

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

**WINGATE OF DUTCHESS, INC.**

**and**

**Cases 03-CA-140576  
03-CA-145659**

**1199 SEIU UNITED HEALTH CARE  
WORKERS EAST**

**GENERAL COUNSEL'S BRIEF IN SUPPORT OF CROSS-EXCEPTIONS  
TO THE DECISION OF THE ADMINISTRATIVE LAW JUDGE**

Pursuant to Section 102.46(e) of the Board's Rules and Regulations, Counsel for the General Counsel submits this Brief in support of Cross-Exceptions to the Decision of Administrative Law Judge Mark Carissimi (ALJ), dated November 16, 2015, in the above-captioned cases. Under separate cover, General Counsel also files with the Board on this date an Answering Brief to Wingate of Dutchess, Inc. (Respondent's) exceptions. It is respectfully submitted that in all respects, other than what is excepted to herein, the findings of the ALJ are appropriate, proper and fully supported by the credible record evidence.

**I. PRELIMINARY STATEMENT**

The ALJ found that Respondent committed numerous and serious unfair labor practices. More specifically, the ALJ concluded that Respondent violated Section 8(a)(1) of the Act by recruiting employees to campaign against 1199 SEIU United Healthcare Workers East (Union), expressing to employees the futility of attempting to obtain union representation by telling them that it would not allow the Union to come into its facility, coercively interrogating employees regarding their union sympathies, threatening employees with unspecified reprisals because of their involvement with the Union by telling them it wanted to let them know what they were getting into, directing employees and union representatives to remove themselves from a parking

lot adjacent to the Respondent's facility, calling the police in response to employees and union representatives engaging in protected Section 7 activity at an intersection near the Respondent's facility without having a reasonable basis to do so, engaging in surveillance and photographing employees engaged in protected Section 7 activity, impliedly threatening to discharge employees by telling them that their union activity was incompatible with continued employment with the Respondent, threatening employees with a loss of existing benefits if they selected the Union as their representative, threatening employees with the loss of hours for per diem employees if they selected the Union as their representative, expressing to employees the futility of selecting the Union as their representative by telling them that the Respondent would not sign a collective-bargaining agreement with the Union, sending text messages to employees in such a manner as to pressure them to make an observable choice with regard to their support for the Union, and by soliciting grievances from employees and impliedly promising to remedy them in order to discourage employees from supporting the Union. (ALJD at 71:21 – 72:21).<sup>1</sup>

The ALJ also found that Respondent violated Section 8(a)(1) and (3) of the Act by granting employees an attendance bonus in order to discourage them from supporting the Union, reinstating a weekly pay period in order to discourage employees from supporting the Union, granting employees a 2-percent wage increase in order to discourage them from supporting the Union, issuing Sandra Stewart a written verbal counseling on September 26, 2014,<sup>2</sup> suspending her on October 4 and discharging her on October 17, because of her Union activities. (ALJD at 26-36, 63-64, 72:23-37).

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<sup>1</sup> Throughout this brief the following references will be used: (ALJD at \_\_\_:\_\_\_) for the Administrative Law Judge's Decision at page(s): line(s); (GC Exh. \_\_\_) for General Counsel's exhibit; (CP Exh. \_\_\_) for Charging Party's exhibit; and (Tr. \_\_\_) for transcript page(s).

<sup>2</sup> All dates are in 2014 unless otherwise noted.

Finally, the ALJ found that because the Union obtained majority status by October 11, and the violations found above, two of which are “Hallmark” violations, have made a fair and free election improbable, a bargaining order effective retroactive to October 11 is an appropriate remedy for these violations. (ALJD at 68-71, 72:45 – 73:13).

In addition to the unfair labor practices found by the ALJ in this proceeding, General Counsel respectfully requests that the Board find and conclude that Respondent also violated Section 8(a)(1) of the Act, by telling an employee that she was being harassed because of her union activity, soliciting employee grievances, and implicitly promising employees the benefit of a 401(k) match, all of which are subjects of the Cross-Exceptions. Additionally, in finding that the Respondent discriminatorily suspended and discharged Sandra Stewart, the ALJ failed to require that the Respondent reimburse Stewart for search-for-work and work-related expenses regardless of whether Stewart received interim earnings for a particular quarter. Finally, in finding that Respondent’s announcement of a wage increase on August 22 violated Section 8(a)(1) of the Act, the ALJ inadvertently failed to order a remedy for this finding.

