

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

**ANHEUSER-BUSCH, LLC**

**and**

**Case 12-CA-094114**

**MATTHEW C. BROWN, an Individual**

**and**

**INTERNATIONAL BROTHERHOOD OF  
TEAMSTERS, LOCAL 947 AND  
INTERNATIONAL BROTHERHOOD OF  
TEAMSTERS, BREWERY, AND SOFT  
DRINK WORKERS CONFERENCE, Parties in Interest**

**GENERAL COUNSEL'S ANSWERING BRIEF TO RESPONDENT'S  
EXCEPTIONS TO THE ADMINISTRATIVE LAW JUDGE'S DECISION**

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## I. STATEMENT OF THE CASE

Pursuant to Section 102.46 of the Board's Rules and Regulations, Counsel for the General Counsel files the following Answering Brief to Respondent's Exceptions to Decision of Administrative Law Judge William Nelson Cates in the instant case, issued on September 10, 2013, finding that Anheuser-Busch, LLC (Respondent) violated Section 8(a)(1) and (5) of the National Labor Relations Act by applying Respondent's Dispute Resolution Program (DRP) requiring mandatory arbitration of employment disputes to Charging Party Matthew Brown, a bargaining unit employee, without giving notice or an opportunity to bargain to International Brotherhood of Teamsters, Local 947 (Local 947) and International Brotherhood of Teamsters, Brewery and Soft Drink Workers Conference (the Conference, and collectively with Local 947, the Union), the collective-bargaining representative of a unit of Respondent's employees at its Jacksonville, Florida brewery.<sup>1</sup> (ALJD 10:24-27, 38-41). As the ALJ found, Respondent unilaterally changed unit employees' conditions of employment by moving to dismiss Brown's federal court lawsuit and compel arbitration of Brown's statutory claims challenging his suspension and discharge by Respondent under Title VII of the Civil Rights Act of 1964.

On October 24, 2013, Respondent filed its Exceptions and a Memorandum in Support of its Exceptions. This brief constitutes Counsel for the General Counsel's answer to Respondent's Exceptions.<sup>2</sup>

The central issues raised in Respondent's exceptions are:

1. Did Brown remain an employee within the meaning of Section 2(3) of the Act

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<sup>1</sup> The ALJ's Decision is identified herein by "ALJD," page and line. Respondent's Exceptions are identified by "RE" and the number of the exception. Transcript pages ("Tr.") are identified by the page, line, and name of the witness, where necessary for clarification. "GCX" refers to General Counsel's exhibits, and "JX" refers to the parties' Joint Exhibits.

<sup>2</sup> Counsel for the General Counsel is separately filing cross-exceptions and a brief in support of cross-exceptions concerning some of the ALJ's findings of fact and seeking an additional remedy.

with respect to the period of time after Respondent suspended and discharged him, and during the period continuing to date when Brown has continued to challenge his suspension and discharge in federal court?

2. Did Respondent's first time application of its Dispute Resolution Program to bargaining unit employees by virtue of its motion to dismiss Brown's federal court lawsuit, challenging his suspension and discharge, and compel arbitration of those claims pursuant to the DRP constitute a unilateral change in the terms of unit employees' employment, and therefore violate Section 8(a)(1) and (5) of the Act?

## **II. STATEMENT OF FACTS**<sup>3</sup>

Respondent is engaged in the manufacture, sale, and nonretail distribution of beer and related products and it has an office and place of business in Jacksonville, Florida, the only facility involved in this matter. [ALJD 2:22; GCX 1(f)].

Since on or about March 28, 1998, Respondent has recognized the Union as the exclusive collective-bargaining representative of its employees in the following collective-bargaining unit:

All maintenance and production and utilities employees of Respondent, including hourly rated employees at its Jacksonville, Florida brewery, excluding clerical employees, professional employees, guards, and watchmen and supervisors as defined in the National Labor Relations Act.

The current collective-bargaining agreement between Respondent and the Union is effective by its terms from November 7, 2008 to February 28, 2014. [ALJD p.3:9-19; GCX 1(f); JX 14, par. 13; JX 5, unit described at Article 1, Section 1, p.7]. The agreement contains a grievance procedure culminating in a final and binding decision by the Multi-Plant Grievance Committee, covering matters relating to wages, hours, and working conditions covered by the agreement, and matters involving the meaning, interpretation, application, or alleged violation of this Agreement

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<sup>3</sup> The facts relevant to this case are essentially undisputed, and most of the facts are included in a stipulation between the parties (JX 14) and the accompanying exhibits. (JX1 through JX 13, JX 15 and JX 16).

by Respondent. (ALJD 4:24-28; JX 5 at Article 8, p.18-21). The agreement also contains a provision prohibiting discrimination on the basis of race. (JX 5 at Article 28, p.43).

