

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

ROUNDY'S INC.,

Respondent,

and

Case 30-CA-17185

MILWAUKEE BUILDING AND
CONSTRUCTION COUNCIL, AFL-CIO,

Charging Party

Andrew S. Gollin, Esq., of Milwaukee, WI,
for the General Counsel.

Ying Tao Ho, Esq. (Previant, Goldberg,
Uelmen, Gratz, Miller & Brueggeman, S.C.), of
Milwaukee, WI, for the Charging Party.

Scott A. Gore, Esq. and Mark L. Stolzenburg, Esq.
(Laner, Muchin, Dombrow, Becker, Levin
& Tominberg, Ltd.), of Chicago, IL, for the Respondent.

DECISION

Statement of the Case

Robert A. Giannasi, Administrative Law Judge. This case was tried in Milwaukee, Wisconsin, on November 15 and December 22, 2005.¹ The complaint alleges that Respondent violated Section 8(a)(1) of the Act by prohibiting handbilling by nonemployee agents of the Charging Party (hereafter the Union or the Council) on property owned or leased by it, while permitting nonunion solicitations and distributions on such property. The complaint also alleges that Respondent violated the Act by having the handbillers removed from its property and having two of them issued citations. The Respondent filed an answer denying the essential allegations in the complaint. After the trial, the parties filed briefs, which I have read and considered.

¹ By agreement, the December 22 session was held via videoconference; the witness and counsel were in Milwaukee and the judge was in Washington, D.C.

Based on the entire record, including the stipulations of the parties, and the testimony of the witnesses and my observation of their demeanor, I make the following:

Findings of Fact

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Jurisdiction

Respondent, a corporation with an office and place of business in Milwaukee, Wisconsin, operates grocery stores throughout southeastern Wisconsin. During a representative one-year period, Respondent derived gross revenues in excess of \$500,000, and received goods and materials valued in excess of \$50,000 directly from points outside Wisconsin. Accordingly, I find, as Respondent admits, that it is engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.

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The Council is a labor organization within the meaning of Section 2(5) of the Act.

The Alleged Unfair Labor Practices

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Background

The Council, a central body comprised of construction industry local unions in the Milwaukee area, coordinates the activities of its member unions. For some time, the Council has been concerned that Respondent, which operates grocery stores in the Milwaukee area under the name Pick N Save, has constructed new stores and expanded or remodeled existing stores by using nonunion contractors, who do not pay their employees the prevailing area standard wage rates and benefits. The Council believes that using contractors who pay less than prevailing wages and benefits undercuts and jeopardizes the wages and benefits collectively bargained by their member unions. Among the offending contractors, according to the Council, were Performance Roofing, Northern Roofing, Glass, Inc., and Merit Painting, all of whom have been used to perform work on Respondent's stores.²

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Respondent, whose own employees are represented by labor organizations, leases all but one of the locations at which it has stores in the Milwaukee area. At its leased locations, Respondent has arrangements with its landlords, whereby the landlord agrees to construct and remodel stores to Respondent's specifications. Respondent, however, retains the authority to approve the contractors selected to perform the work. Since the lease arrangements essentially provide that construction costs are passed through to Respondent in rental charges, Respondent is interested in holding down construction costs. It therefore insists on the selection of contractors who provide the

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² The relevant prevailing or area standard wage and benefits rate for the construction work sought by the Council is, in effect, the wage and benefits rate in the collective bargaining agreements of the Council's member unions. The prevailing wage rates and benefits, which apply to public construction projects, are determined by the State of Wisconsin after surveying and analyzing wage rates and benefits paid by representative contractors in the particular crafts. The area standard rates and benefits are set annually.

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low bid on construction projects both with respect to its leased locations and with respect to the location it owns outright. But, even with respect to its leased premises, Respondent retains the authority to approve the contractors selected to perform the work on its stores; indeed, even on its leased premises, Respondent sometimes
 5 contracts directly for remodeling work. Thus, Respondent may deviate from using low-bid contractors where the quality of the work is a more significant concern or where local ordinances provide that minority contractors are to be used for some construction work. Respondent also sometimes prefers that contractors be used who have some
 10 familiarity with its type of business.