## **II. ARGUMENT**

### **A. Respondent violated Section 8(a)(1) of the Act by telling an employee that she was being harassed because of her union activity (Exception 1)**

On July 29, shortly after Director of Nursing Services Ann Nelson confronted employee Stewart about soliciting union authorization cards in the building, Administrator Clayton Harbby approached Stewart while she was in a patient’s room. Stewart was visibly upset after her confrontation with Nelson and informed Harbby that she felt Nelson had been harassing her. In response, Harbby told Stewart, “You’re the one putting yourself out there.” (Tr. 229-230). Stewart asked what Harbby meant and he replied “look what you’re wearing.” When Stewart

asked what he meant, he specifically pointed to her purple hair and yellow scrub top. Purple and yellow are the Union's colors. (Tr. 230). Harbby then told Stewart that she should educate herself before getting involved with the Union, because he wanted her to know what she was getting herself into. (ALJD at 13:38-45; Tr. 231).

As the ALJ properly found, Harbby's statements violated Section 8(a)(1) of the Act because they threatened unspecified reprisals for engaging in union activity. (ALJD at 14:4-7). The ALJ appropriately analyzed both comments under *Brown Transport Corp.*, in which the Board found a supervisor's statement that things "could be made rough" for an employee who supported the union constituted a threat of unspecified reprisals in violation of Section 8(a)(1) of the Act. 294 NLRB 969, 972-973 (1989). (ALJD at 14:1-4).

However, in addition to these comments threatening unspecified reprisals, they also violate Section 8(a)(1) of the Act because Harbby told Stewart that she was being harassed because of her union activity, as alleged in Paragraph VI(g) of the Complaint. Taken in context, Harbby's statement that Stewart was the one putting herself out there was made in response to Stewart's complaint that a supervisor was harassing her for engaging in union activity. This statement links Stewart's union activity with harassment by management, and tells Stewart that she was being harassed because of her union activity. Harbby's further comments suggest that reprisals such as harassment are what she deserves for engaging in union activity. Such comments are unlawful. *See Hoffman Fuel Co.*, 309 NLRB 327, 327 (1992) (citing *Philips Industries*, 295 NLRB 717, 730-731 (1989)). Accordingly, Respondent violated Section 8(a)(1) of the Act by telling Stewart that she was being harassed because of her union activity.

**B. Respondent violated Section 8(a)(1) of the Act when Diane McDonald solicited employee grievances (Exception 2)**

On a date in late August or early September, when Respondent had knowledge of the organizing campaign, unit manager Diane McDonald called employee Georgeann Allen into her office to ask about a resident. (Tr. 704). During the conversation, McDonald stated that she was going into a meeting with President Scott Schuster. McDonald asked Allen “if there was anything [Allen] would like her to bring up in there.” (Tr. 704). In response, Allen listed “the things I was concerned about from working here,” including her inability to afford health care and “other benefits that I felt were unfair.” (Tr. 705). McDonald replied that she “would throw some things out to [Schuster] when she met with him to see if she could make it better.” (Tr. 705). Although McDonald testified at the hearing, she did not testify about any conversation with Allen. (Tr. 1680-1715).

An employer's solicitation of grievances in the midst of a union campaign inherently constitutes an implied promise to remedy the grievances. *See Doane Pet Care*, 342 NLRB 1116, 1122 (2004), *citing Laboratory Corp. of America Holdings*, 333 NLRB 284 (2001); *Maple Grove Health Care Center*, 330 NLRB 775 (2000). While it is true that “an employer who has a past policy and practice of soliciting employees’ grievances may continue such a practice during an organizational campaign,” “an employer cannot rely on past practice to justify solicitation of grievances where the employer significantly alters its past manner and methods of solicitation.” *Wal Mart Stores*, 339 NLRB 1187, 1187 (2003), *citing Carbonneau Industries*, 228 NLRB 597, 598 (1977).

While Respondent arguably had a practice of soliciting grievances during “round-the-clock” meetings, Allen’s undisputed testimony establishes that McDonald solicited grievances from Allen one-on-one. While the petition for election had not yet been filed, Respondent had clear knowledge of union activity at the facility at this time. (Tr. 631-632, 718, 2057-2058).

Allen was a known union supporter who had participated in shift change activities and solicited cards from her fellow employees. McDonald explicitly told Allen she would bring Allen's grievances to Scott Schuster, the highest ranking official in the entire company. In fact she was going to bring the grievances to Schuster that very day, in a meeting she was about to attend. She told Allen she would "see if she could make it better." These comments constitute an unlawful solicitation of grievances during a union organizing campaign and an explicit promise to remedy the grievances, as alleged in paragraph VI(i) of the Complaint. (GC Exh. 51). Unlike *Wal Mart Stores*, McDonald's one-on-one solicitation of grievances from Allen was "significantly altered" from Respondent's practice of hearing employee complaints and suggestions during "round-the-clock" meetings and violated the Act.