Since on or about April 1, 2004, applicants for jobs at Respondent's Jacksonville, Florida facility, for both non-bargaining unit positions and bargaining unit positions, are required to complete Respondent's Application for Employment form which contains their agreement to be bound by the Dispute Resolution Program Policy in certain circumstances. In relevant part, the application form states:

I agree that if I become employed by the company and **unless a written contract provides to the contrary** any claim I may have against the company will be subject to final and binding arbitration in accordance with the company's dispute resolution program and that arbitration will be the exclusive method I will have for final and binding resolution of any such claim.

(JX 14, par. 8-9; JX 2, emphasis added).

On June 16, 2004, Brown applied to Respondent to be a weekend worker, referred to as a "Weekender," at Respondent's Jacksonville, Florida brewery, and signed an application form with the aforementioned language.<sup>4</sup> (JX14, JX 2). Brown did not receive a copy of the Dispute Resolution Program Policy during or before his employment by Respondent. (JX 14, par.8). Since on or about April 1, 2004 and continuing until the present time, Respondent has maintained the Anheuser-Busch Dispute Resolution Program, which states that it "applies to all salaried and **non-union** employees of Anheuser-Busch Companies, Inc., or any of its U.S.

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<sup>4</sup> General Counsel submits that the collective-bargaining agreement between Respondent and the Union is a written contract contrary to the application of the DRP to unit employees because the collective-bargaining agreement provides for arbitration as the final step in the parties' grievance procedure, and that is contrary to the DRP arbitration provision. Thus, the express language of the application signed by Brown does not support Respondent's claim that it had the right to apply the DRP to Brown after he was discharged, based on the application form he signed. Rather, Respondent's post-discharge attempt to apply the DRP to Brown was a unilateral change in the terms of employment of unit employees.

subsidiaries.” (ALJD 3:23-25; ALJD 4:1-5; JX 14, par. 7; JX 1, p.2, emphasis added). Thus, by its own terms, the DRP does not apply to union-represented employees.

On September 20, 2004, Brown was offered employment by Respondent as a Weekender employed at Respondent’s Jacksonville, Florida brewery and on September 25, 2004, Brown began working for Respondent in that position. Brown worked for Respondent as a Weekender continuously from September 25, 2004 until May 20, 2005, when he became an Apprentice I at Respondent’s Jacksonville, Florida brewery. Brown worked continuously as an Apprentice I until he was discharged by Respondent on March 11, 2010. Brown’s positions of Weekender and Apprentice I are included in the above-described bargaining unit. Brown worked in the unit during his entire employment by Respondent. (ALJD 4:11-12; ALJD 4:16-22; JX 14 pars. 8, 11, and 12; JX 3).

On September 23, 2009, Respondent suspended Brown from his job for four weeks. On September 25, 2009, the Union filed a grievance claiming Brown’s suspension was not for just cause. On December 9, 2009, the Multi-Plant Grievance Committee denied Brown’s suspension grievance. Brown served the suspension starting on January 4, 2010 and was scheduled to return to work on February 1, 2010. (ALJD: 4:30-31; JX 14, pars. 14, 15, and 16; JX 6; JX 7; JX 15).

In the meantime, on December 7, 2009, Brown filed a charge with the Florida Commission on Human Relations alleging that by suspending him Respondent discriminated against him because of his race, in violation of Title VII of the Civil Rights Act of 1964, as amended. (ALJD 4:33-35; JX 14, par. 19).

On March 11, 2010, Respondent discharged Brown. On March 22, 2010, the Union filed a grievance claiming Brown’s discharge was not for just cause. On May 3, 2010, the Multi-Plant Grievance Committee upheld Brown’s discharge and denied the Union’s grievance.

In the meantime, on March 30, 2010, Brown filed a second charge with the Florida Commission on Human Relations, which was received by the Miami District Office of the United States Equal Employment Opportunity Commission (EEOC), alleging that Respondent discriminated against him in retaliation for having filed the charge regarding his four week suspension and discipline, in violation of Title VII of the Civil Rights Act of 1964, as amended. (ALJD 4:37-45; JX 14, pars. 17, 18, and 20; JX 10).

