

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

CARE ONE AT MADISON AVENUE, LLC
d/b/a CARE ONE AT MADISON AVENUE

and

1199 SEIU, UNITED HEALTHCARE
WORKERS EAST

Case Nos. 22-CA-085127
22-CA-089333

MEMORANDUM IN SUPPORT OF EMPLOYER'S EXCEPTIONS

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Respondent CareOne at Madison Avenue, LLC d/b/a CareOne at Madison Avenue (“Employer” or “Madison Avenue”) submits this Memorandum in support of its Exceptions to the Decision and Order, dated July 31, 2013 (“Decision”), issued by Administrative Law Judge Mindy Landow (“ALJ”). The Employer’s exceptions are set forth in an accompanying document. The ALJ issued the Decision without holding a hearing on the basis of facts and exhibits to which the parties stipulated.

PRELIMINARY STATEMENT

Most unfair labor practices involve acts of commission and a respondent engaging in conduct that involves adverse action. This case is an unusual one that contrasts that typical scenario. The Employer denies that its conduct was unlawful. However, the conduct under review consists principally of acts of omission or the Employer trying to promote workplace harmony and unity.

The two acts of omission that the ALJ concluded were unfair labor practices arose out of the Employer refraining from changing the voting unit’s terms and conditions of employment, or even talking about doing so, prior to the election. Two other unfair labor practices the ALJ found, though acts of commission, involved the Employer photographing employees to be part of a team-building video set to the song “We Are Family” and notifying employees post-election that it prohibited anyone in its work force from harassing, threatening, or intimidating other employees.

The simple point the Employer is making here is that the conduct under scrutiny reflects restraint and moderation. The record includes reams of the Employer’s campaign literature, yet except for a single question on one of those documents there is no allegation that in its voluminous distribution the Employer violated the Act. In assessing whether the ALJ’s recommendations are correct, the Board should keep in mind that the Employer resisted the

temptation to remit money to voters, eschewed making an anti-union video in favor of a team-building presentation, and informed its personnel that it would not tolerate threats, harassment, or intimidation capable of leading to violence or an unsafe workplace. The Employer submits, respectfully, that the ALJ assessed the Employer's actions and inaction through a faulty lens and that the ALJ's determinations should be reversed.

I. THE BOARD MUST VACATE THE DECISION AND REMAND THE CASE SINCE ALL OF THOSE TO WHOM THE BOARD DELEGATED POWERS AND RESPONSIBILITIES WERE WITHOUT POWER TO PROSECUTE OR DECIDE THIS CASE.

Throughout the proceeding below, the Employer objected repeatedly to the ALJ deciding the case in view of the decision in *Noel Canning v. NLRB*, 705 F.3d 490 (D.C. Cir.), *cert. granted*, 133 S. Ct. 2861 (2013). *See* March 18, 2013 Answer; March 29, 2013 Statement of Position; and Employer's Memorandum to the ALJ at 3-4. First, the Board was without a quorum when the Complaint issued on November 14, 2012, and the Amended Consolidated Complaint issued on March 4, 2013. Second, for two reasons the Board's delegation of authority to the Acting General Counsel was invalid at those times. One reason was that in the absence of a quorum the Board was without power to act. The other was that any self-executing delegation of authority to the Acting General Counsel was invalid. For all of these reasons, the prosecution of the above-referenced Complaint and Amended Consolidated Complaint was unconstitutional and impermissible. Similarly, insofar as the ALJ's authority to hear the case was also derived from a delegation of authority from the Board, she was without power to decide the case.

The ALJ rejected the above arguments on the basis of three Board decisions issued in 2013 that categorically reject these jurisdictional arguments (Decision at 1 n. 1). Those Board decisions and the ALJ's reliance upon them is deficient because they must yield to overriding federal appellate court authority. The Board has overstepped its authority in stating that it will

not yield its jurisdiction in the face of United States Courts of Appeals decisions that compel it to do so and that it will continue to fulfill its mission until such time as the United States Supreme Court has determined that the jurisdictional arguments set forth have merit. In view of the Board's non-acquiescence position, the Employer will not set forth its arguments here in detail and merely reserves its position for appellate review that neither Counsel for the Acting General Counsel nor the ALJ had power to proceed as they did herein. The Employer further points out that precedent adverse to the Board's position has continued to mount. The Third Circuit Court of Appeal echoed the DC Circuit's *Noel Canning* decision in *NLRB v. New Vista Nursing and Rehabilitation*, ___ F.3d ___, 2013 WL 2099742 (3d Cir. March 19, 2013). As it happens, *New Vista* involved the very Union that is the petitioner in this case and the decision covers the geographical region in which the operative facts in this case arose. Similarly, relying upon *Noel Canning*, the Fourth Circuit Court of Appeals nullified two Board decisions jointly on the same grounds. *NLRB v. Enterprise Leasing Company Southeast LLC and Huntington Ingalls Inc. v. NLRB*, ___ F.3d ___, Nos. 12-1514, 12-2065 (4th Cir. July 17, 2013). In addition to the arguments the Employer has made or preserved, the Employer hereby incorporates by reference the arguments adopted by the courts in each of the above-referenced Court of Appeal decisions in support of its position that the ALJ's decision is invalid and *ultra vires* because of the absence of a quorum at the Board when the Complaint and Amended Consolidated Complaint issued, the case was prosecuted before the ALJ, and the ALJ issued the Decision on review.

