

**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

REPLY MEMORANDUM OF CARE ONE AT MADISON AVENUE

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TABLE OF CONTENTS

	PAGE
I. GENERAL COUNSEL AND THE UNION FAIL TO ADDRESS THE EMPLOYER’S ARGUMENT THAT SOUND POLICY CALLS FOR A RULE INSULATING A COMPANY THAT ADHERES SCRUPULOUSLY TO EXCHANGE PARTS FROM HAVING TO DISCUSS OR IMPLEMENT WITHIN THE ELECTION UNIT A CHANGE IN A TERM OR CONDITION OF EMPLOYMENT INSTITUTED OUTSIDE THE ELECTION UNIT	1
II. GENERAL COUNSEL MISSTATES THE PROHIBITION OF ALLEGHENY LUDLUM AS WELL AS THE EMPLOYER’S EXPLANATION AS TO WHY IT DID NOT VIOLATE THAT DECISION	5
III. GENERAL COUNSEL FAILS TO REFUTE THE EMPLOYER’S POINT THAT THE “JEOPARDIZE YOUR JOB” LANGUAGE IN THE LEAFLET DID NOT THREATEN EMPLOYEES WITH JOB LOSS AS A RESULT OF A STRIKE	6
IV. GENERAL COUNSEL FAILS TO ADDRESS THE EMPLOYER’S EXPLANATION AS TO WHY THE ALJ ERRED IN CONCLUDING THAT THE EMPLOYER’S POSTING OF THE AREZZO MEMORANDUM ALONG WITH THE EMPLOYER’S WORKPLACE VIOLENCE PREVENTION POLCY VIOLATED THE ACT	8
CONCLUSION	10

Respondent Care One at Madison Avenue, LLC d/b/a CareOne at Madison Avenue (“Employer”) submits this Reply Memorandum in support of its Exceptions to the July 31, 2013 Decision and Order (“Decision”) of Administrative Law Judge Mindy Landow (“ALJ”) and in response to the answering briefs of Counsel for the General Counsel and Charging Party Union, both of which were filed on November 5, 2013.

I. GENERAL COUNSEL AND THE UNION FAIL TO ADDRESS THE EMPLOYER’S ARGUMENT THAT SOUND POLICY CALLS FOR A RULE INSULATING A COMPANY THAT ADHERES SCRUPULOUSLY TO *EXCHANGE PARTS* FROM HAVING TO DISCUSS OR IMPLEMENT WITHIN THE ELECTION UNIT A CHANGE IN A TERM OR CONDITION OF EMPLOYMENT INSTITUTED OUTSIDE THE ELECTION UNIT.

In their answering briefs, both Counsel for the General Counsel and Charging Party Union merely regurgitate black letter law and fail to grapple with the Employer’s central argument that existing case law does not address the question presented: does a company violate the Act when, during the critical period, it adheres scrupulously to *NLRB v. Exchange Parts*, 375 U.S. 405, 409 (1964), institutes a change in a term or condition of employment outside the election unit, and then does not institute that change as to eligible voters and informs them only that it cannot discuss what has happened at that time? The Employer argues that when a company in an election campaign consistently refrains from discussing changes in terms and conditions of employment with eligible voters or instituting such changes as to them, a rule of decision that requires it to deviate from that approach, as ordered by the ALJ here, interferes with its campaign prejudicially and infringes upon its rights under § 8(c) of the Act. The Employer’s Exceptions Brief emphasizes that Board case law does not address the limited class of case in which there is **no evidence** that a company departed from *Exchange Parts* and that the rule of decision in such cases should be that in such circumstances a company is privileged to refrain

from instituting changes made outside the election unit as to eligible voters or discussing those changes with those voters.

The approach the Employer advocates is desirable on several grounds:

- it encourages companies not to alter the terms and conditions of employment of eligible voters during the critical period, a laudable goal under the Act;

- it establishes a bright line rule that is easy to enforce and does not, as is the case under the rule to which the Decision gives rise, cause a company to communicate an inconsistent and muddled message that although the company has previously stated that it cannot discuss or implement changes in terms and conditions during the critical period it is nonetheless doing so; and

- it does not propagate a fiction that undermines the credibility of management, as does the line of decisions represented by *Noah's Bay Area Bagels, LLC*, 331 NLRB 188 (2000), by providing for a company to announce to eligible voters that there will be an improvement in a term or condition but that the improvement will be postponed until after the election so that the company avoids the appearance of trying to influence the outcome of the election (which, obviously, is exactly what the company appears to be doing by making such an announcement).