On December 29, 2011, the EEOC issued two Notices of Right to Sue over Brown's suspension and discharge. (JX 16). Thereafter, on April 3, 2012, Brown filed a Complaint against Respondent in the United States District Court for the Middle District of Florida, Jacksonville Division, alleging race discrimination and retaliation in violation of Title VII of the Civil Rights Act of 1964 and the Florida Civil Rights Act. (ALJD 5:1-3; JX 14, par. 21; JX 11). Section 2000e-5(g)(1) of Title VII of the Civil Rights Act of 1964, 42 U.S.C. Sec. 2000e-5(g)(1), states:

- (g) Injunctions; appropriate affirmative action; equitable relief; accrual of back pay; reduction of back pay; limitations on judicial orders
- (1) If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay (payable by the employer, employment agency, or labor organization, as the case may be, responsible for the unlawful employment practice), or any other equitable relief as the court deems appropriate. Back pay liability shall not accrue from a date more than two years prior to the filing of a charge with the Commission. Interim earning or amounts earnable with reasonable diligence by the person or persons discriminated against shall operate to reduce the back pay otherwise allowable.

On June 4, 2012, Respondent filed a Motion to Dismiss or Stay and Compel Arbitration pursuant to its Dispute Resolution Program policy, in response to Brown's complaint. (ALJD

5:3-5; JX 14, par. 22, JX 12, Point B at p. 6-8). The District Court has not ruled on this issue. (Tr. 31).

Respondent admits that it never gave the Union written notice of its intent to apply the Dispute Resolution Program Policy to bargaining unit employees, or offered to bargain with the Union regarding its Dispute Resolution Program Policy or with respect to the application of the Policy to bargaining unit employees, and further admits that it did not bargain with the Union regarding its Policy or with respect to the application of the Policy to bargaining unit employees. (ALJD 5:36-40; JX 14, par. 23). The undisputed testimony of Union representatives James Miller and Larry Knouse further establishes that Respondent never gave the Union any notice, written or otherwise, of its intent to apply the Dispute Resolution Program Policy to unit employees, including employees who had been discharged from positions in the bargaining unit. (Tr. 43-45, Brown; Tr. 67-70, Knouse). In addition, Respondent's People Manager Timothy Saggau admitted that Respondent has never applied the Dispute Resolution Program Policy to bargaining unit employees (i.e. other than Brown), and notwithstanding the vague and hypothetical testimony of Respondent agent Susan Brueggemann, there is no evidence that Respondent made any effort to apply that policy to employees who have been discharged from positions in the bargaining unit until it did so with respect to Brown. (Tr. 94, Saggau; Tr. 108, Brueggemann).

### **III. ARGUMENT**

#### **A. The ALJ's Findings and Conclusion that Brown was an Employee as Defined in Section 2(3) of the Act at the Time Respondent Unilaterally Applied the DRP to Brown Should Be Affirmed, and Respondent's Exceptions 1, 2, 3, 4, 7, 8, and 11 Should Be Denied.**

Section 2(3) of the National Labor Relations Act, in relevant part, states:

The term "employee" shall include any employee, and shall not be limited to the employees of a particular employer, unless the Act [this subchapter] explicitly states

otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment, . . . .

The ALJ properly found that Brown was an employee of Respondent within the meaning of Section 2(3) of the Act at all material times. The ALJ relied on the Board's historical interpretation of Section 2(3) of the Act to include 'members of the working class generally,' including 'former employees of a particular employer.'" *Little Rock Crate & Basket Co.*, 227 NLRB 1406 (1977); see also, *Briggs Manufacturing Company*, 75 NLRB 569, 570 (1947). He further properly relied on the fact that the Supreme Court has consistently upheld the Board's broad interpretation noting the breadth of Section 2(3) is "striking" and applies to any employee, except those explicitly excluded. Applicants for employment are statutory employees under Section 2(3), entitled to the Act's protection. *NLRB v. Town & Country Electric, Inc.*, 516 U.S. 85 (1995); see also *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177 (1941); *Toering Electric Co.*, 351 NLRB 225 (2007). (ALJD 8:26-34). Therefore, Respondent's Exception 7 should be denied.

The ALJ's finding that Brown has been a statutory employee since he applied for work and throughout his employment with Respondent is not time barred. Rather, these are simply findings of fact and background evidence relied on by the ALJ to make his decision. Accordingly, Respondent's Exception 8 should be denied.