The Board recently regained a quorum. Accordingly, the Board is able to act as to this case at this time. In accordance with the appellate authority cited above, the Board must reverse the Decision and remand the case for further proceedings before a new Administrative Law Judge.

The remainder of this Memorandum addresses the merits of the ALJ's Decision assuming, *arguendo*, that the Board decides this case even though it is clear that the Board must vacate the Decision and remand the case for further proceedings.

II. THE ALJ'S CONCLUSION THAT THE EMPLOYER VIOLATED THE ACT BY ANNOUNCING COST REDUCTIONS IN THE HEALTH INSURANCE PLAN AND IMPLEMENTING THE REDUCTIONS SOLELY AS TO EMPLOYEES WHO WERE NOT ELIGIBLE TO VOTE IN THE ELECTION WAS ERRONEOUS AS A MATTER OF LAW.

There is no case right on point with respect to the question whether a company that complies scrupulously with the Supreme Court's decision in *NLRB v. Exchange Parts Co.*, 375 U.S. 405, 409 (1964), violates the Act by continuing to refrain from discussing or effecting changes in terms and conditions of employment in the voting unit when it makes improvements for employees outside the voting unit before the election. The ALJ relied upon decisions that hold that a company must conduct itself as if the petitioning union is not "in the picture", but that line of cases collides with the prohibition in *Exchange Parts* against a company making payments to voters and is inapposite when, as here, the record establishes that a company has consistently refrained from discussing or changing terms and conditions of employment. Other Board decisions upon which the ALJ relied are unhelpful because, by their terms, they indicate an employer may announce but defer changes in compensation and conditions until after an election has been held; the question presented is whether the Employer was obligated to institute within the voting unit the improvements it announced to employees outside the voting unit and made on their behalf before the election. The Employer submits that the Board, writing on this clean slate, should reverse the ALJ and make clear that on this record the Employer conducted itself lawfully.

A. The Employer Did Not Violate Section 8(a)(1) Since At All Times From The Filing Of The Petition Through The Election It Complied With *Exchange Parts* By Not Discussing Or Instituting Changes In Terms And Conditions Of Employment.

The ALJ concluded that the Employer violated Section 8(a)(1) on or about March 5, 2012, by announcing solely to Madison Avenue employees who were not eligible to vote in the representation election scheduled for March 23, 2012, that it would be implementing reductions in premiums for them retroactive to January 1, 2012, and reductions in co-pays prospectively, the same as happened at the other approximately twenty (20) New Jersey facilities managed by Care One Management, LLC (“Care One Management”). The ALJ also concluded that the Employer violated Sections 8(a)(3) and (1) on March 23, 2012, after the election when it implemented those cost reductions solely for employees who were not eligible voters, the same as happened at those other approximately twenty (20) facilities also managed by Care One Management.

(ALJD 11:14-12:49; 13:1-15:5)

The Employer disputes that the ALJ applied the correct legal principles in reaching these conclusions.¹ It is undisputed that the Employer did not announce the health insurance cost reductions to eligible voters (ALJD 12:32-35). The Employer made sure to avoid allegations of promise of benefit by: (1) not raising such matters with eligible voters; and (2) refusing to address questions from eligible voters about terms and conditions of employment except by responding that the Company could not discuss this issue at that time (12:39-46). It is also undisputed that the Employer implemented the health insurance cost reductions solely as to personnel who were not eligible voters. The Board needs to develop the law consistent with the Employer’s approach in this case because the analysis the ALJ applied puts a company between

¹ This is a question of application of the correct legal principles since the facts were stipulated.

a rock and a hard place that is impossible to navigate when a question of representation is pending.

The ALJ's starting point was that the approximately twenty (20) New Jersey facilities that Care One Management manages are a "system" (ALJD 13:13-15; 14:2-5). While the record confirms that these are the only facilities **in New Jersey** that Care One Management manages, the record is barren with respect to the question whether Care One Management manages any other facilities. In the absence of record evidence concerning how Care One Management may have addressed health insurance elsewhere, the ALJ's conclusion that health insurance cost reductions were announced and implemented **system-wide** is insupportable.

If, *arguendo*, the Board treats the approximately twenty (20) New Jersey facilities managed by Care One Management as a system, the question becomes whether the ALJ is correct that the Employer violated the Act by announcing the cost reductions and thereafter implementing them solely as to employees who were not eligible voters. Relying upon several Board decisions, the ALJ reasoned that the Employer conducted itself unlawfully because a company with a question concerning representation pending must grant benefits "as it would if the union was not in the picture" (ALJD at 14:4-9, 32-36). *See Great A&P Tea Co.*, 166 NLRB 27 n.1 (1967); *Russell Stover Candies, Inc.*, 221 NLRB 441 (1975); and *Lampi, LLC*, 322 NLRB 502 (1996). However, the ALJ also concluded that the Employer failed to avail itself of an exception to this "announce and implement" approach under case law that affords a company the option of announcing an improvement before an election but postponing its implementation until after the election, provided that the announcement informs eligible voters that the improvement is assured but delayed so that there is no appearance that the company is trying to influence the outcome of the election. *See Noah's Bay Area Bagels, LLC*, 331 NLRB 188, 189-91 (2000) and

KMST-TV, Channel 46, 302 NLRB 381, 382 (1991). The ALJ did not appear to recognize that this “announce and defer” approach is optional, but an examination of those decisions makes clear that the Board did not mandate that companies follow this approach. *See Network Ambulance Services, Inc.*, 329 NLRB 1, 2 (1999)(Board expressly stated that “announce and defer” is an option and not required).²

It is black-letter law that during the critical period an employer should refrain from granting or taking away compensation or benefits and should leave terms and conditions of employment “as is”. The United States Supreme Court endorsed that rule in *NLRB v. Exchange Parts Co.*, 375 U.S. 405, 409 (1964), pointing out the potentially enormous coercive message an employer conveys when it confers improvements upon voting unit members during the critical period:

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.