In arguing against the Employer's proposed rule of decision, Counsel for the General Counsel and the Union do not meaningfully address the above explanation of its merits and how it would improve decision making and administration of the Act. The Board should adopt the Employer's proposed rule of decision for two principal reasons: as explained, it offers a superior approach for conducting election campaigns and, even more crucially, it is necessary to prevent interference with the § 8(c) rights of a company that adheres to *Exchange Parts*.

In their desperate attempt to sidestep the Employer's legal and policy arguments, Counsel for the General Counsel and the Union contend that the record does not support the Employer's position that during the critical period it adhered scrupulously to *Exchange Parts* by not instituting changed terms and conditions of employment as to eligible voters or discussing changes with those voters. This challenge is unfounded. Paragraph 12 of the stipulated facts sets forth the following:

- “[t]he health insurance improvements were not raised by management at communication meetings with eligible voters.”
- when “eligible voters complained to the Employer” about health insurance costs and “asked if they were going to receive the improvements”, the Administrator for the Employer, George Arezzo, “responded by stating that he was not allowed to discuss the issue with them at that time. This was the same response the Employer gave during the critical period when eligible voters asked whether the Employer could grant a specific benefit.”

(Emphasis added). The final sentence in the above-quoted excerpt underscores that the parties stipulated that during the critical period generally, the Employer not only refrained from discussing but affirmatively informed eligible voters that it could not discuss improvements in terms and conditions of employment. On this basis alone, the attempt by Counsel for the General Counsel and the Union to argue that the record is other than the Employer asserts is incomprehensible. However, the overall record itself supports the Employer's position further. Transcripts from the record in the related representation case are part of the record herein. Nothing therein establishes anything other than that the Employer scrupulously refrained from discussing or implementing changes in terms and conditions of employment with eligible voters. Indeed, in that case, Arezzo testified that he was not allowed to discuss improvements (Tr. Vol. I at 45:22-46:7). In both the representation and unfair labor practice cases, opposing counsel had

ample opportunity to establish that the Employer deviated from *Exchange Parts* but failed to do so.

Counsel for the General Counsel and the Union, like the ALJ, also fail to set forth a basis for the conclusion that the Employer violated § 8(a)(3). There is no evidence of unlawful motivation nor can such a motive be inferred on the instant record. The Hearing Officer's June 18, 2012 Report on Objections (at 12) in related representation case 22-RC-072946, which was adopted by the Board on September 13, 2012, found that the Employer had a legitimate basis for instituting the health insurance changes (though the Employer certainly had no assurance that a trier of fact would arrive at that conclusion and every reason to fear, given that the changes were *ad hoc* and not previously scheduled, that the Union would allege that implementation of the changes for all employees was for the purpose of "buying" eligible employees' votes but disguised as an across-the-board change). There is also nothing in the record to suggest that the Employer engaged in any kind of "manipulation" with an eye upon the Madison Avenue election: it directed notice of the change solely to employees outside the election unit in closed envelopes (ALJD 11:32-34), did not announce the change at communication meetings it held for eligible voters (ALJD 12:39-40), and responded to employee inquiries about the changes by telling eligible voters that it could not discuss the changes (ALJD 12:40-46).

The rule of decision the ALJ applied, and which Counsel for the General Counsel and the Union advocate, for determining whether a company must institute improvements conferred upon employees outside an election unit upon eligible voters as well infringes on the Employer's § 8(c) rights. Here, the Employer would have had to address the matter of a benefit improvement, either then or later, after having consistently informed voters that it was not permitted to discuss changes in terms or conditions of employment prior to the election. Since

Counsel for the General Counsel also failed to sustain her burden of proving that the Employer harbored discriminatory animus in withholding the changes in health insurance from employees eligible to vote in the election, the ALJ also erred in ruling against the Employer on that allegation. Accordingly, the Board should reverse the ALJ's findings and conclusions with respect to the announcement and implementation of changes in health insurance.

II. GENERAL COUNSEL MISSTATES THE PROHIBITION OF *ALLEGHENY LUDLUM* AS WELL AS THE EMPLOYER'S EXPLANATION AS TO WHY IT DID NOT VIOLATE THAT DECISION.

In her brief (at 11), Counsel for the General Counsel asserts that *Allegheny Ludlum Corp.*, 333 NLRB 734 (2001), *enfd.*, 301 F.3d 167 (3d Cir. 2002), holds that a company may include images of non-consenting employees in a campaign video “if the videotape, viewed as a whole, does not convey the message that the employees depicted therein either support or oppose union representation”, 333 NLRB at 745, provided that the company can also establish that the following safeguards existed as well: it did not mislead the employees about the use of their images, there is a disclaimer stating that the video does not reflect the employees' views, and nothing in the video contradicts the disclaimer. 333 NLRB at 734. Counsel for the General Counsel is mistaken.

