UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 34

PRESSROOM CLEANERS,	)	
	)	
Charged Party,	)	
	)	
and	)	**CASE NO. 34-CA-071823**
	)	
SERVICE EMPLOYEES INTERNATIONAL UNION, LOCAL 32BJ	)	
	)	
	)	
Charging Party.	)	

RESPONDENT'S ANSWERING BRIEF TO CHARGING PARTY'S CROSS-EXCEPTIONS

COMES NOW, Pressroom Cleaners ("Respondent"), and hereby submits its Answering Brief to Charging Party's Cross-Exceptions in the above-entitled matter. For the reasons set forth below, and based upon the record as a whole, Respondent urges the Board to dismiss Charging Party's Cross-Exception, reverse Judge Fish's Decision, and dismiss all charges against Respondent.

1. THE ADMINISTRATIVE LAW JUDGE MUST FOLLOW BOARD PRECEDENT IN ADHERING TO *PLANNED BUILDING SERVICES.*

The Board's traditional remedy in cases where a successor, because it has committed unfair labor practices, is not allowed to set initial terms and conditions of employment is to order restoration of those terms and conditions of employment until a new agreement or impasse has been reached. *State Distributing Co.*, 282 NLRB 1048, 1048 (1987). In *Planned Building Services,* 347 NLRB 670, 676 (2006), the Board modified this remedy acknowledging that some

courts of appeals have rejected this remedy as punitive. Thus the Board modified the traditional remedy in refusal-to-hire cases to allow the successor employer to present evidence, in a compliance proceeding, that it would not have agreed to the predecessor's terms of employment, as well as evidence of the terms it would have agreed to, and the date it would have either reached agreement with the union or would have bargained to impasse. *Planned Building Services,* 347 NLRB at 675. General Counsel's position that *Planned Building Services'* modified test should be overruled has already been heard and rejected by the D.C. Circuit Court. In *W & M Properties of Conn., Inc. v. NLRB,* 514 F.3d 1341, 1347 (D.C. Cir. 2008), the Court determined that the "Board provided a reasoned justification" for its decision in *Planned Bldg. Servs.* and refused to "upset [the] new standard." Therefore, General Counsel's misguided argument concerning Judge Fish's application of *Planned Building Services* is moot, not to mention the improper forum.

Furthermore, an Administrative Law Judge is required to follow established Board precedent which neither the Board nor the Supreme Court has reversed, notwithstanding contrary decisions by courts of appeals. *Waco, Inc.*, 273 NLRB 746, 749 fn. 14 (1984) (citing *Iowa Beef Pcakers,* 144 NLRB 615, 616 (1983); *Los Angeles New Hospital*, 244 NLRB 960, 962 fn. 4 (1979), enfd. 640 F.2d 1017 (9th Cir. 1981); *Pathmark Stores, Inc.,* 342 NLRB 378 fn 1 (2004); *accord Healthbridge Mgt., LLC et al,*. 34-CA-12964, 2012 WL 2992088 (N.L.R.B. Div. of Judges July 20, 2012). Since *Planned Building Services* has not been reversed by the Board or the Supreme Court, Judge Fish is bound to follow it even though it *may* be inconsistent with D.C. Circuit law. Therefore, General Counsel's contention that *Planned Building Services* should be overruled must fail.

2. IF THE BOARD AFFIRMS ITS DECISION AND ORDERS BACKPAY, THEN THE BOARD ACTED WITHIN ITS BROAD REMEDIAL DISCRETION IN AFFORDING RESPONDENT AN OPPORTUNITY DURING COMPLIANCE PROCEEDINGS TO PRESENT EVIDENCE THAT WOULD REDUCE ITS BACKPAY OBLIGATION.

The Board's remedial power is "a broad, discretionary one, subject to limited judicial review." *Fibreboard Paper Prods. Corp. v. NLRB,* 379 U.S. 203, 216 (1964); *UFCW Local 204 v. NLRB*, 447 F.3d 821, 827 (D.C. Cir. 2006). Section 10(c) of the Act provides that the Board, upon finding that an unfair labor practice has been committed, "shall order the violator 'to take such affirmative action including reinstatement with or without back pay, as will effectuate the policies' of the Act." *NLRB v. J.H. Rutter-Rex Mfg. Co.,* 396 U.S. 258, 262 (1969). In the exercise of that statutory duty, the Board strives to tailor remedies in a particular case that will "expunge only the *actual*, and not merely *speculative* consequences of the unfair labor practices." *Sure-Tan v. NLRB,* 467 U.S. 883, 900-01 (1984).