Accordingly, during the critical period, the most prudent course for an employer to take in order not to interfere with NLRB “laboratory conditions” is to leave the *status quo* unchanged and conduct its communication policy consistent with that approach.

Here, the Employer did exactly that. It refrained from instituting the health insurance improvement for voting unit personnel. When the Employer announced to personnel outside the voting unit that it would be instituting the health insurance improvements for them, it did not direct communications concerning those changes to eligible voters. The Employer limited its

² The other decision upon which the ALJ relied as well as the decision it cited are distinguishable because, unlike here where the improvement was a one-time occurrence, those cases involved recurring changes. *KMST-TV, Channel 46*, 302 NLRB 381, 382 (1991), *citing Atlantic Forest Products*, 282 NLRB 855, 858 (1987). In any event, those decisions, along with *Noah’s Bay Area Bagels, LLC*, 331 NLRB 188, 189 (2000), also indicate that an employer **may** take the “announce and defer” approach; nowhere do they indicate that it must do so.

communications about the health insurance changes to employees **outside** the voting unit. It did not raise the matter with eligible voters. The Employer also refused to address questions from eligible voters about the health insurance changes outside the voting unit and/or the application of those changes to them by responding that the Employer could not discuss this issue at that time. This was the very same response the Employer repeated prior to the election throughout the critical period when eligible voters asked about **any** term and condition of employment.

The ALJ's analysis is deficient in a setting such as the instant one. Because the general rule is that a company is prohibited from introducing improvements during the critical period and must maintain the *status quo*, the Employer here built its campaign around strict adherence to that requirement. During the campaign the Employer followed *Exchange Parts* scrupulously, and the Amended Consolidated Complaint does not allege otherwise. The Employer did not introduce any improvements for eligible voters. The message it conveyed, consistent therewith, was that it cannot address employee concerns and inquiries about improving terms and conditions of employment. Under these circumstances, the rule of decision the ALJ applied requiring either "announcement and implementation" or "announcement and deferral" as to voters of a non-recurring benefit conferred upon employees outside the voting unit runs afoul of *Exchange Parts*. Beyond that, it interferes with a company's right to control the content of its campaign communications under Section 8(c). Indeed, as discussed below, a clearly detrimental effect of such a rule would be to make the Employer appear inconsistent and impotent, suggesting to employees that it is not adhering to the previously consistent campaign message it conveyed that it cannot discuss or change employment terms.

The ALJ's announcement and implementation option conflicts with *Exchange Parts* in circumstances such as these. The record supports the Employer's position that it conducted its

campaign by not introducing improvements and informing eligible voters that it neither can, nor will, change their terms and conditions of employment prior to the election. A rule of decision of the Board should not impinge upon the ability of the Employer to conduct a law-abiding campaign in which it refrains from changing terms and conditions of employment, thereby avoiding allegations that it has conferred benefits to “buy” votes or cut back benefits to “warn” voters as to what they can expect if a union is elected. The Board’s rule of decision also should not force the Employer to speak or otherwise deviate from conveying the law-abiding campaign message that “it neither can, nor will, discuss terms and conditions of employment,” which also insulates it from allegations that it “buys” votes or “warns” voters about the consequences of unionization. At the same time, a company must be able to run those portions of its business that have nothing to do with the representation election without unnecessary impingement. In these circumstances, the principle that the company should act the same as it would have had the union not been in the picture must yield to the Employer’s lawful campaign conduct and message. Insofar as the rule the ALJ applied interferes with the Employer’s ability to conduct a campaign consistent with *Exchange Parts* by requiring it to inform employees of an improvement outside the voting unit and make that improvement after it has built its campaign around the principle that management cannot and will not discuss improvements or implement them, that rule cannot stand given how it is contrary to clear and longstanding Supreme Court precedent.

The ALJ’s announcement and deferral option is equally indefensible. It is untenable for the Board to require a company that has scrupulously adhered to *Exchange Parts* to announce to eligible voters prior to the election that there will be an improvement in terms and conditions but that implementation is being postponed until after the election so that the company avoids the appearance of trying to influence the outcome of the election. Not only is the announcement of a

future improvement utterly inconsistent with the message that the company cannot discuss future improvements in terms and conditions but, even worse, the requirement that the company tell eligible voters that it is withholding the improvement so as not to give the appearance of trying to influence the election puts the company in the position of looking like it is doing *exactly that!* The announcement and deferral option compels the company to put itself precisely in the position that it tells the employees it is trying to avoid—looking as if it is trying to buy the eligible voters’ votes. This option turns Supreme Court law on its head, mandating that the company metaphorically poke eligible voters in the eye with its fist and velvet glove so as to undermine the company’s credibility with them.

The Board is, of course, only deciding the instant case and in doing so does not need to make any sweeping pronouncements. The Employer’s argument is that the ALJ’s rule of decision transgresses well-settled law when a company adheres to the holding of *Exchange Parts* scrupulously. A decision of the Board reversing the ALJ will be limited in its application solely to cases in which a company, like the Employer here, so conducted itself.

