IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

CORNELE A. OVERSTREET,
Regional Director, Region 28 of the
National Labor Relations Board,
For and On Behalf of the
NATIONAL LABOR RELATIONS BOARD,

Petitioner,

v.

Civil No. 1:13-cv-165-RB-LFG

SFTC, LLC D/B/A
SANTA FE TORTILLA COMPANY,

Respondent.

PETITIONER'S REPLY BRIEF IN
SUPPORT OF MOTION FOR CLARIFICATION

In its August 16, 2013, Response to Petitioner's Motion for Clarification (Response), Respondent asserts, in pertinent part, that there is no need for the clarification sought by Petitioner because "Respondent is already prohibited from engaging in such conduct by virtue of the protections afforded employees by the [Act]." (Docket # 60, p. 2) Furthermore, Respondent claims that, rather than clarification, Petitioner is now seeking "additional relief," which the Court had already concluded in its "Finding of Facts, Conclusions of Law and Memorandum Order . . . that '[t]he Board has not met its burden to show this additional relief is reasonably necessary to preserve the ultimate remedial power of the Board.'" (Docket # 60, p. 1) (quoting Docket # 57, p. 18).

Respondent's assertions are misplaced. Regarding Respondent's claim that the Court already concluded Petitioner has not shown such relief is necessary, Respondent parses sentences

from the Court's Opinion to fit its misplaced claim. The full quotation by the Court, which Respondent relies upon, is as follows:

> Although ALJ Kocol recommends that the Board order additional relief, including back pay, the removal from SFTC's files any reference to the unlawful discharges, the posting of a notice to employees regarding their rights under the NLRA, and certification of compliance, (ALJ Decision at 20–22), the Court concludes that this additional relief should not be ordered as part of the Court's temporary injunction. The Board has not met its burden to show that this additional relief is "reasonably necessary to preserve the ultimate remedial power of the Board."

Overstreet v. SFTC, LLC 2013 WL 3921178 at *10. The Court is clearly referring to the discretion provisions ordered by ALJ Kocol, in pages 20-22 of his decision, not to the **cease and desist** provisions, set forth on page 20 of the ALJ decision, which Petitioner seeks to clarify in its Motion. Section 10(c) of the Act states that, whenever a violation occurs, the Board "*shall* issue . . . an order requiring such persons to cease and desist from such unfair labor practices" as well as to take such affirmative action including reinstatement of employees. . . as will effectuate the policies of the Act." (emphasis added) Accordingly, the cease and desist provisions are **mandatory** whenever the Board finds a violation, whereas the Board has great discretion in fashioning affirmative relief. *U.S. v. Myers* 106 F.3d 936, 941 (10th Cir. 1997) (finding it is a basic canon of statutory construction that the word "shall" indicates a mandatory intent); *Anderson v. Yungkau*, 329 U.S. 482, 485 (1947) (finding the word 'shall' in a statute is ordinarily "the language of command"); *NLRB v. Pennsylvania Greyhound Lines,* 303 U.S. 261, 265 (1938) (Board has discretion in determining "whether the case is one requiring an affirmative order, and in choosing the particular affirmative relief to be ordered.").

Consequently, while the Court determined no other discretionary relief was necessary to preserve the Board's ultimate remedial power, contrary to Respondent's claim, it made no

findings whether any cease and desists provisions were necessary. Instead, the Court specifically "granted the Board's Petition, as modified on June 26, 2013;" that Petition specifically asks that the Court issue an order with the cease and desist provisions set forth in Petitioner's Motion. *See* Docket #2, pg. 14-18.

Next, Respondent's claim that the Motion is improper, because the Act already prohibits Respondent from breaking the law, is specious. As the Fifth Circuit noted, in a 10(j) proceeding, "a decree enjoining a party from violating the law . . . adequately protects the interests of the [Committee], since employers can be held in contempt if they try to dissipate [Committee] strength in any unlawful manner." *Boire v. Pilot Freight Carriers, Inc.* 515 F.2d 1185, 1193 (5th Cir. 1975).

Because this Court granted the modified Petition, but did not include the cease and desist provisions sought by the Petition, Petitioner's Motion is proper, and Petitioner respectfully requests it be granted.

Dated at Albuquerque, New Mexico, this 27th day of August, 2013

Respectfully submitted,

/s/ Sophia Alonso

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CERTIFICATE OF SERVICE

I hereby certify that on the 27th day of August 2013, Petitioner's Reply Brief in Support of Motion for Clarification, was served on the parties listed below.

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