Allegheny Ludlum states that the safeguards listed above are only necessary if a campaign video conveys employee views about unionization. 333 NLRB at 744-45 (full quotation set forth in Employer Exception Brief at 14). Accordingly, when a video does not convey employee views, as is the case here, *Allegheny Ludlum* is inapplicable and the company does not need to establish that it complied with the safeguards. The portion of the decision that sets forth the safeguards makes clear that they are only necessary when the prohibitions established by the decision are implicated, meaning the video conveys employee sentiments regarding unionization. As noted, that is not the case here.

Counsel for the General Counsel also misses the mark in asserting that in the video under scrutiny here “the employees were not given the opportunity to choose to express an opinion *or* remain silent regarding the issue of unionization” (Brief at 12). However, as the Employer asserted in its Exceptions Brief and is clearly the case notwithstanding the ALJ’s erroneous conclusion to the contrary (ALJD 16:38-17:1-6,15,22-31), nowhere in the video did any employee convey any sentiment, directly or indirectly, regarding unionization. Counsel for the General Counsel’s assertion, then, that employees were put in the position of revealing their preference regarding unionization is plainly wrong.

Similarly, Counsel for the General Counsel mistakenly contends (at 12) that the video was “coercive”. Nothing could be further from the truth. As a review of the video demonstrates, in and of itself it could not be more benign. That the video followed on the heels of the Employer’s numerous campaign leaflets, only one of which has been challenged as unlawful (see Point III below), and the Employer adhered to *Exchange Parts* rather than exploiting the opportunity to implement improvements for eligible voters underscores that the Employer’s conduct was the opposite of coercive and that the Board should reverse the ALJ’s conclusion that the video violated § 8(a)(1).

III. GENERAL COUNSEL FAILS TO REFUTE THE EMPLOYER’S POINT THAT THE “JEOPARDIZE YOUR JOB” LANGUAGE IN THE LEAFLET DID NOT THREATEN EMPLOYEES WITH JOB LOSS AS A RESULT OF A STRIKE.

The ALJ concluded that the language in the leaflet that posed the question “Do you want to give outsiders the power to jeopardize your job by putting you out on **strike**?” unlawfully threatened employees with job loss. In its Exceptions Brief, the Employer attacked the ALJ’s analysis, including the deficiencies in her attempt to distinguish *River’s Bend Health & Rehabilitation Services*, 350 NLRB 184 (2007). The ALJ maintained that the inclusion of the word “status” after the word “job” in the leaflet in *River’s Bend Health* was noteworthy: the

leaflet there read “In a strike the Company would be forced to hire replacements....This puts each striker’s continued job status in jeopardy”. (Emphasis added).

In her brief (at 5-6), Counsel for the General Counsel attempts to bolster the ALJ’s rationale. However, the problem with the analysis of both the ALJ and Counsel for the General Counsel is that employees do not differentiate the phrase “jeopardize your job” from “puts [your] job status in jeopardy”. Only lawyers, aware of subtle legal distinctions, recognize that there might be significance to the slight difference in wording in the two leaflets. It follows that the Board should not adopt a rule that presupposes that an ordinary working person would understand use of the phrase “job status” rather than “job” to imbue the *River’s Bend Health* leaflet with a different meaning than the leaflet in the instant case. Indeed, as the Board remarked in *River’s Bend Health*, 350 NLRB at 185 (quoting another decision), in this arena “any ambiguity...must be construed in the [Employer’s] favor” since the burden of proof is on Counsel for the General Counsel.

Counsel for the General Counsel tries to resuscitate the ALJ’s tortured reasoning by pointing out that at the conclusion of the *River’s Bend Health* analysis, the Board quotes from another decision in stating that “[t]he Respondent...did not tell employees that they would ‘lose their jobs,’ a phrase that the Board has found clearly conveys to the ordinary employee that his or her employment will be terminated.” 350 NLRB at 186. The problem with this argument is that the language the Board utilized--“would lose their jobs”—differs materially from the language included in the leaflet here: “jeopardize your job”. The phrase “would lose” is definitive and certain and in this context means that a company has conveyed the thought that an employee who strikes will most assuredly relinquish his position by virtue of the strike. In contrast, the word “jeopardize” means putting something at risk, i.e., imperiling it. As the Employer pointed out in

its Exceptions Brief (at 19), “[u]rging 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”. It follows that Counsel for the General Counsel’s attempted reconciliation of *River’s Bend Health* with its position fails and the Board should reverse the ALJ’s conclusion and dismiss this allegation.¹

IV. GENERAL COUNSEL FAILS TO ADDRESS THE EMPLOYER’S EXPLANATION AS TO WHY THE ALJ ERRED IN CONCLUDING THAT THE EMPLOYER’S POSTING OF THE AREZZO MEMORANDUM ALONG WITH THE EMPLOYER’S WORKPLACE VIOLENCE PREVENTION POLICY VIOLATED THE ACT.