Representatives of the Council have met with representatives of the Respondent about the Council's concerns that Respondent was using nonunion contractors in the construction and remodeling of its stores. The parties met on several occasions in the
 15 winter and spring of 2005. The efforts of the Council to have its union contractors be given an opportunity to bid on Respondent's construction work were rebuffed by Respondent's representatives, who took the position that the selection of contractors was up to its landlords and that Respondent was either restricted to or preferred using
 20 only the low bidders. As a practical matter this policy excluded using union contractors who usually paid higher wages and benefits. When the meetings proved unsuccessful in resolving the differences between the Council and the Respondent, the Council authorized and began a campaign of handbilling at Respondent's retail stores.

25 The Council Handbills at Respondent's Stores

From about April 6, 2005 through about the end of June 2005, agents of the Council distributed informational handbills in front of 26 of Respondent's stores. The handbilling, which took place on Respondent's private property, was peaceful.³ The
 30 Council did not picket. Respondent's agents undertook to expel the handbillers. They were responsible for contacting police or having the landlord contact police to expel the handbillers, who left the premises as a result. Two handbillers, Steven Schreiner and Gerald Rintamaki, were issued citations and were required to appear in court to contest
 35 the citations. The legal matters were resolved without a criminal conviction, and the handbillers had the assistance of counsel employed and paid by one of the constituent union members of the Council.

40 ³ In his brief, counsel for the General Counsel asserts that Respondent has not shown that the handbilling took place on property in which Respondent had a sufficient interest to prohibit the handbilling (GC Br. 20-22). That is not an issue in this case. The General Counsel's complaint alleges that Union agents handbilled "on Respondent's property and/or property
 45 leased by Respondent." The gravamen of the complaint was that Respondent's prohibition of the handbilling was unlawful because it permitted similar activity by nonunion entities on that same property. This is essentially a disparate treatment theory, and the theory upon which the case was tried. The parties assumed at all stages of this litigation that the Respondent had a property interest sufficient to oust the handbillers. Indeed, the General Counsel's basic
 50 argument was that the Respondent, having such a property interest, permitted similar conduct by nonunion entities. It is too late now—and a potential due process problem—for the General Counsel to change the theory of the case on brief.

The Council's handbills identified Respondent or Pick-N-Save as using nonunion contractors, who did not pay their employees prevailing wages and benefits, to build or remodel its stores. The handbills asked consumers not to patronize Respondent, accusing Respondent of saving money by using cheap labor to build and remodel its stores and not passing those savings on to consumers. The Council suggested that consumers could achieve savings of their own by shopping at competitor stores, pointing out price differences favoring products sold by competitors. It also urged consumers to contact Respondent in support of the Council's efforts to protect the prevailing wage rates and benefits of its member unions.⁴

The parties stipulated that Respondent permitted widespread solicitation and distribution of literature on private property both inside and outside its stores for at least the last three years. For example, Respondent permitted Salvation Army bellringers to solicit donations, annually, from November through December; it permitted the Boy Scouts to sell cornstalks, popcorn and other items, and the Girl Scouts to sell cookies and other items, at multiple times throughout the year; it permitted the Veterans of Foreign Wars to sell poppies, and the Shriners to sell onions, multiple times throughout the year; and it permitted the Hunger Task Force, the Red Cross and Second Harvest to solicit donations at various times.

The parties also stipulated that Respondent regularly allows various other civic, political and/or charitable solicitations, inside or outside several of its stores, and that Respondent maintains bulletin boards inside many of its stores, whereby the public may solicit items for sale or advertise community and organizational events. There was uncontradicted testimony that an environmental group solicited support and contributions, and a judicial candidate handed out campaign literature, outside of its stores; and that Respondent also permitted a state senator to set up a table inside of one of its stores in order to distribute campaign literature or otherwise meet with potential voters.

Discussion and Analysis

Let me begin by stating what this case does and does not involve. It does not involve organizing activities, either by employees or non-employee union representatives. And it does not involve a bargaining dispute between union-represented employees and their employer. It deals with nonemployee union representatives publicizing a dispute between a union and an employer over using contractors, in the construction or remodeling of its stores, who do not adhere to area wage standards. It involves peaceful handbilling, not picketing, on private, not public, property. In addition to publicizing what is described as an area standards dispute with

⁴ The evidence shows that several of the contractors used by Respondent, including those referred to in the handbills, did, in fact, fail to pay prevailing wage rates and benefits. The Council adequately researched those wage rates and benefits and knew they were below the prevailing standards before it prepared the handbills. Respondent submitted no evidence to the contrary; and it also conceded that the price comparisons in the Council's handbills were accurate.