A backpay award is a make-whole remedy designed to restore "the economic status quo that [the discriminatee] would have obtained but for the...wrongful [act]." *Golden State Bottling Co. v. NLRB,* 414 U.S. 168, 188 (1973) (quoting *J.H. Rutter-Rex,* 396 U.S. at 263). Typically, a finding of discriminatory employment action "is presumptive proof that some backpay is owed." *NLRB v. Madison Courier, Inc.*, 472 F.2d 1307, 1316 (D.C. Cir. 1972). A backpay award can also serve to deter future unfair labor practices by preventing wrongdoers from gaining any advantage from their unlawful conduct. *J.H. Rutter-Rex,* 396 U.S. at 265. To restore the economic status quo, the discriminatee is ordinarily entitled to the difference between his gross backpay - the amount that he would have earned but for the wrongful conduct - and his actual

interim earnings. *See, Oil, Chemical & Atomic Workers Int'l Union v. NLRB,* 547 F.2d 598, 602 (D.C. Cir. 1976).

Contrary to General Counsel's position, the purpose of the compliance proceedings is to restore the status quo by restoring the circumstances that would have existed had there been no unfair labor practice. *Hubert Distributors, Inc.,* 344 NLRB 339, 341 (2005). The burden of proof in a backpay compliance proceeding are matters of settled law. The General Counsel's sole burden is to show the gross amounts of backpay due. *See, Madison Courier,* 472 F.2d at 1318. Once that has been done, the burden is on the wrongdoer "to establish facts which would negative the existence of liability to a given employee or which would mitigate that liability." *Id.* (quoting *NLRB v. Brown & Root, Inc.,* 311 F.2d 447, 454 (8th Cir. 1963). Again, while the Act provides the Board broad authority to fashion a make-whole remedy, this authority does not extend to the imposition of punitive measures. *Republic Steel Corp. v. NLRB,* 311 U.S. 7, 12 (1940).

Here, Judge Fish issued the traditional backpay remedy and tailored it to the circumstances of this case, an alleged refusal-to-hire, by allowing Respondent to demonstrate "in a compliance hearing that, had it lawfully bargained with the Union, it would have, at some identifiable time, lawfully imposed or reached agreement on less favorable terms than those that existed prior to its commencing operations at the Hartford Courant building." Administrative Law Judge's Decision at 41:36-41. Judge Fish's proposed remedy strikes a balance between the potential effects of providing Local 32BJ an undue windfall or allowing Respondent to escape backpay liability. By adhering to *Planned Building Services* and placing the burden on Respondent, Judge Fish remained consistent with the Board's responsibility to effectuate the policies of the Act in that it places the burden on the wrongdoer and avoids a remedy that is

punitive. *See Planned Building Services,* 347 NLRB 670, 675 (2006); *J.H. Rutter-Rex,* supra. Accordingly, Judge Fish issued this remedy within his broad remedial discretion. Furthermore, to side with General Counsel's position that the Board should disregard well-settled Board precedent and effectively circumvent a compliance proceeding in this matter, would be punitive and against founded policies of the Act. Additionally, to rule in favor of General Counsel would forfeit Respondent's right to mitigate its backpay liability and deprive it of due process of law.

3. GENERAL COUNSEL'S CHALLENGE IS NOT RIPE FOR REVIEW AT THIS STAGE BECAUSE THE COMPLIANCE PROCEEDING HAS NOT TAKEN PLACE.

Provided that neither Respondent's backpay liability, if any, has yet to be determined, nor any adverse consequence of Judge Fish's remedy has yet to occurred, General Counsel's challenges do not appear ripe for review. At this stage in the matter, any claim of adverse effect resulting from Judge Fish's tailored remedy is purely hypothetical. In a similar case involving a challenge to *Planned Building Services* and backpay liability, the D.C. Circuit Court held that because the Board's new evidentiary rule for determining backpay and instatement liability in cases of unfair labor practices (committed against union salts) was to be applied during the compliance stage, challenges to the rule were not ripe for review until after compliance proceedings were held and an actual injury was present. *Sheet Metal Workers Int'l Ass'n, Local 270 v. NLRB,* 561 F.3d 497, 500-02 (D.C. Cir. 2009).

Therefore, if and when the compliance proceeding results in an actual aggrievement to General Counsel on this issue, its challenge will then be reviewable "in a concrete factual context, shedding light on how the [Board's remedy] operates in practice." *Id.* at 497. As a

result, General Counsel is not "aggrieved" by that portion of Judge Fish's Decision within the meaning of section 10(f) of the Act, and its claim is not ripe for review. 29 U.S.C. §160(f). Moreover, although Respondent believes the point is not ripe at this stage, Respondent anticipates that at the compliance proceeding, the evidence will show the parties would have reached impasse quickly and that Respondent would have been forced out of its contract with the Tribune as a result. General Counsel is asking this Board to bypass the compliance proceeding thereby eliminating Respondent's right to bring such evidence to light. Accordingly, General Counsel's Cross-Exception must be rejected.

CONCLUSION

As is apparent from the settled Board precedent, Judge Fish applied the appropriate remedy with regard to allowing Respondent the opportunity to mitigate its backpay liability through a traditional compliance proceeding. Accordingly, if it is determined Respondent committed an unfair labor practice, the Board is urged to reject General Counsel's Cross-Exception, thereby affirming and abiding by *Planned Building Services* per Judge Fish's Decision. Further, pursuant to Respondent's Exceptions filed August 1, 2013, Respondent requests that the Board reverse Judge Fish's Decision and that all charges against Respondent be dismissed.