Counsel for the General Counsel’s response to the Employer’s exceptions fails to address the Employer’s key attack upon the ALJ’s conclusion that the workplace violence prevention policy, in tandem with the Arezzo memorandum, interfered with § 7 rights. The Employer emphasized that the workplace violence prevention policy, which was posted next to the Arezzo memorandum, made clear that Arezzo’s comments pertained solely to threats of violence or similarly egregious conduct prohibited under the policy. Counsel for the General Counsel disregarded that point, interpreting the words set forth in the Arezzo memorandum in their most abstract sense and disregarding case law referenced in the Employer’s Exceptions Brief that prohibits analysis of the Arezzo memorandum in isolation, i.e., without regard for the workplace violence prevention policy, as well as any presumption of interference with protected rights.

Counsel for the General Counsel also bootstraps her argument (at 14), just as she did in several of her other brief points, asserting that the Arezzo memorandum must be seen as threatening job loss for exercising protected rights in light of the single line in the single

¹ Counsel for the General Counsel also mounts an attack on the leaflet (at 6) similar to that utilized in connection with her attack on the video, maintaining that it is coercive when assessed through the lens of other allegedly coercive conduct in which the Employer supposedly engaged. Just as in Point II the Employer successfully refuted the assertion that it engaged in coercive conduct throughout the critical period, the same reasoning overcomes that argument by Counsel for the General Counsel here.

“jeopardize your job” leaflet examined in Point III. Passing the Employer’s position that the “jeopardize your job” leaflet is lawful, nothing connects these separate writings or otherwise supports Counsel for the General Counsel’s contention that anyone who reviewed the Arezzo memorandum, which was posted after the election, considered it in light of that single line of a leaflet distributed many weeks earlier.

Counsel for the General Counsel also echoes a rationale the ALJ offered to support her conclusion, maintaining that the record does not include anything validating the circumstances that prompted Arezzo to post his memorandum along with the workplace violence prevention policy (Brief at 14). The Employer’s answer to this is the same as its argument against the ALJ’s mistaken invocation of this rationale: the ALJ herself pointed out that whether an unfair labor practice was committed depends upon what an employee reasonably would understand in reading the two documents, and the Employer has emphasized that the ordinary employee would have no independent knowledge of what transpired between the employees about whom Arezzo wrote in his memorandum. It necessarily follows that evidence concerning the incident about which Arezzo wrote is not probative in any respect. This is precisely why the Employer concluded that it could stipulate the facts; all that mattered was the language of the postings. For this reason, the ALJ irrevocably tainted her analysis by setting forth this rationale for her decision and Counsel for the General Counsel compounds that mistake by trotting it out yet again without demonstrating why the Employer’s argument is not correct.

One final point related to that immediately above arises out of Counsel for the General Counsel’s reference to the Employer “reissuing” the workplace violence prevention policy (Brief at 13). The ALJ also utilized that vernacular, titling her analysis “The Reissuance of Respondent’s Workplace Violence Policy” (ALJD 17:41) and using the term “reissuance”

several additional times in her decision (e.g., ALJD 22:1-2; 23:5). The depiction of the Employer's posting of a longstanding policy document next to Arezzo's memorandum as a "reissuance" further betrays the ALJ's analysis, suggesting an implicit conclusion by the ALJ that the Employer exploited the situation (which, as indicated above, the ALJ apparently believed, without basis, may have been imagined or at least exaggerated or concocted) to re-promulgate the workplace violence prevention policy with an unlawful purpose. Since the unfair labor practice alleged did not require an unlawful motive, the Employer neither had notice that motive was an issue nor sought to address it herein, and nothing in the record supports an inference of the existence of an unlawful motive, the Board should reverse the ALJ's conclusion insofar as Counsel for the General Counsel's brief has revealed how the ALJ's conclusion was further tainted by such faulty analysis.

CONCLUSION

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

Respectfully submitted,

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Dated: November 19, 2013

CERTIFICATE OF SERVICE

The undersigned hereby certifies that copies of the aforesaid Reply Memorandum of Care

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