As the ALJ found, the undisputed facts show that Brown was an employee when he applied to work for Respondent, and throughout the approximately six years he worked for Respondent, and he has remained an employee since he was discharged by Respondent. Thus, since September 2009, before his discharge by Respondent, Brown has challenged his

suspension, and he has challenged his discharge by Respondent continuously since Respondent fired him on March 11, 2010.

Although Brown's contractual suspension and discharge grievances were denied, he continued to pursue his employment status by challenging his suspension and discharge by filing charges with the Florida Commission on Human Relations, and subsequently filing a lawsuit, claiming violations of Title VII of the Civil Rights Act of 1964. (ALJD 8:36 to 9:5). As noted above, if Brown's federal lawsuit results in a finding that Respondent discharged him in violation of Title VII of the Civil Rights Act of 1964, he will be eligible for remedies including reinstatement to his former job as a bargaining unit employee and backpay. 42 U.S.C. 2000e-5(g)(1).

Respondent points out that Brown did not specifically request reinstatement in his lawsuit. However, under Section 54(c) of the Federal Rules of Civil Procedure, "[e]very final judgment should grant the relief to which each party is entitled, even if the party has not demanded that relief in its pleadings." Because reinstatement is possible under 42 U.S.C. Section 2000(e)-5(g)(1), if Brown prevails in his lawsuit, he will be eligible for reinstatement to his former job as a unit employee of Respondent.

The employee status of Brown is further demonstrated by the fact that the Board treats individuals who, like Brown, have challenged the lawfulness of their discharges, as potential eligible voters who are permitted to cast challenged ballots in representation case proceedings. *Advance Industrial Security*, 217 NLRB 17, 17-18 (1975) (discharged employee awaiting disposition of claim filed with the U.S. Department of Labor under the Age Discrimination in Employment Act of 1974); *Machinists*, 159 NLRB 137, 143 (1966) (discharged employees seeking reinstatement from U.S. District Court under the Labor Management Reporting and

Disclosure Act); *Pacific Tile & Porcelain*, 137 NLRB 1359, 1365-1367 (1968) (discharged employees awaiting determination of their discharge grievances that were pending arbitration); see also *Curtis Industries, Inc.*, 310 NLRB 1212, 1212-1213 (1993).

These cases stand for the proposition that if the outcome of the pending litigation or grievance is a finding that the employee was unlawfully discharged and reinstatement results from that finding, the employee will be found eligible to vote and the challenge to his or her ballot will therefore be overruled. Under such circumstances, the Board recognizes that, but for the employer's violation of the collective-bargaining agreement, or the employer's unlawful action under the National Labor Relations Act or another statute, the employee would have remained employed throughout the eligibility period and on the date of the election and, therefore, would have been eligible to vote as a bargaining unit employee.

Respondent relies on *Allied Chemical & Alkali Workers of America, Local Union No. 1 v. Pittsburgh Plate Glass Co.*, 404 U.S. 157 (1971) for the proposition that individuals who have been separated from employment are not a part of a bargaining unit. However, the Supreme Court in *Allied Chemical* was dealing with retired benefits of retirees, who have no expectancy of returning to the work force, rather than dealing with the statutory reinstatement rights of discharged employees that are involved in the case at bar. The Supreme Court makes it clear that in doubtful situations, the term "employee" must be applied broadly. An employee is someone who works for another for hire and has not ceased to work without expectation of further employment, as in the case of a retiree. *Id.* at 166-168. Brown has been an employee at all times material to this case because he remains in the work force, he has filed a lawsuit challenging his discharge by Respondent, and he may be reinstated by Respondent if he prevails.

Accordingly, the ALJ's finding and conclusion that Brown remained an employee within the meaning of Section 2(3) of the Act and should be considered a bargaining unit employee with respect to his efforts to be reinstated to his bargaining unit job should be affirmed, and Respondent's Exceptions 1, 2, 3, 4, 7, 8, and 11 should be denied.

**B. The ALJ's Finding and Conclusion that Respondent Unilaterally Changed Terms and Conditions of Employment of Unit Employees by Applying its DRP policy to Brown, in violation of Section 8(a)(5) Should Be Affirmed, and Respondent's Exceptions 6, 9, and 11 Should Be Denied.**

Unilateral actions by an employer that modify terms or conditions of employment of bargaining unit employees constitute a per se violation of Section 8(a)(5) of the Act. Such actions allow for an inference of subjective bad faith. *NLRB v. Katz*, 369 U.S. 736 (1962). Respondent concedes that it did not notify or offer to bargain with the Union with respect to the application of the DRP Policy to Brown. Respondent's application of the DRP Policy to Brown without notifying the Union or offering to bargain with the Union over its application violates Section 8(a)(5) of the Act.