Conversely, when a company does not adhere to *Exchange Parts* scrupulously, the Board can apply the rule of decision that the ALJ relied upon here. In that setting, there is no basis for the employer to complain that the rule undermines its campaign conduct of **refraining from both** discussion of improvements with eligible voters and implementation of improvements as to them. It may be that in most instances the employer cannot demonstrate that it conducted its campaign consistent with *Exchange Parts*. Here, however, the Employer followed a consistent course of not addressing the possibility of improvements in terms and conditions of employment, neither raising such matters itself nor addressing comments or inquiries of eligible voters. The record further confirms that the Employer did not make changes in terms and conditions of

employment: indeed, the fight here is over the Employer's refusal to implement the health insurance cost reductions as to the voting unit because it was so insistent upon maintaining terms and conditions "as is."

Indisputably, there is tension between the fundamental prohibition against announcing and/or implementing improvements during the critical period and the competing precept that a company should conduct itself as if the union is "out of the picture." However, even under the rule of decision that the Employer advocates, a company always has the **option** of instituting an improvement as to eligible voters. It does so it is at its peril, though, that General Counsel alleges that it violated the critical period *status quo*. Similarly, a labor union that wins an election and is certified very well may allege that the Employer wrongfully implemented changes. Under the Employer's approach, a company **elects** to take those risks. In contrast, under the ALJ's rule of decision, a company is **compelled** to make a judgment call and persuade the Board that it would have acted as it did if the union was "out of the picture." That approach is deficient since there are often uncertainties in such a scenario. Even worse, such a rule "sets up" even the most well-intentioned company for election objections and unfair labor practice charges a petitioner files attacking such changes.

The rule of decision the Employer advances here establishes a bright line test and gives rise to greater certainty: if an employer has not changed any terms and conditions of employment for eligible voters during the critical period, it knows that it can continue to conduct itself lawfully by refraining from announcing and implementing a change as to the voting unit that it institutes for employees outside the voting unit. This eliminates the "damned if I do/damned if I don't" scenario that currently undermines confidence in the Board and its jurisprudence. By creating a safe harbor for companies that do not make changes, the Employer's proposed rule

will also reduce the volume of objections and unfair labor practice charges the Board must process and decide. While these virtues of the Employer's proposed rule strongly militate in favor of its adoption, the principal reason the Board must embrace it is that the rule avoids the collision with well-settled principles that result from the ALJ's decision and, in particular, its intrusion upon a company's right to campaign in strict compliance with *Exchange Parts*.

B. The Employer Did Not Violate Section 8(a)(3) Since Nothing In The Record Demonstrates Or Supports An Inference That The Employer Withheld The Health Insurance Cost Reductions From The Voting Unit With The Purpose Of Discouraging Unionization.

The ALJ's Section 8(a)(3) finding is also insupportable since the record is barren of any evidence that the Employer implemented the health care improvement with an anti-union purpose. The entity that operates the property, Care One Management, instituted health care cost reductions in response to employee complaints. The ALJ concluded that this was a legitimate reason for implementation of the improvement. However, the Employer's point, which the ALJ either missed or sidestepped, is that the change was instituted by an entity other than the Employer. On this record, an anti-union motivation cannot be ascribed to the Employer when another entity was the impetus behind the improvement. Nor can an anti-union motivation be inferred as to the Employer's motivation in not pressing Care One Management to implement the change as to eligible voters since the record confirms that throughout the campaign the Employer scrupulously adhered to *Exchange Parts* and by both its words and deeds refrained from making **any** changes in the terms and conditions of employment of the voting unit.

The ALJ's rejoinder is that in the absence of an explanation as to why employees outside the voting unit received the improvement and the voting unit did not, eligible voters would reasonably conclude that the improvement was withheld from them because of their union activity (ALJD 13:27-28; 14:40-15:2). The ALJ's conclusion is utter speculation. Nothing in

the record supports the conclusion that eligible voters in fact drew this inference. In fact, the record supports a contrary conclusion since it is stipulated that during the campaign the Employer made clear that it could not and would not discuss terms and conditions of employment. Under Section 8(c) and *Exchange Parts*, it was lawful for the Employer to convey that message. Accordingly, it is equally plausible, if not more so, that eligible voters believed that during the period before an election there are special rules relating to terms and conditions of employment. There is nothing unlawful about that since the litany of Board rules governing the critical period make clear that is true and accurate.

In view of the fact that the Acting General Counsel had the burden of proof, the ALJ erred in concluding as she did since the Acting General Counsel failed to meet that burden by establishing that eligible voters actually believed that the failure of the Employer to extend the improvements to the voting unit was a result of union activity. Counsel for the Acting General Counsel and Union counsel could have insisted upon a stipulation to that effect by producing affidavits that established this point or, in the absence of agreement, proceeded to hearing. The absence of record evidence showing voters believed that the Employer did not extend the health insurance cost reductions to them because of their union activity is fatal to the 8(a)(3) allegation and compels reversal of the ALJ's conclusion.

III. THE ALJ ERRED AS A MATTER OF LAW IN CONCLUDING THAT THE VIDEO VIOLATED THE ACT SINCE THE VIDEO DID NOT ADDRESS UNIONIZATION AND NO INFERENCE COULD BE DRAWN AS TO WHETHER ANY EMPLOYEE FAVORED THE UNION.