DATED this 28th day of August, 2013.

PRESSROOM CLEANERS, Respondent

By: _____

Raymond R. Aranza, #18523
MARKS CLARE & RICHARDS, LLC
11605 Miracle Hills Drive, Suite 300
Omaha, NE 68154
Telephone: 402-492-9800
Fax: 402-492-9336
Email: raranza@mcrlawyers.com
ATTORNEY FOR RESPONDENT

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing document, entitled **Respondent's Answering Brief to Charged Party's Cross-Exceptions**, was served on this 28th day of August, 2013, via electronic mail, on the following parties:

Andrew Strom
astrom@seiu32bj.org

Terri Craig
Terri.Craig@nlrb.gov

By: _____
Raymond R. Aranza, #18523

N.\WDOX\CLIENTS\20922\001\PLEA\00102353.DOC

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 34

PRESSROOM CLEANERS,	)	
Charged Party,	)	
	)	
and	)	**CASE NO. 34-CA-071823**
	)	
SERVICE EMPLOYEES	)	
INTERNATIONAL UNION,	)	
LOCAL 32BJ	)	
Charging Party.	)	

AFFIDAVIT OF SERVICE OF PRESSROOM CLEANERS, INC.'S ANSWERING BRIEF TO CHARGING PARTY'S CROSS-EXCEPTIONS

State of Nebraska)
) ss
County of Douglas)

I, the undersigned counsel for the Respondent, Pressroom Cleaners, Inc., state under oath that on August 28, 2013, I served a true and correct copy of Respondent's Answering Brief to Charging Party's Cross-Exceptions upon the following counsel of record by first-class U.S. mail, postage prepaid, to:

Roy Lilledahl, President
Pressroom Cleaners
5709 S. 60th Street, Suite 100B
Omaha, NE 68117-2204

Terri A. Craig
Counsel for the Acting General Counsel
Subregion 34, National Labor Relations Board
A.A. Ribicoff Federal Building
450 Main St. , Suite 410
Hartford, CT. 06103

Andrew Strom
Associate General Counsel
Service Employees International Union
Local 32BJ, SEIU, CLC
25 W. 18th St.
New York, NY 10011-4677

Thomas W. Meiklejohn, Esq.
Livingston Adler Pulda
Meiklejohn & Kelly, PC
557 Prospect Avenue
Hartford, CT 06105-2922

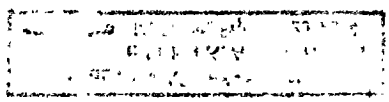
Judith A. Scott
General Counsel
Service Employees International Union
1800 Massachusetts Ave., N.W.
Washington, DC 20036-1806

Raymond R. Aranza

Sworn before me this 28th day of August, 2013.

Notary Public

GENERAL NOTARY - State of Nebraska
EILEEN K. ARMSTRONG
My Comm. Exp. May 25, 2014



From: (402) 492-9800
Raymond R. Aranza
Marks Clare & Richards
11605 Miracle Hills Dr
Suite 300
Omaha, NE 68154

Origin ID: OMAA

FedEx Express

J13201306280326

Ship Date: 28AUG13
ActWgt: 2.0 LB
CAD: 7700382/INET3430

Delivery Address Bar Code

Ref # 20922.001 Pressman/NLRB
Invoice #
PO #
Dept #

SHIP TO: (202) 208-3000 BILL SENDER

National Labor Relations Board

1099 14th Street, NW

WASHINGTON, DC 20570

THU - 29 AUG 10:30A
PRIORITY OVERNIGHT

TRK# 7965 6661 1670
0201

XC BZSA

20570
DC-US
DCA

51AG1/09B9/1A9E

After printing this label:
1. Use the 'Print' button on this page to print your label to your laser or inkjet printer.
2. Fold the printed page along the horizontal line.
3. Place label in shipping pouch and affix it to your shipment so that the barcode portion of the label can be read and scanned.

Warning: Use only the printed original label for shipping Using a photocopy of this label for shipping purposes is fraudulent and could result in additional billing charges, along with the cancellation of your FedEx account number.
Use of this system constitutes your agreement to the service conditions in the current FedEx Service Guide, available on fedex.com FedEx will not be responsible for any claim in excess of $100 per package, whether the result of loss, damage, delay, non-delivery,misdelivery,or misinformation, unless you declare a higher value, pay an additional charge, document your actual loss and file a timely claim.Limitations found in the current FedEx Service Guide apply. Your right to recover from FedEx for any loss, including intrinsic value of the package, loss of sales, income interest, profit, attorney's fees, costs, and other forms of damage whether direct, incidental,consequential, or special is limited to the greater of $100 or the authorized declared value. Recovery cannot exceed actual documented loss.Maximum for items of extraordinary value is $1,000, e.g. jewelry, precious metals, negotiable instruments and other items listed in our ServiceGuide. Written claims must be filed within strict time limits, see current FedEx Service Guide.