In *Utility Vault Company*, 345 NLRB 79, fn. 2 (2005), the Board agreed with the administrative law judge that the respondent was obligated to bargain with the union representing its employees with respect to the implementation of a dispute resolution process agreement that required employees to arbitrate claims involving their terms and conditions of employment, including wrongful termination and the failure to pay wages and benefits.

The ALJ properly found and concluded that at all material times Brown was an employee within the meaning of Section 2(3) of the Act and a member of the bargaining unit. It is undisputed that Respondent unilaterally attempted to apply the DRP Policy to Brown with respect to both his suspension and discharge, without giving the Union any notice or opportunity to bargain. Respondent admits that it did not offer to bargain with the Union over the application

of the DRP Policy to Brown. The ALJ properly relied on *Utility Vault* to find and conclude that Respondent unilaterally and without notice to the Union or affording the Union an opportunity to bargain, applied its DRP policy against Brown, a unit employee, in violation of Section 8(a)(5) and (1) of the Act. Respondent's attempt to distinguish the facts in *Utility Vault* from those in the instant case are unavailing in view of the fact that the Union retains an interest in protecting the rights of discharged unit employees. Respondent concedes that the collective-bargaining agreement between Respondent and the Union does not contain any waiver of bargaining unit employee's right to file a lawsuit claiming discrimination regarding terms of employment on the basis of race under Title VII of the Civil Rights Act of 1964 or any other legislation, or to file a claim of race discrimination with a state agency such as the Florida Commission on Human Relations or a federal agency such as the Equal Employment Opportunity Commission. (Tr. 59; JX 5, especially at Article 28, p.43). Cf. *14 Penn Plaza v. Pyett*, 556 U.S. 247 (2009).

Therefore, Respondent's Exceptions 6 and 9 should be denied.

**C. The ALJ Properly Curtailed Respondent's Cross-Examination of Secretary-Treasurer Larry Knouse and Respondent's Direct Examination of Human Resources Official Tim Saggau, and therefore Respondent's Exception 14 Should Be Denied.**

Section 102.35(a)(6) of the Board's Rules and Regulations sets forth that participation of parties during trials "shall be limited to the extent permitted by the administrative law judge." Section 102.38 of the Board's Rules goes on to state that "it is appropriate also for the [judge] to direct the [trial] so that it may be confined to material issues and conducted with all expeditiousness consonant with due process" (footnote omitted). *Indianapolis Glove Co.*, 88 NLRB 986, 987 (1950). Toward that end, "[i]n the conducting of a [trial] the question of whether certain lines of inquiry or responses of witnesses should be curtailed rests within the

sound discretion of the” judge. *American Life Insurance and Accident Co.*, 123 NLRB 529, 530 (1959). See also FRE 611(a), which states:

The court shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to (1) make the interrogation and presentation effective for the ascertainment of truth, (2) avoid needless consumption of time, and (3) protect witnesses from harassment or undue influence.

The ALJ properly curtailed Knouse’s testimony as to who is a member of the bargaining unit because Respondent sought an “answer to the bottom-line question in this case,” i.e. a legal conclusion. (Tr. 79). For the same reason, the ALJ also properly curtailed Saggau’s testimony as to why he believed the DRP was applicable to Brown. Therefore, Respondent’s Exception 14 should be denied.

**D. The ALJ’s Recommended Order that Respondent Withdraw that Portion of its Defense in Brown’s District Court Lawsuit that Requests the District Court Have the Matter before it Decided Pursuant to Respondent’s DRP policy Should Be Affirmed, and Respondent’s Exceptions 10 and 13 Should Be Denied.**

The Supreme Court has recognized that a suit that has an objective that is illegal may be enjoined without violating the First Amendment. *Bill Johnson’s Restaurants, Inc. v. NLRB*, 461 U.S. 731, 737 fn. 5 (1983). The Supreme Court’s decision in *BE&K Construction Company v. NLRB*, 536 U.S. 516 (2002), did not eliminate the illegal objective exception in *Bill Johnson’s* footnote 5. Respondent admits that it unilaterally applied its DRP policy to Brown without notice to or affording the Union an opportunity to bargain with respect thereto. This conduct affected the rights of bargaining unit employees in violation of Section 8(a)(5) of the Act, and therefore had an illegal objective. Accordingly, the ALJ properly recommended that the Board order Respondent to withdraw that portion of its defense in Brown’s District Court lawsuit that requests the District Court have the matter before it decided pursuant to its DRP policy, and Respondent’s Exceptions 10 and 13 should be denied.