The ALJ concluded that the Employer violated the law by showing eligible voters a campaign video that contained images of many of them without their consent to use their images in the video and without an appropriate disclaimer. This conclusion, which is grounded in *Allegheny Ludlum Corp.*, 333 NLRB 734 (2001), *enfd.*, 301 F.3d 167 (3d Cir. 2002), is

erroneous for several reasons. *Allegheny Ludlum* is **not** controlling because the instant video is not anti-union. The ALJ's reliance upon decisions that suggest that the video only had to be related to the Employer's campaign, rather than anti-union, is misplaced. If, *arguendo*, *Allegheny Ludlum* is controlling, the Board should dismiss the charge in any event since, "viewed as a whole", the video did not expressly or impliedly disclose any employee's view on unionization and did not impinge upon anyone's Section 7 rights. Finally, the fact that the video was shown at a meeting that included an appeal to employees to vote against the Union does not magically turn a lawful video into an unlawful one.

In *Allegheny Ludlum*, the Board established limits on the right of a company to include images of employees in a video that contains an anti-union message. Plainly contemplating circumstances such as those here, the Board made clear that these limits are inapplicable to a video that is not anti-union:

We perceive no basis for finding that the inclusion of employees' images in a videotape that **does not convey a message about the employees' views concerning union representation**, without more, would violate Section 8(a)(1). The filming and presentation of such a videotape would not contravene the employees' Section 7 right to choose whether to express an opinion or remain silent...because the videotape would not have represented the employees' views. Likewise, such a videotape would not interfere with the depicted employees' ability subsequently to express freely their own views concerning union representation, because the videotape would not have created any prior representation of the employees' position which the employees would have to disavow.

333 NLRB at 744-45 (emphasis added).

The ALJ attempted to escape the narrow scope of *Allegheny Ludlum* by citing to decisions that hold a company cannot compel employees to make an "observable choice" regarding whether they support unionization even in circumstances in which the employer is not conveying an explicit anti-union message (ALJD 17:15-20 and 16:10-23). Putting aside that in this case employees were not forced to make that choice, the Board's application of this rule to

situations involving “campaign material,” even if not explicitly anti-union, does not undo the distinction that renders *Allegheny Ludlum* inapplicable here. In the case law upon which the ALJ relied, the violation emanated from a company putting an employee in the position of having to decide whether to object to engaging in conduct that would pit him against other employees engaged in pro-union activity. See ALJ’s discussion at 16:10-23 and the decisions and parenthetical explanations set forth there. As the ALJ reluctantly conceded (ALJD), nothing in the instant video indicates whether an employee does or does not favor the Union. Put differently, inclusion of an employee’s image in the video did not divulge the employee’s sentiments regarding the Union because the video merely included photographs of employees in circumstances unrelated to the Union, its organizing drive, or the election. It follows that the ALJ had no basis for applying *Allegheny Ludlum* here and erred in concluding that the Employer violated Section 8(a)(1) in making and showing the video.

The analysis does not change because the Employer showed the video at a meeting where the Employer communicated its hope that employees would vote “no” and reject the Union. *Allegheny Ludlum* concerns the video itself, **not** what happens where the video is shown. The underpinnings of *Allegheny Ludlum* were twofold: protect employees from (1) being forced to acknowledge to their employer their position regarding unionization and (2) being shown in a video with an anti-union message in which they appear to have taken a position opposing unionization, if they have not done so freely. As noted, nothing in the video compelled an employee to express a sentiment regarding the Union or, in view of the absence of an anti-union message, could have inhibited an employee from supporting the Union following the making or showing of the video. Moreover, at no time during the meeting at which the video was shown was anyone asked to express a sentiment regarding the Union. Accordingly, the meeting did not

convert the video into an anti-union video that implicated the concerns that *Allegheny Ludlum* addresses.

Assuming, *arguendo*, that *Allegheny Ludlum* is applicable, the ALJ nonetheless erred in finding that the Employer violated Section 8(a)(1). *Allegheny Ludlum* permits a company to include employees in a video that, “**viewed as a whole**, does not convey the message that the employees depicted therein either support or oppose union representation”. 333 NLRB at 743 (emphasis added). Although the decision established safeguards, including inclusion in a video of a prominent disclaimer stating that the video is not intended to reflect the views of the employees appearing in it, their omission here is not material since the video does not reflect the views of the employees at all regarding unionization. Significantly, the photographs were taken in connection with three separate team-building and customer service activities unrelated to the election several weeks before the video was shown (none of these other team-building activities conducted during the campaign were alleged to be unlawful); the video included photographs of **employees outside the voting unit**, consistent with the point that the video was for the purpose of team-building; and the video omitted images of election unit employees who did not wish to be photographed. In contrast, in *Allegheny Ludlum*, employees on the video spoke extensively about their opposition to unionization and their negative experiences in union settings.