5 the employer over its store construction policy, however, the handbilling on the
employer's property also urged a consumer boycott of the employer. The case does not
involve protest or boycott messages emanating from newspapers, radio or TV or from
handbilling on public property. It involves messages of protest about an area standards
dispute and a suggested boycott disseminated by handbilling on Respondent's private
property. It is not disputed that the Respondent took steps to oust the handbillers from
its private property or that it permitted other nonunion nonboycott solicitation and
distribution on its property.

10 The General Counsel alleges that, by permitting widespread charitable, political
and other solicitation and distributions on its private property, the Respondent could not
ban what is allegedly similar conduct by the union handbillers. This is essentially an
argument that Respondent discriminated against the handbillers. But nothing in the
15 complaint or in the General Counsel's presentation suggests that the Respondent's
ouster of the handbillers was based on an anti-union motive. Indeed, the complaint
does not allege a violation of Section 8(a)(3) of the Act. Rather, the General Counsel
relies on Board cases which find, after balancing competing interests and on an
essentially disparate treatment analysis, that banning union activity on private property
20 while permitting other solicitation or distribution on that same property interferes with
protected activity under Section 8(a)(1) of the Act. See *Sandusky Mall Co.*, 329 NLRB
618 (1999), enf. denied in relevant part 242 F.3d 682 (6th Cir. 2001), and cases cited
therein. The Charging Party makes essentially the same points.

25 The Respondent makes a multi-pronged attack on the General Counsel's case.
Its essential argument, however, is that the handbilling was not protected by the Act
because it used Respondent's property to seek a boycott of Respondent's business.
Respondent also alleges that permitting solicitation by charitable, civic or political
30 groups is not the same as urging a boycott of a business and therefore there is no
discrimination as alleged by the General Counsel. Respondent also urges that the
Board reverse its ruling in *Sandusky Mall* and adopt the reasoning of Member Hurtgen's
dissent in *Sandusky Mall* as well as the contrary position of several circuit courts which
35 more narrowly describes the kind of discrimination needed to justify union activity on
private property.

40 In my view, the Board's decision in *Sandusky Mall* is controlling and the decision
cannot be distinguished in any meaningful way. In that case, the Board held, in a 3-2
decision, that a shopping mall owner violated Section 8(a)(1) of the Act by prohibiting
peaceful union handbilling by union representatives on its property and by having the
handbillers arrested and charged with criminal trespass. The handbilling targeted a mall
tenant accused of using a nonunion contractor, who did not pay prevailing area wages
45 and benefits, to remodel its store. The handbills asked the public not to patronize the
tenant because its employment of the nonunion contractor undermined area standards.
The mall owner had allowed charitable, civic and other organizations to solicit on its
premises, in accordance with its policy to permit such solicitation only where it benefits
the business interest or good will of the mall or its tenants and does not create
50 controversy or political divisiveness, a policy which it consistently followed.

The Board majority, citing applicable authorities, including the Supreme Court's

decision in *Babcock & Wilcox Company*, 351 U.S. 105, 112 (1956), found that the handbilling was protected by the Act, notwithstanding that it was undertaken on private property, and the mall owner's prohibition of the handbilling was discrimination because the mall owner permitted other nonunion solicitation on its property.⁵ Noting its disagreement with a more narrow definition of discrimination articulated by the Sixth Circuit in *Cleveland Real Estate Partners v. NLRB*, 95 F.3d 457, 465 (6th Cir. 1996), the Board stated that the mall owner's policy of permitting some solicitation, but not the union's, still amounted to discrimination under the Act. Although the Board did not specifically address the boycott message of the handbills, it implicitly affirmed that that message did not render the handbilling unprotected or the discrimination any less significant by finding a violation in those circumstances. In addition, it disagreed with the Court's approach in *Cleveland Real Estate Partners*, which also involved a boycott message. The Board rejected the mall owner's attempted distinction of the two types of solicitation as "little more than an employer permitting on its property solicitation that it likes and forbidding solicitation that it dislikes [citation omitted]." Accordingly, in *Sandusky Mall*, the Board majority found that the mall owner violated the Act by "discriminatorily prohibiting the Union's representatives from distributing area standards handbills on the mall property and by summoning the police to have the representatives arrested."

Members Hurtgen and Brame wrote separate dissents in *Sandusky Mall*. Both took the position that urging a boycott of one of the mall tenants was not the same as the type of charitable and other solicitation permitted on the mall property. Member Hurtgen's dissent makes clear that he viewed messages in support of a boycott as qualitatively different from other solicitation that does not have a boycott message. He therefore found no discrimination. He concluded that the mall owner would have forbidden "boycott activity" on its property by anyone, whether it was a union or not, because such activity would be detrimental to the business of the mall tenants, "irrespective of the identity of the boycotter."