**E. The ALJ Properly Found that Respondent Violated Section 8(a)(1) of the Act as a Derivative Violation of Section 8(a)(5) of the Act, and Properly Recommended the Inclusion of the Description of Employee Rights Guaranteed in Section 7 of the Act in the Notice to Employees, and therefore Respondent's Exceptions 5 and 12 Should Be Denied.**

Respondent asserts that the ALJ improperly found that Brown's federal lawsuit constitutes Section 7 activity, but the ALJ made no such finding. Respondent infers such a finding from paragraph 1(c) of the recommended Board Order, requiring that Respondent cease and desist from "in any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed in Section 7 of the Act." However, this language is derived from Section 8(a)(1) of the Act, and from its inception the Board has consistently held that a violation of any other portion of Section 8(a) of the Act is a derivative violation of Section 8(a)(1) (formerly Section 8(1)), as stated in the Board's 1938 annual report:

The Board consistently has held that a violation by an employer of any of the four subdivisions of section 8 other than subdivision is also a violation of subdivision (1).

1938 NLRB Annual Report, p.52 (1939); see also *Standard Oil Company of California, Western Operations, Inc. v. NLRB*, 399 F.2d 369 (9<sup>th</sup> Cir. 1968), holding:

It is elementary that an employer's violation of § 8(a)(5) of the Act by wrongfully refusing to bargain collectively with the statutory representative of its employees does 'interfere with, restrain and coerce' its employees in their rights of self organization and collective bargaining, in violation of § 8(a)(1) of the Act.

Accordingly, Respondent's Exception 5 should be denied.

Respondent further claims that the ALJ improperly included the introductory language notifying employees of their Section 7 rights in the recommended Notice to Employees. However, the Board routinely includes language notifying employees of their Section 7 rights at the beginning of Notices to Employees in all cases where it finds unlawful conduct, including cases where no protected concerted activity is involved. See for example, *USC University Hospital*, 358 NLRB No. 132, slip op. at p. 3 (2012) (the only unlawful conduct found, as in this

case, was a unilateral change in terms and conditions of employment in violation of Section 8(a)(5) and (1) of the Act); *Bristol Manor Health Care Center*, 360 NLRB No. 7, slip op., at p. 4 (2013) (the only unlawful conduct was an employer's refusal to furnish requested information to a union in violation of Section 8(a)(5) and (1) of the Act). Therefore, Respondent's Exception 12 should be denied.

**F. Respondent's Challenges to the Authority of the Acting General Counsel, Regional Director, and Administrative Law Judge Have No Merit, and Respondent's Exceptions 15 and 16 Should Be Denied.**

Respondent challenges the authority of the Acting General Counsel and Regional Director to investigate and prosecute the complaint and the Administrative Law Judge to issue a decision in this case. In support of its claims, Respondent proffers two arguments. First, citing *Noel Canning v. NLRB*, 705 F.3d 490 (D.C. Cir. 2013), *cert. granted*, 81 U.S.L.W. 3629 (U.S. June 24, 2013) (No. 12-1281), Respondent argues that the Board could not issue the complaint because it had no quorum. Next, citing *Hooks v. Kitsap Tenant Support Services, Inc.*, 2013 WL 4094344 (W.D. Wash. Aug. 13, 2013), *appeal docketed*, No. 13-35912 (9th Cir. Oct. 1, 2013), and the Federal Vacancies Reform Act ("FVRA"), 5 U.S.C. § 3345, et seq., Respondent argues that Acting General Counsel Solomon could not issue the complaint because Mr. Solomon was invalidly appointed. As shown below, both arguments fail.