Just as the analysis of whether *Allegheny Ludlum* is applicable does not change because of what transpired at the meeting at which the video was shown, so too is there no basis for finding that the Employer violated that decision because of what occurred at the meeting. First, in her analysis of whether an Employer leaflet concerning strikes violated Section 8(a)(1), the ALJ specifically remarked that “it is the content of the communication and not its method of dissemination which is at issue here” (ALJD 9:23-24)(footnote omitted). That is as much true

regarding the video as the leaflet and, therefore, discussion of the meeting at which the video was shown is beside the point. Assuming, *arguendo*, the meeting somehow bears on the analysis despite the ALJ's rejection of that premise with respect to the leaflet, the ALJ portrayed the meeting as "part of the Employer's crusade to encourage employees to vote against union representation" (ALJD 17:26-27). Her hyperbole underscores a flawed legal analysis. The meeting focused upon the positives of the Employer and its staff working together as family in serving the needs of the facility residents. The meeting was about team-building and, despite the election, bolstering the sense of unity. Nothing in the record indicates that negative comments were made about the Union. All management indicated, most briefly, was that it hoped employees would show their support for the Employer and management team by voting "no." It follows that the ALJ's conclusion that the meeting's "expressed purpose was to encourage employees to vote against the Union" (ALJD 17:24) is unsupported.

As the ALJ herself recognized, the examination of whether the Employer violated Section 8(a)(1) under *Allegheny Ludlum* depends upon the substance of the video, not what happened when it was shown. However, the record of what transpired at the meeting does not change the conclusion that no violation of the Act was committed even considering, for purposes of argument, what took place at the meeting at which the video was played.

IV. THE ALJ ERRED IN CONCLUDING THAT THE EMPLOYER'S LEAFLET VIOLATED SECTION 8(A)(1) SINCE RAISING THE QUESTION WHETHER A STRIKE PLACES AN EMPLOYEE'S JOB IN JEOPARDY DOES NOT THREATEN EMPLOYEES WITH JOB LOSS.

The ALJ concluded that a leaflet that posed the question "Do you want to give outsiders the power to jeopardize your job by putting you out on strike?" violated Section 8(a)(1) because it threatened employees with job loss. The gravamen of the ALJ's conclusion was that the question "implied that job loss was a consequence of a strike and failed to notify employees of

any reinstatement rights to which they might be entitled” (ALJD at 10:11-13). The ALJ’s conclusion is erroneous because the question does not contain a threat that removes it from the protection of Section 8(c) and is permissible thought-provoking campaign material that merely conveys the point that a strike is not without possible risk.

Section 8(c) makes clear that campaign propaganda is privileged if it “contains no threat of reprisal.” In *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 617 (1969), the United States Supreme Court recognized that Section 8(c) commands that the Board refrain from infringing upon the elemental right to free speech during elections. It is indisputable that during an election campaign an employer is entitled to communicate facts and even predict economic consequences it foresees from unionization so long as such statements are reasonable expressions of belief or opinion based upon fact. Such statements cross the line and become unprotected and impermissibly coercive when the statements indicate that the employer’s conduct is “solely on [the employer’s] own initiative for reasons unrelated to economic necessities and known only to him.” 395 U.S. at 618.

Distilled to its most basic level, the challenged question (hereinafter the “jeopardize question”) asked each eligible voter to consider whether electing the Union would confer power upon it to put the voter on strike and “jeopardize your job”? (ALJD 3:39-40) It did not affirmatively or declaratively state that election of the Union **would** result in a strike and job loss. It did not even connect the issue of job loss to the hiring of permanent replacements. Rather, it simply attempted to promote consideration of the question whether election of the Union might (**not would**) place job security into question because of the **possibility** that a strike might (**not would**) have negative effects. In no way did the jeopardize question indicate that a

strike was **inevitable** or that job loss was **definite** in the event of a Union election victory. Moreover, the statement focused upon conduct of the Union rather than the Employer.

At that most basic level, the jeopardize question plainly is neither threatening nor coercive. Contrary to the ALJ's conclusion, the term "jeopardize" does not equate to discharge or job loss. It refers to putting something at risk or imperiling it. Urging employees to recognize that engaging in a strike may put one's job at risk is a far cry from maintaining that a strike in fact **will** result in loss of one's job. Significant in this regard is the juxtaposition of the jeopardize question, which does not use terms such as job loss or discharge, with the **unchallenged** questions that precede and follow it.

- The second question after the jeopardize question asks "Do you want to give outsiders the right to have you **fired if you fail to pay your union dues?**" (ALJD 4:1-2) Quite obviously, a reasonable eligible voter would have noticed that the Employer used the term "fired" in this question but not the jeopardize question. The ALJ's inference that an employee would reasonably tend to infer that the jeopardize question meant that a strike equates with job loss does not withstand scrutiny when two questions later the Employer expressly stated that failure to pay union dues could result in being fired but the term "fired" is not utilized in the jeopardize question.

- Immediately preceding the jeopardy question is the question "Do you want to give outsiders the power to **gamble with your wages and benefits?**" (ALJD 3:37) The term "gamble", like "jeopardize", speaks in terms of risk and possibility. Inasmuch as it is indefinite, it is non-coercive and non-threatening and, just like the jeopardy question, lawful.

- Immediately after the jeopardy question is the question "Do you want to give outsiders the right to speak for you and make **binding decisions** for you that could affect your future?"

(ALJD 3:42-43) Read together with the question immediately preceding the jeopardy question, it is apparent that both contemplate the possibility of job impacts resulting from unionization, collective bargaining, and strikes. However, there is nothing in these thought-provoking questions that is coercive or threatening such that they forfeit the safe harbor provided by Section 8(c) and violate Section 8(a)(1).