Accordingly, Respondent violated Section 8(a)(1) of the Act by soliciting employee grievances.

**C. Respondent violated Section 8(a)(1) of the Act by implicitly promising employees the benefit of a 401(k) match (Exception 3)**

An employer cannot time the announcement of a benefit in order to discourage union support, and the Board may separately scrutinize the timing of the benefit announcement to determine its lawfulness. *Mercy Hospital Mercy Southwest Hospital*, 338 NLRB 545 (2002). *See, e.g., Capitol EMI Music*, 311 NLRB 997, 997 n. 4 (1993), *enfd.* 23 F.3d 399 (4th Cir. 1994). The announcement of benefits during a union campaign is presumed unlawful unless it can be shown that the benefits were planned and settled upon before the advent of union activity, the announcement was made for a legitimate business reason, or that an employer was following its past practice regarding such increases. *Capitol EMI Music*, 311 NLRB at 1012; *Holly Farms Corp.*, 311 NLRB 273, 274 (1993).

In this case, the timing of the Respondent's August 22 announcement that 401(k) matching contributions would be restored occurred during the union organizing campaign and thus, raises an inference of coercive conduct. In order to overcome this inference, the Respondent has the burden of showing that the restoration of 401(k) matching benefits was planned and settled upon before the advent of union activity or that it was following its past practice. *Capitol EMI Music*, 311 NLRB at 1012.

Here, Respondent cannot provide a credible alternative explanation for its August 22 announcement that “We agree that having some retirement savings for everyone is important. So we are investigating a plan to bring back a match to employee 401(k) contributions...” The announcement, on its face, makes clear that the restoration of 401(k) matching benefits was not planned and settled upon before the advent of union activity. In fact, the August 22 announcement further stated, “We will be looking to include that as part of our annual budgeting process for 2015.” This makes clear that the discussion and planning of the restoration of matching contributions was actually going on during the Union’s campaign. It also makes clear that the announcement was made to put employees on notice of a forthcoming benefit—one that would almost certainly not be implemented until after the Union election, which was held on November 12. Respondent’s President Scott Schuster gave a “25<sup>th</sup> Hour Speech” to employees on November 11, the day before the election, and his talking points for that speech lay out the benefits Respondent granted to employees during the union campaign, including “an additional 2% pay raise to a vast majority of employees, switched to weekly payroll...committed to evaluating health and retirement plans...” (CP Exh. 21) (emphasis added). Schuster’s mention of “retirement plans,” among other benefits, was clearly intended to remind employees in the heart

of the critical period of Respondent's implicit promise to restore matching 401(k) contributions in an effort to discourage support for the Union.

Respondent cannot show a legitimate business reason for announcing that it was in the process of considering the restoration of 401(k) matching contributions sometime in 2015. *See Holly Farms Corp.*, 311 NLRB at 274. Respondent made that announcement before it had even determined what the details of those matching contributions would be or when they would begin. No final decision on those details or the restoration itself had been made by the time of the announcement or even by the time Schuster gave his 25<sup>th</sup> Hour Speech the night before the election. Like the wage increase announced in *Holly Farms Corp.*, the Respondent here can provide no legitimate business reason for the timing of the announcement. *Id.* The only possible explanation for Respondent's announcement during the Union campaign was to impliedly promise a benefit to employees to curry favor with them and undermine their support for the Union.

There is no indication that this is part of some past practice, proof of which could be used to overcome the inference of coercive conduct under *Capitol EMI Music*; rather, the facts show that it was not a past practice because Respondent had not provided matching contributions since September 2009. 311 NLRB at 1012. Therefore, despite the ALJ's finding to the contrary, the Board should find that Respondent violated Section 8(a)(1) of the Act by announcing and implicitly promising employees the benefit of 401(k) matching contributions during the Union campaign in an effort to influence employees' votes at the upcoming Union election.

The timing of the announcement of the restoration of 401(k) matching contributions indicates that it was an unlawful promise of benefit, and the manner of the announcement also supports that conclusion. The 401(k) announcement was coercively made in a memorandum

issued by the Respondent which contained another independent 8(a)(1) violation. The announcement was included in an August 22 memorandum to all employees that also announced the 2% wage increase-another 8(a)(1) violation. When the ALJ discussed that increase in his decision, he found that “the Respondent has failed to meet its burden to establish that its announcement and granting of a 2-percent across-the-board wage increase to eligible employees during a union organizing campaign at Dutchess was governed by factors other than the pending union campaign.” (GC Exh. 17; ALJD at 33:8-12).

