

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

SPACE NEEDLE, LLC

and

UNITE HERE! LOCAL 8

and

JULIA DUBE, an Individual

**Cases 19-CA-098908
 19-CA-098988
 19-CA-098936
 19-CA-108459**

19-CA-107024

**COUNSEL FOR THE GENERAL COUNSEL'S LIMITED
EXCEPTIONS AND SUPPORTING BRIEF**

Pursuant to § 102.46(a) of the Board's Rules and Regulations, Series 8, as amended, Counsel for the General Counsel ("CGC") submits the following limited exceptions and supporting brief regarding the March 5, 2014, Decision and recommended Order of Administrative Law Judge Mary Miller Cracraft the ("ALJ") in the above-captioned matter. (See JD(SF)-05-04)

Exception No. 1

The ALJ found that Respondent violated §§ 8(a)(1) and (5) of the Act by reneging on its agreement to reinstitute payroll dues deduction; specifically, the ALJ found that, although Respondent and the Union entered into an agreement on January 2, 2013, to reinstate dues deduction, Respondent unlawfully reneged on that agreement on February 11, 2013. (ALJD 5:20-21) Despite this finding, Judge Cracraft inadvertently omitted language remedying this violation in her recommended Order and Notice to Employees. The CGC excepts to this ministerial oversight and asks that the Board revise the Order and Notice to Employees in accordance with Board precedent.

The Board's standard remedy for an employer's unlawful failure to deduct dues where employees have individually signed checkoff authorizations is to order the respondent to reimburse the union for any dues it failed to deduct and remit them to the union, with interest. *West Coast Cintas Corp.*, 291 NLRB 152, 156 (1988); *Texaco, Inc.*, 264 NLRB 1132, 1134 (1982). Additionally, the Board prohibits the employer from recouping the amount of dues it is required to reimburse the union from its employees. *Alamo Rent-A-Car*, 359 NLRB No. 149, slip op. at 4 (2013).

Accordingly, by this Exception, the CGC requests that the Board: (a) revise the ALJ's recommended Order to require that Respondent remit to the Union all the dues it failed to deduct and remit after it reneged on its agreement to reinstitute dues deduction, with interest and without recouping that amount from its employees; and (b) revise the ALJ's recommended Notice to Employees to include the statement, "WE WILL remit to the Union an amount equal to the dues it would have received had we reinstated payroll deduction on January 29, 2013, as agreed, and WE WILL NOT seek to recoup those monies from our employees."

Exception No. 2

The ALJ determined that statements by Sous Chef Harold Fields ("Fields") to Line Cook Andrew Roos ("Roos") did not constitute an unlawful interrogation because Fields did not directly ask about Roos' union sympathies. (ALJD 12:10-16) CGC respectfully excepts to this finding and requests that the Board reverse this determination because the credited testimony establishes a violation of § 8(a)(1) of the Act.

The ALJ fully credited Roos' unrebutted testimony regarding the one-on-one meeting he had with Fields. (ALJD 12:5) The meeting occurred shortly after Roos began his shift, when Fields approached him and told him they needed to speak. Fields led Roos out of the kitchen to a table in the restaurant. (TR 361) After sitting Roos down, Fields handed Roos a letter concerning his right to withdraw his union membership, and, according to the ALJ, said:

he knew things were getting a little crazy "around here" and he wanted to let Roos know his options concerning the Union. Fields told Roos one of his options was to resign from the Union without any effect on his wages, benefits, or seniority. Fields said he knew what it could be like when a union comes in and tries to take over. Fields stated, "I know you're a smart guy and you'll make the right decision. I know you kind of see which way the wind is blowing." Fields asked if Roos had any questions and Roos responded that he did not.

(ALJD 11-12:49-4; see TR 361). This letter was found to be the type used to obtain employee responses in Respondent's unlawful campaign to solicit employees to withdraw their union membership. (ALJD 7-10:43-15).

The Board's test for determining whether an employer's statements to or communications with employees violate § 8(a)(1) is an objective one, *i.e.*, whether the interrogation reasonably tends to interfere with, restrain or coerce employees in the exercise of their § 7 rights. *Rossmore House*, 269 NLRB 1176, 1177-78 (1984), *aff'd sub nom. Hotel Employees Local 11 v. NLRB*, 770 F.2d 1006 (9th Cir. 1985).