Assuming, *arguendo*, that the jeopardize question is understood as referencing possible permanent replacement of strikers, despite its silence in that regard, the ALJ's conclusion remains erroneous and must be reversed. *Eagle Comtronics*, 263 NLRB 515 (1982), holds that a company does not violate Section 8(a)(1) by truthfully informing employees that they are subject to permanent replacement in the event of an economic strike without explaining reinstatement rights. The linchpin of *Eagle Comtronics* is that a company's statement must not "threaten that, as a result of a strike, employees will be deprived of their rights in a manner inconsistent with those detailed in *Laidlaw [Corp.]*." 263 NLRB at 516. The Employer submits that its posing of the question whether a strike jeopardizes a voter's job is so indefinite and non-specific that no employee reasonably would construe it, as the ALJ did, to equate strikes with discharge. Accordingly, the absence of reference to permanent replacement, let alone the concept of a reinstatement list, is not unlawful.

River's Bend Health and Rehabilitation Service, 350 NLRB 184, 185 (2007), supports the Employer's position. There the Board rejected the allegation that the company made a threat in violation of Section 8(a)(1) because it "did *not* say that replaced strikers would permanently lose their jobs" (emphasis underlined). "Instead, the Respondent stated that the hiring of replacements 'puts **each striker's continued job status in jeopardy.**'" 350 NLRB at 185 (emphasis added). The decision continues by pointing out that General Counsel bears the burden

of proof and that in the absence of a threat “any ambiguity... must be construed in the Respondent’s favor.” 350 NLRB at 185 and n. 7 (citation omitted).

The ALJ attempted to distinguish *River’s Bend Health* by maintaining River Bend Health’s reference to “job status” somehow distinguished it from the case at bar where only the word “status” was omitted (ALJD 9:31-36). However, contrary to the ALJ’s assertion (in lines 34-35), the Board majority never stated that its rationale for deeming the “job status in jeopardy” language permissible hinged on use of the term “job status” rather than just “job”. Indeed, the suggestion that employees would ascribe different significance to the phrase “job status” than “job” is fanciful. It follows that *River’s Bend Health* controls here, necessitating reversal of the ALJ and dismissal of this Section 8(a)(1) allegation.

The ALJ cited to several Board decisions in an attempt to support her conclusion. Notable in particular are several decisions that make clear that a company runs afoul of *Eagle Comtronics* only when it makes a statement—as distinct from a question like that posed by the Employer—that conveys the idea that a strike **would** result in job loss. *Eagle Comtronics* itself distinguished two decisions from its facts on the ground that the respondents in those cases told the employees that “they **would** permanently lose their jobs.” 263 NLRB at 516 n. 8 (emphasis added). Similarly, in *Kentucky River Medical Center*, the Board held that the company violated Section 8(a)(1) because it told an employee that strikers “**would** lose their jobs” if they were permanently replaced and there were no openings when they sought reinstatement. 340 NLRB 536, 546 (2003)(emphasis added)

Finally, in concluding that the jeopardy question is unlawful, the ALJ concluded that it must be assessed in isolation and, as a result, other lawful statements the Employer made concerning reinstatement rights of permanently replaced strikers cannot mitigate its coercive

effect (ALJD 10:39-47). *See Federated Logistics & Operations*, 340 NLRB 255, 256 (2003), *citing Gissel*, 395 U.S. at 617. Passing the point that the jeopardy question was not threatening and was in and of itself lawful, the record here supports examination of that statement not in isolation but, rather, as one of a number of communications the Employer provided the eligible voters in its attempt to educate them about the consequences of unionization. While the ALJ concluded that power point presentations the Employer showed eligible voters reinforced the idea that strikes put their jobs in jeopardy and at risk (ALJD 10:29-37 and n. 10), other power points explained that permanently replaced strikers have reinstatement rights from preferential hiring lists (ALJD 5:29-44; Joint Exhibit 4). As noted earlier, Counsel for the Acting General Counsel did not challenge these communications nor should she have since they are plainly lawful. It follows that, in context and against the backdrop of the Employer's communication program, the Employer explained *Laidlaw* rights to eligible voters and any voter who reviewed the jeopardy question would have reasonably understood it to be a non-coercive campaign communication concerning the general risks of unionization and not a threat of job loss. Assuming, *arguendo*, that the Board assesses the jeopardy question without regard for other components of the Employer's communication program, the analysis set forth above contrasting the jeopardy question against other questions preceding and following it on the challenged leaflet is that much more probative and compelling. For these reasons as well, the Board should reverse the ALJ's conclusion that the jeopardy question violated Section 8(a)(1).

V. THE ALJ ERRED IN CONCLUDING THAT THE EMPLOYER’S POSTING OF THE AREZZO MEMORANDUM WITH THE EMPLOYER’S LONGSTANDING WORKPLACE VIOLENCE PREVENTION POLICY VIOLATED SECTION 8(A)(1).

The ALJ concluded that the Employer’s workplace violence prevention policy was facially lawful because an employee would reasonably understand it to prohibit conduct that jeopardized the safety, health, and well-being of others and not to prohibit protected Section 7 activity. References in the policy to “threats,” “harassment,” and “intimidation” and discipline up to and including discharge were permissible because the policy made clear that it was focused upon the avoidance of workplace violence or other acts that could result in physical confrontation – not run-of-the-mill tense interactions that could amount to protected activity. (ALJD 21:9-24)

Despite her conclusion that the policy was facially lawful, the ALJ decided that the Employer violated Section 8(a)(1) a few days after the election by posting the Employer’s workplace violence prevention policy next to a memorandum in which Administrator George Arezzo expressed extreme disappointment that a few employees had violated the policy by threatening physical violence against other employees. *See* Joint Exhibit 9. The ALJ reasoned that employees would reasonably construe its warning that “threats, intimidation, and harassment” would result in discipline up to and including discharge as interfering with Section 7 rights because the Arezzo memorandum was vague about what conduct would result in discipline and connected the conduct that had occurred to lingering hard feelings relating to the representation election (ALJD 22:15-23). The ALJ’s conclusion that the posting of the Arezzo memorandum adjacent to the workplace violence prevention policy was unlawful is erroneous for several reasons.