The facts of this case are analogous to those in *Mercy Hospital Mercy Southwest Hospital*, 338 NLRB 545 (2002). In that case, the Board affirmed the ALJ’s determination that the respondent violated Section 8(a)(1) of the Act by announcing a wage increase amidst union organizing drives by two competing labor unions. During the union organizing campaigns, the respondent announced the implementation of a wage increase to all employees at the organizing facility. *See id.* at 547-48. The Board relied heavily upon the fact that the respondent made the announcement before having resolved the details of the adjustment. *See id.* at 545-46. The Board concluded further that the evidence showing that the respondent had been considering a wage adjustment before its announcement did not preclude a finding of a 8(a)(1) violation. *Id.* at 545.

The ALJ in this case relied upon *Greenbrier Valley Hospital*, 265 NLRB 1056 (1982), when he found that Respondent’s announcement of the restoration of 401(k) matching benefits was lawful. (ALJD at 37:25-29). Significant facts in this case distinguish it from *Greenbrier Valley Hospital*. First, in that case the announcement of benefits was done at 197 facilities nationwide whereas in this case the announcement was made at a single facility at which a union campaign was ongoing. Second, in that case the decision to grant improved sick-pay benefits was made by a board of directors that were completely removed from that organizing activity that

was occurring at its one facility. Here, Harbby directly participated in Respondent's anti-union campaign. Finally and most importantly, when the employer in *Greenbrier Valley Hospital* announced the benefit increases, the plan was already finalized and ready to be implemented. Here, the August 22 memorandum expressly stated that the Respondent was still "investigating a plan to bring back a match to employee 401(k) contributions..." making it clear that the plan was not finalized. Therefore, the Board should find that Respondent's announcement violated Section 8(a)(1) of the Act, by implicitly promising employees the benefit of a 401(k) match.

**D. The ALJ failed to require that the Respondent reimburse Sandra Stewart for search-for-work and work-related expenses regardless of whether Stewart received interim earnings for a particular quarter. (Exception 4)**

The Board should award search-for-work and work-related expenses regardless of whether these amounts exceed interim earnings. Discriminatees are entitled to reimbursement of expenses incurred while seeking interim employment, where such expenses would not have been necessary had the employee been able to maintain working for respondent. *Deena Artware, Inc.*, 112 NLRB 371, 374 (1955); *Crossett Lumber Co.*, 8 NLRB 440, 498 (1938). These expenses might include: increased transportation costs in seeking or commuting to interim employment;<sup>3</sup> the cost of tools or uniforms required by an interim employer;<sup>4</sup> room and board when seeking employment and/or working away from home;<sup>5</sup> contractually required union dues and/or initiation fees, if not previously required while working for respondent;<sup>6</sup> and/or the cost of moving if required to assume interim employment.<sup>7</sup>

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<sup>3</sup> *D.L. Baker, Inc.*, 351 NLRB 515, 537 (2007).

<sup>4</sup> *Cibao Meat Products & Local 169, Union of Needle Trades, Indus. & Textile Employees*, 348 NLRB 47, 50 (2006); *Rice Lake Creamery Co.*, 151 NLRB 1113, 1114 (1965).

<sup>5</sup> *Aircraft & Helicopter Leasing*, 227 NLRB 644, 650 (1976).

<sup>6</sup> *Rainbow Coaches*, 280 NLRB 166, 190 (1986).

<sup>7</sup> *Coronet Foods, Inc.*, 322 NLRB 837 (1997).

Until now, however, the Board has considered these expenses as an offset to a discriminatee's interim earnings rather than calculating them separately. This has had the effect of limiting reimbursement for search-for-work and work-related expenses to an amount that cannot exceed the discriminatees' gross interim earnings. *See W. Texas Utilities Co.*, 109 NLRB 936, 939 n.3 (1954) ("We find it unnecessary to consider the deductibility of [the discriminatee's] expenses over and above the amount of his gross interim earnings in any quarter, as such expenses are in no event charged to the Respondent"). *See also North Slope Mechanical*, 286 NLRB 633, 641 n. 40 (1987). Thus, under current Board law, a discriminatee, who incurs expenses while searching for interim employment, but is ultimately unsuccessful in securing such employment, is not entitled to any reimbursement for expenses. Similarly, under current law, an employee who expends funds searching for work and ultimately obtains a job, but at a wage rate or for a period of time such that his/her interim earnings fail to exceed search-for-work or work-related expenses for that quarter, is left uncompensated for his/her full expenses. The practical effect of this rule is to punish discriminatees, who meet their statutory obligations to seek interim work<sup>8</sup>, but who, through no fault of their own, are unable to secure employment, or who secure employment at a lower rate than interim expenses.

