GC's Brief in Support of Exceptions. GC reiterates its exception to the omission of a remedy for the Section 8(a)(1) violation found by the ALJ.

(E) General Counsel's Exception 4

(a) GC excepts to the failure to order a backpay remedy for Respondent's unlawful freezing of all employee spot bonuses, in violation of Section 8(a)(1) and (3).
(b) GC excepts to the omission of a rescission remedy in the Order and Notice to Employees for Respondent's unlawful policy putting all wage increases, spot bonuses, transfers and promotions on hold because of the Union.
(ALJD 12:[7-9]; 13:[3-11] 13:[17-35]; and Appendix)

(a) Respondent opposes a backpay remedy for its freeze of spot bonuses.

Respondent opposes any backpay to remedy its unlawful policy putting all spot bonuses "on hold" because of the Union. Respondent argues as follows: (i) there is no basis to believe that Respondent failed to consider spot bonuses while its unlawful policy was in effect; (ii) the impact of the policy was only to delay bonuses for a month or two; (iii) the ALJ found that some employees were recommended for bonuses in August; (iv) spot bonuses are discretionary, with standards varying from supervisor to supervisor, so there is no identifiable or meaningful standard to ascertain backpay; (v) any remedy is accordingly entirely speculative; (vi) the amounts of backpay are minimal and "marginal" ($50 and $150); and (vii) the small monetary value of backpay is outweighed by the burden of a lengthy, costly compliance proceeding.

GC respectfully disagrees. GC stands by and incorporates herein the factual summary and legal argument set forth at pages 18-24 in GC's Brief in Support of Exceptions.

It is well settled that the finding of an unfair labor practice is presumptive proof that some backpay is owed. *NLRB v. Mastro Plastics Corp.*, 354 F.2d 170, 178 (2d Cir. 1965); *Gimrock Construction,* 356 NLRB No. 83, slip op. at 10 (2011), enfd. in relevant part 695 F.2d 1188 (11th Cir. 2012). The Board's objective in compliance proceedings is to restore, to the extent feasible, the status quo ante by restructuring the circumstances that would have existed had there been no

unfair labor practices. *Phelps Dodge Corp. v. NLRB,* 313 U.S. 177, 194 (1941); *Parts Depot,* 348 NLRB 152, 153 (2006), enfd. 260 Fed. Appx. 607 (4th Cir. 1008) (unpub.) In a backpay proceeding, the sole burden on the General Counsel is to show the gross amounts of backpay due--the amount the employees would have received but for the employer's illegal conduct. *La Favorita,* 313 NLRB 902, 902-903 (1994) enfd. mem. 48 F.3d 1232 (10th Cir. 1995). Any method which approximates what the discriminatees would have earned had they not been discriminated against is acceptable if it is not unreasonable or arbitrary. Id, see also *Kansas Refined Helium Co.*, 252 NLRB 1156, 1157 (1980), enfd. 683 F.2d 1296 (10th Cir. 1982); *NLRB v. Brown & Root*, 311 F.2d 447, 453 (8th Cir. 1963). The Board is vested with broad discretion in selecting a backpay formula appropriate to the circumstances of the case. The courts and the Board "have applied a broad standard of reasonableness in approving numerous methods of calculating gross backpay." *Performance Friction Corp.*, 335 NLRB 1117, 1117 (2001). The General Counsel, in demonstrating gross amounts owed, need not show an exact amount. An approximate amount is sufficient. *Laborers Local 158 (Worthy Bros.)*, 301 NLRB 35, 36 (1991). An offending Respondent is not allowed to profit from any uncertainty caused by its discrimination. Any ambiguities, doubts or uncertainties are resolved against Respondent, the wrongdoer. *United Aircraft Corp.*, 204 NLRB 1068, 1068 (1973); *Minette Mills*, 316 NLRB 1009, 1011 (1995).

There is no merit to Respondent's contention that there is no identifiable standard to determine whether employees would have received spot bonuses in the backpay period. Human Resources Manager Diane Ware testified that a supervisor or lead employee can recommend an employee for a bonus for a variety of reasons: working overtime or extra hours, covering for an absent or vacationing employee, catching an error and saving Respondent some money. (T. 165)

An employee qualifies for a spot bonus by working 50 or 100 hours "filling in" for another employee (GC 3, pp. 1, 3, 22, 28); or by making a referral (GC 3, page 3). Spot bonuses can also be recommended for outstanding performance. In these circumstances, GC should not be deprived of the opportunity to establish an approximate amount of backpay in a compliance proceeding. If there is any uncertainty about this, it should be resolved against Respondent, the wrongdoer.

Respondent regularly awarded bonuses. In 2012, there were three bonuses recommended in April, six bonuses in May, twelve bonuses in June and nine bonuses in July. After Respondent's unlawful freeze policy went into effect around August 2, the number of bonuses dropped: only two bonuses were recommended in August (the month prior to the election) and one bonus in September. (GC 3) See ***Chart*** at pages 33-34 of GC's Answering Brief. Pursuant to the freeze, the majority of bonuses recommended in June, July and August were not paid until October. The ALJ correctly stated that there were employees who were recommended for bonuses in August (with payment delayed until after the election). (ALJD 8:[37-39]) Respondent seizes on this factual finding to argue that it continued to consider bonuses in August, despite its unlawful freeze policy. A closer inspection of the evidence (GC 3) shows that the August bonus was awarded to Borkee Phethsarath, an employee who had been awarded bonuses monthly (in May, June and July). No other employee was recommended for a bonus in August.

In short, Respondent's records contradict its argument that it continued to consider spot bonuses in August. Respondent deviated from its regular practice of granting spot bonuses. The ALJ properly found that Respondent's freeze policy violated the Act, and accordingly a backpay remedy is appropriate. In compliance, under Respondent's clearly stated criteria (working

overtime, filling in for another employee, etc.), it can be determined whether additional employees qualified for spot bonuses, but were not recommended for the bonus, due to the unlawful policy. There is no basis for Respondent's fear that granting a monetary remedy for spot bonuses will result in a lengthy, costly compliance proceeding. Instead, Respondent's payroll, vacation and personnel records can be readily utilized to determine a method for calculation of backpay. The fact that the backpay amounts may be minimal does not warrant the total abandonment of a remedy. See, e.g. *Czas Publishing Co.,* 205 NLRB 958, 972 (1973), enfd. --- Fed. Appx.--- (2d Cir. 1974), where the backpay award consisted of a $50 bonus.

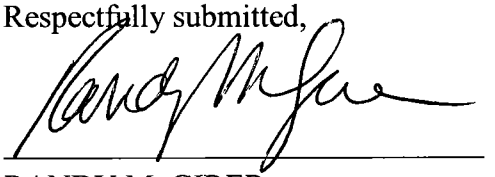
Accordingly GC respectfully requests that a backpay remedy be granted in regard to Respondent's unlawful freeze of spot bonuses because of the Union.

(b) Respondent opposes a rescission remedy.

Respondent opposes a rescission remedy for its unlawful freeze policy placing wage increases, spot bonuses, transfers and promotions on hold because of the Union. Respondent argues that such a remedy is unnecessary where the ALJ found that the delayed wages increases and spot bonuses were paid after the election, and accordingly the relief is "superfluous."

GC respectfully disagrees. Respondent has never informed its employees that it rescinded its unlawful policy. (T. 191, 492-94) A rescission remedy is appropriate.

Respectfully submitted,



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