Here, as in *Sandusky Mall*, the handbillers were on private property and they urged a boycott of a mall tenant because it employed a nonunion contractor who was not paying area standards. In *Sandusky Mall*, The Board found that the handbilling was protected activity, notwithstanding the boycott message. The Respondent attempts to distinguish *Sandusky Mall* by suggesting that the handbilling in this case was unprotected because it had no control over the selection of the contractor who built or remodeled its stores, raising a sort of secondary boycott or "no right of control" argument. The Board's decision in *Sandusky Mall* is silent as to whether the mall tenant had any control over the selection of the contractor who was remodeling its store. I doubt that Respondent's suggested distinction makes a difference, but the evidence in this case shows that, both in practice and in the lease agreements, Respondent had

⁵ In *Babcock & Wilcox*, the Supreme Court stated that "an employer may validly post his property . . . [if he] does not discriminate against the union by allowing other distribution." As the Board observed, that discrimination exception has survived in subsequent Supreme Court, courts of appeals and Board decisions, although the definition of discrimination has been applied somewhat more narrowly by some courts of appeals than by the Board.

5 sufficient authority to select or suggest contractors, although, in most instances, it chose
to go with the low bidder because the construction costs were ultimately paid by it.
Contrary to Respondent's further suggestion that the Council's only dispute was with the
nonunion contractors, the Council's dispute in this case was with the Respondent; it
10 wanted Respondent to use whatever influence it had to employ union contractors to
construct and remodel its stores. Thus, contrary to Respondent's view, it is
inconsequential that a contractor was not actually present at Respondent's stores while
the handbilling was in progress. In any event, this entire argument is of no moment
15 because the Supreme Court's decision in *Edward J. Debartolo Corp. v. Florida Gulf
Coast Building & Construction Trades Council*, 485 U.S. 568, 583-587 (1988) makes it
clear that handbilling is not prohibited under the secondary boycott sections of the Act.

15 In addition, here, as in *Sandusky Mall*, the discrimination is shown by the
employer's tolerance of other nonunion solicitation on its property. In neither case was
such nonunion solicitation the type of isolated conduct that would negate a finding of
discrimination. See *Hammary Mfg. Corp.*, 265 NLRB 57 (1982). And, as indicated
above, in both cases, the handbillers urged a boycott of the alleged offending entity,
20 while the nonunion solicitors did not. But, as indicated above, the Board majority in
Sandusky Mall did not view the boycott message as significant in its disparate treatment
analysis. In some ways, this would seem to be a stronger case than *Sandusky Mall*
because, in that case, the mall owner had a policy against permitting controversial or
politically divisive solicitation on its property and it consistently applied that policy. Here,
25 the Respondent permitted nonunion political solicitation on its property, a clearly
controversial topic. Moreover, solicitation by an environmental group, which
Respondent also permitted here, might well have offended some of Respondent's
customers who were not favorably disposed to the "Green" movement. Tolerance of
such arguably controversial solicitation in this case offers more support for a finding of
30 disparate treatment here than existed in *Sandusky Mall*.

In the last analysis, however, the determining factor in both *Sandusky Mall* and
this case is whether the *Babcock & Wilcox* discrimination exception to an employer's
35 unfettered right to use his private property applies where the otherwise protected union
handbilling urges a business boycott of the employer and the allegedly comparable
nonunion solicitation does not. The dissenters in *Sandusky Mall* said "no;" and the
majority, without directly addressing the views of the dissenters on this point, said "yes."
The Board's composition has changed significantly since *Sandusky Mall* was decided
40 by closely divided members over 6 years ago. And, during that time, more circuit courts
have weighed in with their own definitions of what kind of comparability is necessary to
establish discrimination in the context of union activity. It is thus likely that the present
Board would want to take a fresh look at the issue. But I am bound by extant Board
45 law, which is set forth in the majority's *Sandusky Mall* opinion.⁶ I do not believe that
case can rationally be distinguished from the instant case in any meaningful way. I
therefore find, based on the Board's decision in *Sandusky Mall*, that Respondent
violated Section 8(a)(1) of the Act by prohibiting the Council's handbilling on its property
while permitting nonunion solicitation on that property, and by having two of the
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⁶ See *Iowa Beef Packers*, 144 NLRB 615, 616 (1963).

handbillers issued citations.