Aside from being inequitable, this current rule is contrary to general Board remedial principles. Under well-established Board law, when evaluating a backpay award the "primary focus clearly must be on making employees whole." *Jackson Hosp. Corp.*, 356 NLRB No. 8 at \*3 (Oct. 22, 2010). This means the remedy should be calculated to restore "the situation, as nearly as possible, to that which would have [occurred] but for the illegal discrimination." *Phelps*

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<sup>8</sup> *In Re Midwestern Pers. Servs., Inc.*, 346 NLRB 624, 625 (2006) ("To be entitled to backpay, a discriminatee must make reasonable efforts to secure interim employment").

*Dodge Corp. v. NLRB*, 313 U.S. 177, 194 (1941). See also *Pressroom Cleaners & Serv. Employees Intl Union, Local 32bj*, 361 NLRB No. 57 at \*2 (Sept. 30, 2014) (quoting *Phelps Dodge*). The current Board law dealing with search-for-work and work-related expenses fails to make discriminatees whole, inasmuch as it excludes from the backpay monies spent by the discriminatee that would not have been expended but for the employer's unlawful conduct. Worse still, the rule applies this truncated remedial structure only to those discriminatees who are affected most by an employer's unlawful actions—i.e., those employees who, despite searching for employment following the employer's violations, are unable to secure work.

It also runs counter to the approach taken by the Equal Employment Opportunity Commission and the United States Department of Labor. See Enforcement Guidance: Compensatory and Punitive Damages Available under § 102 of the Civil Rights Act of 1991, Decision No. 915.002, at \*5, available at 1992 WL 189089 (July 14, 1992); *Hobby v. Georgia Power Co.*, 2001 WL 168898 at \*29 (Feb. 2001), *aff'd Georgia Power Co. v. U.S. Dep't of Labor*, No. 01-10916, 52 Fed.Appx. 490 (Table) (11th Cir. 2002).

In these circumstances, a change to the existing rule regarding search-for-work and work-related expenses is clearly warranted. In the past, where a remedial structure fails to achieve its objective, "the Board has revised and updated its remedial policies from time to time to ensure that victims of unlawful conduct are actually made whole. . ." *Don Chavas, LLC*, 361 NLRB No. 10 at \*3 (Aug. 8, 2014). In order for employees truly to be made whole for their losses, the Board should hold that search-for-work and work-related expenses will be charged to a

respondent regardless of whether the discriminatee received interim earnings during the period.<sup>9</sup> These expenses should be calculated separately from taxable net backpay and should be paid separately, in the payroll period when incurred, with daily compounded interest charged on these amounts. *See Jackson Hosp. Corp.*, 356 NLRB No. 8 at \*1 (Oct. 22, 2010) (interest is to be compounded daily in backpay cases).

**D. The ALJ inadvertently failed to order a remedy for his finding that Respondent violated Section 8(a)(1) of the Act when it announced a wage increase on August 22, 2014 (Exception 5)**

The ALJ found that Respondent violated Section 8(a)(1) of the Act when it announced a wage increase for employees on August 22. (ALJD at 36:5-7). However, the ALJ inadvertently failed to order a remedy for that finding. (ALJD at 71:19-72:21). The Board should correct the ALJ's inadvertent error and issue a remedy for Respondent's unlawful announcement of the wage increase on August 22. Specifically, the Board should include an order requiring Respondent to cease and desist from announcing a wage increase in order to discourage employees from supporting the Union.

**III. CONCLUSION**

For all the reasons set forth above, General Counsel respectfully requests that the Board grant the General Counsel's Cross-Exceptions to the Decision of the Administrative Law Judge and issue an appropriate order that Respondent be found to have committed the additional violations of Section 8(a)(1) of the Act, as discussed above. General Counsel further requests that the Board issue an order otherwise affirming and adopting the Decision and

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<sup>9</sup> Award of expenses regardless of interim earnings is already how the Board treats other non-employment related expenses incurred by discriminatees, such as medical expenses and fund contributions. *Knickerbocker Plastic Co., Inc.*, 104 NLRB 514, 516 at \*2(1953).

Recommendations of the ALJ, and respectfully requests an expedited decision, as the Region has filed a petition seeking Section 10(j) relief in the U.S. District Court for the Southern District of New York.

**DATED** at Albany, New York, this 5th day of February, 2016.

Respectfully submitted,

*/s/ John J. Grunert*

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