In a case factually aligned with the instant matter, the Board upheld the ALJ's finding that the employer engaged in an unlawful interrogation when a supervisor asked two employees, "how did it go?" after they attended an employer-sponsored anti-union

meeting based on five criteria: (1) the questioning was systematic; (2) the questioning followed on the heels of obligatory antiunion meeting; (3) the circumstances of the questioning were designed to cause the employees to divulge union sympathies; (4) the questioning occurred during a union organizing campaign; and (5) there was no evidence that the recipient employees of the questioning were “prominent union sympathizers.” *Springs Motel*, 280 NLRB 284, n.2, 286 (1986).

As in *Spring Motel*, Fields’ questioning of Roos was part of a systematic effort to solicit employees to resign from the Union, and determine which employees would do so. Also, as in *Springs Motel*, Fields’ seemingly simple query, asking Roos if he had questions, was an implicit invitation for Roos to reveal his union sympathies; *i.e.*, Roos was called away from the work floor to a one-on-one meeting, the question came after Fields informed Roos how he could resign from the union, and Fields had heightened the intensity of the meeting just before asking Roos if any questions by saying he knew Roos would “make the right decision” and “I know you kind of see which way the wind is blowing.” Finally, there is no evidence that Roos was a known union supporter. In sum, as in *Spring Motel*, Fields’ statements amount to an unlawful interrogation.

Even if the Board were hesitant to label the violation an “interrogation,” Fields’ statements could simply be found violative of § 8(a)(1) as unlawfully coercive. While the Complaint did not specifically plead Fields’ statements as “coercive,” “[i]t is well settled that the Board may find an remedy a violation even in the absence of a specified allegation in the complaint if the issue is closely connected to the subject matter of the complaint and has been fully litigated.” *Pergament United Sales*, 296 NLRB 333, 334 (1989). For example, in *Greater Omaha Packing Co.*, 360 NLRB No. 62, slip op.

(2014), the Board found that a manager's asking an employee what he wanted in relation to a work stoppage was not an interrogation as alleged in the complaint. *Id.* slip op. at 2. However, it nevertheless was found violative as unlawfully coercive. *Id.* The Board explained that the statement was coercive because it conveyed the employer's displeasure with the employee's protected conduct. *Id.*

The Board further found that the requirements of closely related allegations and fully litigated in order to find a violation not alleged in the complaint were met. *Id.* With respect to the "closely related" requirement, the Board recognized that an interrogation and coercive statement require the same totality of the circumstances analysis to determine if the conduct at issue would tend to coerce an employee in the exercise of § 7 rights. *Id.* slip op. at 3. As to the "fully litigated" requirement, the Board noted the more specific allegation of interrogation would not prevent the employer from presenting exculpatory evidence or alter its defense. *Id.* Indeed, it pointed to the very fact that the employer argued on brief that the statement was not coercive as evidence the issue was fully litigated. *Id.*

As in *Greater Omaha Packing Co.*, the interrogation here could have just as easily been pled as a coercive statement, as both allegations concern the same nexus of facts. The issue was fully litigated, as evidenced by the fact that Respondent argued on brief to the ALJ that neither Fields' statements nor the environment in which they were made were coercive. (R. Brief 46-47). Finally, there is no doubt that from the totality of the circumstances that Fields clearly conveyed to Roos Respondent's displeasure with employee protected conduct – namely union membership. Thus, as the Board explained in *Greater Omaha Packing Co.*, it was coercive.

Accordingly, by this Exception, the CGC requests the Board: (a) revise the ALJ's Conclusions of Law to find that Respondent unlawfully interrogated employees about their union sympathies and/or, in the alternative, made unlawful coercive statements concerning employee union sentiments; (b) revise the ALJ's recommended Order to include that Respondent cease and desist from asking employees about their union sympathies and/or make coercive statements about union sentiments; and (c) revise the ALJ's recommended Notice to Employees to include the statement, "WE WILL NOT ask you about your union sympathies and/or make coercive statements about your union sentiments."

DATED at Seattle, Washington, this 2nd day of April, 2014.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that a copy of Counsel for the General Counsel's Limited Exceptions and Supporting Brief was served on the 2nd day of April, 2014, on the following parties:

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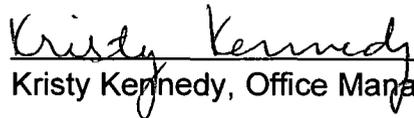
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