Conclusions of Law

5 1. By discriminatorily prohibiting Council representatives from handbilling on its property outside its stores, while permitting other solicitation and distributions on that property, and, by having handbillers issued citations, Respondent violated Section 8(a)(1) of the Act.

10 2. The above violations are unfair labor practices within the meaning of the Act.

Remedy

15 Having found that Respondent violated Section 8(a)(1) of the Act, I will order it to cease and desist from engaging in conduct found unlawful and to take certain affirmative action, including the posting of an appropriate notice, that will effectuate the policy of the Act. The remedy shall include a provision that Respondent take steps to have the appropriate law enforcement authorities remove any reference to the citations issued to handbillers Steven Schreiner and Gerald Rintamaki. In accordance with the General Counsel's concession (GC Br. 3 at n. 3), there will be no provision providing reimbursement of legal fees since it appears that Schreiner and Rintamaki suffered no losses due to their legal representation in connection with the citations. The General Counsel also asks that I specifically order the notices to be posted on bulletin boards at the entrance to Respondent's stores because that is the point closest to where the handbilling took place. I am reluctant to do so because the General Counsel's request seems to go beyond what the Board ordered in *Sandusky Mall* and the Respondent has not had the opportunity to respond to the request. In these circumstances, I will follow *Sandusky Mall* and use the traditional notice-posting language of the order in that case.⁷

On these findings of fact and conclusions of law, and on the entire record herein, I issue the following recommended ⁸

ORDER

The Respondent, Roundy's Inc., its officers, agents, successors and assigns, shall

⁷ Actually, the Board's notice in *Sandusky Mall*, which is addressed to the employer's employees, seems an odd remedy for the ouster and arrest of nonemployee handbillers whose area standards message had absolutely nothing to do with the employer's employees. Indeed, the boycott urged by the handbillers might well have adversely affected those employees by jeopardizing their jobs through the consequent loss of business due to the boycott of their employer.

⁸ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions and recommended order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be waived for all purposes.

1. Cease and desist from

5 (a) Discriminatorily prohibiting representatives of the Council from distributing handbills on its property, by demanding that they leave the property and by having them issued citations, or, in any other way, interfering with them.

10 (b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

15 (a) Within 14 days from the date of this order, notify the appropriate law enforcement authorities, in writing, with copies to the Council, that the Board has found that the citations issued to Steven Schreiber and Gerald Rintamaki were unlawful and ask them to expunge any citations and other records dealing with the events in this case.

20 (b) Within 14 days after service by the Region, post at all of its stores, at which Council representatives were prohibited from handbilling, copies of the attached notice marked "Appendix."⁹ Copies of the notice, on forms provided by the Regional Director for Region 30, after being signed by Respondent's representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed any of the stores involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by Respondent since May 9, 2005, the date the first charge was filed in this case.

30 (c) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps the Respondent has taken to comply with this order.

40 Dated, Washington, D.C., February 8, 2006

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Robert A. Giannasi
Administrative Law Judge

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⁹ If this order is enforced by a judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

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APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice

Section 7 of the Act gives employees these rights.

- To organize
- To form, join or assist any union
- To bargain collectively through representatives of their own choice
- To act together for other mutual aid or protection
- To choose not to engage in any of these protected concerted activities.

WE WILL NOT discriminatorily prohibit representatives of Milwaukee Building and Construction Trades Council, AFL-CIO from distributing handbills on property owned or leased by Roundy's Inc., by demanding that they leave the property, having them issued citations, or, in any other way, interfering with them.

WE WILL NOT, in any like or related manner, interfere with, restrain or coerce you in the exercise of rights guaranteed you by Section 7 of the Act.

WE WILL, within 14 days of the Board's order, notify the applicable law enforcement authorities, in writing, that the citations issued to Steven Schreiber and Gerald Rintamaki were found to be unlawful by the Board and ask them to expunge any citations and other records dealing with the citations. Copies of such notification and request will be sent to the above individuals and the Council.

ROUNDY'S INC.

(Employer)

Dated _____ By _____
(Representative) (Title)

Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov.

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310 West Wisconsin Avenue, Federal Plaza, Suite 700

Milwaukee, Wisconsin 53203-2211

Hours: 8 a.m. to 4:30 p.m.

414-297-3861.

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THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, 414-297-1819.

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(Employer)

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