The ALJ failed to explain how the Arezzo memorandum could transform the same workplace violence prevention policy that she concluded was lawful into a key component of an unlawful posting. Nothing in the Arezzo memorandum amended or modified the workplace violence prevention policy. Nor did the Arezzo memorandum set forth a new or different set of rules and guidelines pertaining to situations covered by the workplace violence prevention policy.

The most likely retort is that the ALJ concluded that the Arezzo memorandum is “vague” and “ambiguous” and thereby unlawfully conveyed the impression that an employee could be disciplined for exercising Section 7 rights (ALJD 22:47-23:3). However, there was nothing in the Arezzo memorandum that was unclear about the workplace violence prevention policy or swept Section 7 conduct under it. After Arezzo referenced protected Section 7 rights, his memorandum remarked that “these rights do not give anyone the right to threaten or intimidate another team member....” (Joint Exhibit 9). There was no basis for the ALJ to conclude that this statement was “sufficiently ambiguous” to lead employees to believe that they could be disciplined for engaging in Section 7 conduct. To the contrary, the workplace violence prevention policy, posted adjacent to the Arezzo memorandum and described by the ALJ as being understandable and specific (ALJD 21:16-29, 26-28), made crystal clear that only the misconduct it delineates and like misconduct is prohibited and subject to discipline. The ALJ analyzed the situation as if the workplace violence prevention policy was not posted adjacent to the Arezzo memorandum. Doing so was error; the Arezzo memorandum was presented in tandem with the workplace violence prevention policy and the ALJ should not have read it in isolation. *See Lutheran Heritage Village-Livonia*, 343 NLRB 646 (2004), where the Board stated that when a workplace policy or rule is attacked for impinging upon Section 7 rights, it

must “give the rule a reasonable reading” and “refrain from reading particular phrases in isolation.” The ALJ violated both of those principles of construction in this instance despite earlier referencing them (ALJD 20:17-20). The indisputable reality is that the Arezzo memorandum called employee attention to the workplace violence prevention policy, the policy’s specific terms control, and nothing in the Arezzo memorandum expressly or impliedly indicated otherwise.

The ALJ also condemned the Arezzo memorandum because it referred expressly to the election and union activity (ALJD 22:15-16). In doing so, however, she failed to heed yet another tenet of construction that the Board has issued in these cases, specifically, “not [to] presume improper interference with employee rights”. *Lutheran Heritage*, 343 NLRB at 646. In fixating on Arezzo’s references to Section 7 rights, the ALJ overlooked the fact that Arezzo underscored that the election was over, management respected every employee’s right to exercise those rights and support the Union or not as she wishes, and all management was asking was that employees resume working as a team in the interest of the facility’s residents and refrain from conduct that violates the workplace violence prevention policy. Arezzo’s memorandum makes clear that the Employer will not tolerate threats, intimidation, and harassment **that violate the workplace violence prevention policy**. In finding that the memorandum’s reference to “threats, intimidation, and harassment” could be understood to trample upon Section 7 rights, the ALJ disregarded the critical point that the Arezzo memorandum clearly and unequivocally connects those terms to the workplace violence prevention policy. Accordingly, consistent with her earlier finding, she should have realized that the only kind of threatening, intimidating, and harassing conduct that the Employer indicated it would discipline would be that which violated

the workplace violence prevention policy, foreclosing the interpretation of the Arezzo memorandum that the ALJ mistakenly reached.

Finally, the ALJ also overstepped her bounds by grounding her conclusion in the absence of record evidence establishing that the threatening conduct that Arezzo reported had in fact occurred (ALJD 22:25-33 and 38-39). The ALJ herself pointed out that whether the posted documents violated Section 8(a)(1) depends upon what an employee reasonably would understand in reading the two documents. The ordinary employee reading the posted documents would have no independent knowledge of what transpired between the employee about whom Arezzo wrote in his memorandum. It follows that there was no reason for the Employer or, for that matter, Counsel for the Acting General Counsel or the Union to introduce into the record evidence of the kind that the ALJ condemned the Employer for not eliciting, such as documents or testimony showing that the episode actually occurred, the investigation the Employer conducted, and/or discipline if any was imposed. Stated differently, such evidence would not have been probative of anything related to the question of whether the Employer's posting of the Arezzo memorandum and workplace violence prevention policy together violated Section 8(a)(1). For this very reason, the Employer determined that it *could* stipulate the facts because all that mattered was the language of the postings. The ALJ's reliance upon this additional rationale irrevocably tainted and undermined her analysis.

CONCLUSION

For the reasons set forth herein as well as the accompanying Exceptions, and on the basis of the stipulated record, the Employer requests that the Board reverse certain of the ALJ's conclusions and dismiss those allegations.

Respectfully submitted,

s/

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Dated: September 17, 2013

CERTIFICATE OF SERVICE

The undersigned hereby certifies that copies of the aforesaid Memorandum in Support of Employer's Exceptions were served on September 17, 2013, in the manner set forth below:

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