**1. Under Section 3(d) of the Act, the General Counsel has independent authority to issue complaints.**

Regardless of the issue of the Board's composition, Acting General Counsel Lafe Solomon had independent authority to issue and prosecute complaints. *Bloomington's, Inc.*, 359 NLRB No. 113, slip op. at 1 (Apr. 30, 2013) ("[u]nder the NLRA, the General Counsel is an independent officer appointed by the President and confirmed by the Senate, and staff engaged in the investigation and prosecution of unfair labor practices are directly accountable to the General

Counsel.”) (citing 29 U.S.C. § 153(d); *NLRB v. United Food & Commercial Workers Union, Local 23*, 484 U.S. 112, 127-28 (1987); *NLRB v. FLRA*, 613 F.3d 275, 278 (D.C. Cir. 2010)). Thus, “[t]he authority of the General Counsel to investigate unfair labor practice charges and prosecute complaints derives not from any ‘power delegated’ by the Board, but rather directly from the language of the NLRA.” *Id.* In addition, as Respondent acknowledges (Memo. in Support, p. 32 (quoting S. Rep. No. 105-250, at 2 (1998))), the authority of the Acting General Counsel to investigate and prosecute violations of the Act is separate from, and cannot be delegated to, the Board. Therefore, contrary to Respondent’s argument, the Board’s quorum has no effect on the Acting General Counsel’s authority to issue complaints. Accordingly, both Acting General Counsel Solomon’s authority to issue and prosecute the complaint, and, in turn, Regional Director Margaret Diaz’s<sup>5</sup> to do so, are unaffected by any issue concerning the composition of the Board.

Similarly, any issue regarding the composition of the Board does not affect the Board’s longstanding delegation of authority to administrative law judges (“ALJs”). ALJs have possessed the authority to hold hearings on the Board’s behalf since 1936. *See* General Rules and Regulations, 1 Fed. Reg. 207, 209 (Apr. 18, 1936) (designating trial examiners (now called ALJs) as agents responsible for hearings); Secs. 102.34-35, Board’s Rules and Regulations (designating ALJs as agents responsible for hearings). Any assertion that delegees may not exercise delegated authority fails to account for the Supreme Court’s decision in *New Process Steel, LP v. NLRB*, 130 S.Ct. 2635 (2010). In *New Process*, the Supreme Court, refusing to rely on language in the D.C. Circuit’s *Laurel Baye*<sup>6</sup> decision, stated that its “conclusion that the

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<sup>5</sup> The General Counsel has delegated the authority to the Regional Directors for issuing complaints. *See United Elec. Contractors Ass’n v. Ordman*, 258 F.Supp. 758, 760 (D.C.N.Y. 1965), *aff’d*. 366 F.3d 776 (2d Cir. 1966).

<sup>6</sup> *Laurel Baye Healthcare of Lake Lanier, Inc. v. NLRB*, 564 F.3d 469, 475 (D.C. Cir. 2009).

delegee group ceases to exist once there are no longer three Board members to constitute the group does not cast doubt on the prior delegations of authority to nongroup members, such as the regional directors or the general counsel.” 130 S.Ct. at 2643 n.4. Indeed, since *New Process*, four Courts of Appeal have held that valid prior delegations of Board authority survive a loss of Board quorum. See *Kreisberg v. Healthbridge Mgmt., LLC*, \_\_\_ F.3d \_\_\_, 2013 WL 5614101 at \*6 (Oct. 15, 2013); *Frankl v. HTH Corp.*, 650 F.3d 1334, 1354 (9th Cir. 2011), *cert. denied* 132 S.Ct. 1821 (2012); *Overstreet v. El Paso Disposal, LP*, 625 F.3d 844, 853 (5th Cir. 2010); *Osthus v. Whitesell Corp.*, 639 F.3d 841, 844 (8th Cir. 2011). For these reasons, the Board should deny Respondent’s Exception 15.

**2. The Regional Director had authority to issue a complaint in this case because the Acting General Counsel was properly appointed.**

Respondent’s claim that Mr. Solomon was invalidly appointed is based on the ruling of a lone district court, which dismissed an application for preliminary relief under Section 10(j). *Hooks v. Kitsap Tenant Support Services, Inc.*, 2013 WL 4094344 (W.D. Wash. Aug. 13, 2013), *appeal docketed*, No. 13-35912 (9th Cir. Oct. 1, 2013). Although *Kitsap*’s rationale is not entirely clear, the district court appears to have accepted *Kitsap*’s argument that the Acting General Counsel was not qualified to be designated an acting officer under the Federal Vacancies Reform Act, 5 U.S.C. § 3345, et seq., because he had never served as a first assistant to the departing officer, as assertedly required by Section 3345(b)(1) of the FVRA. The text, structure, and history of Section 3345 of the FVRA stand against *Kitsap*’s construction of its terms.

Subsection (a) of Section 3345 designates three categories of persons who can serve in an acting capacity: first assistants to the vacant office (subsection (a)(1)), a Senate-confirmed officer in the government (subsection (a)(2)), and any other qualified high-level officers or employees of the agency in which the vacancy arises (subsection (a)(3)). The President directed

Acting General Counsel Solomon to perform the duties of the office of General Counsel pursuant to subsection (a)(3). To qualify under subsection (a)(3), the person named must have served in the agency in which the vacancy arises for at least 90 days during the 365 days preceding the vacancy, and the person must have been paid at a rate at least equal to a GS-15. It is undisputed that Mr. Solomon satisfies the requirements of subsection (a)(3).

The employer in *Kitsap* contended, however, that Mr. Solomon was also subject to the minimum service requirements set forth in subsection (b)(1) of Section 3345. That provision states that “[n]otwithstanding subsection (a)(1),” the subsection authorizing service by a first assistant, a person may not serve as an acting officer “under this section” if that person did not serve as a first assistant for a minimum period during the prior year and has been nominated by the President to fill the vacant office. The employer hinged its argument on subsection (b)(1)’s use of the phrase “under this section,” claiming that the conditions set forth in subsection (b)(1) therefore applied to all three categories of acting officials listed in subsection (a).

That argument fails as a textual matter, because it conflicts with other language in subsection (b)(1). By its terms, subsection (b)(1) specifies that its limitations apply “[n]otwithstanding subsection (a)(1).” Subsection (b)(1) thereby expressly directs its limitations toward the class of officials covered by subsection (a)(1) – namely, first assistants. If Congress had meant for the service limitation in subsection (b)(1) to apply to all three categories of officials identified in subsection (a), rather than just to first assistants, it would have said “notwithstanding subsection (a)” rather than referring more specifically and exclusively to subsection (a)(1). The position taken by the employer and the district court in *Kitsap* would render the explicit and specific textual cross-reference to subsection (a)(1) meaningless.

Moreover, even if Respondent's reading of subsection (b)(1) were "textually permissible in a narrow sense," it is "structurally implausible." *New Process Steel, L.P. v. NLRB*, 130 S.Ct. 2635, 2641 (2010). All of subsection (b)(1)'s limiting conditions are linked to service as a first assistant. In addition, subsection (b)(1) constitutes the sole source of any limitations on a first assistant's serving as an acting officer pursuant to subsection (a)(1). By contrast, subsection (a)(3), the provision applicable to Mr. Solomon, has its own self-contained minimum service requirements, noted above. The proposition that a person independently qualified to serve as an officer or employee under subsection (a)(3) must also satisfy requirements linked to service as a first assistant is structurally implausible.

Finally, *Kitsap's* reading of subsection (b)(1) is squarely foreclosed by the legislative history of the provision. The amendment's chief sponsor, Senator Thompson, stated explicitly that subsection (b)(1) applies only to first assistants: "Under § 3345(b)(1), the revised reference to § 3345(a)(1) means that *this subsection applies only when the acting officer is the first assistant, and not* when the acting officer is designated by the President pursuant to §§ 3345(a)(2) or 3345(a)(3)." 144 Cong. Rec. 27496 (1998) (emphasis added). Moreover, Congress's purpose in adding subsection (a)(3) to the bill after it was reported out of Committee would be frustrated by *Kitsap's* construction of Section 3345(b)(1). As Senator Thompson explained, subsection (a)(3) was added because Congress feared that the pool of available first assistants was too small and therefore sought to expand categories from which acting officers could be selected. *Id.* It would seriously undermine Congress's stated goal of expanding the pool of potential acting officials beyond first assistants if subsection (b)(1) were construed, as *Kitsap* construes it, to disqualify Senate-confirmed officials and other senior agency officials

who have been nominated to fill the vacancy unless those officials had also served as first assistants.

Accordingly, as Mr. Solomon was properly appointed under the FVRA, his delegation of authority to Regional Director Diaz to issue and process complaints is valid, and therefore the Board should deny Respondent's Exception 16.

**VII. CONCLUSION**

In summary, Counsel for the General Counsel respectfully urges the Board to deny Respondent's exceptions in their entirety.

Dated at Miami, Florida this 14<sup>th</sup> day of November, 2013.

Respectfully submitted,

*/s/ Marinelly Maldonado*

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**CERTIFICATE OF SERVICE**

I hereby certify that Counsel for the General Counsel's Cross-Exceptions in the matter of Anheuser-Busch, LLC, Case 12-CA-094114, were electronically filed and served by electronic mail on November 14, 2013, as set forth below:

By Electronic Filing

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