UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

INTERACTIVE COMMUNICATIONS
INTERNATIONAL, INC., d/b/a INCOMM, INC.

and Case 12-CA-155362

KARINA NILDA RODRIGUEZ, an Individual

COUNSEL FOR THE GENERAL COUNSEL'S EXCEPTIONS TO THE DECISION OF THE ADMINISTRATIVE LAW JUDGE AND INCORPORATED BRIEF IN SUPPORT OF EXCEPTIONS

Submitted by:
Caroline Leonard
Counsel for the General Counsel
National Labor Relations Board, Region 12
201 E. Kennedy Blvd., Suite 530
Tampa, Florida 33602-5824

Pursuant to Section 102.46 of the Board's Rules and Regulations, Counsel for the General Counsel hereby submits, in Section I, General Counsel's exceptions to the Decision issued by Administrative Law Judge Keltner W. Locke ("the ALJ" or "ALJ Locke") on March 22, 2016, in the above-captioned case, and in Sections II to IV, General Counsel's brief in support of exceptions:

I. EXCEPTIONS

1. The ALJ erred by failing to find that Interactive Communications International, Inc. d/b/a INCOMM (Respondent) does not prohibit employees from talking to each other about non-work subjects during working time. [ALJD[1] 15:14-18:21].

2. The ALJ erred by failing to find that employees are permitted to speak to each other about non-work subjects during working time. [ALJD 15:14-18:21].

3. The ALJ erred by limiting to non-working time the requirements in paragraph 1(a) of the recommended Order, and in the second and third "WE WILL NOT" paragraphs of the recommended Notice to Employees, that Respondent cease and desist from prohibiting employees from discussing wages, hours, or other terms and conditions of employment, and from threatening employees with discharge if they discuss wages, hours, or other terms and conditions of employment to discussions. [ALJD 19:8-19; Appendix A].

4. The ALJ erred by failing to recommend that the Order and Notice to Employees require Respondent to cease and desist from prohibiting employees from discussing wages, hours, or other terms and conditions of employment while on Respondent's property (at any time), and cease and desist from threatening to discharge employees who discuss wages, hours,

[1] ALJ Locke's Decision is referenced as ALJD (page:line). General Counsel's Exhibits are referenced as GCX (number); Respondent's Exhibits are referenced as RX (number). The hearing transcript is referenced as Tr. (page number).

or other terms and conditions of employment while on Respondent's property (at any time). [ALJD 19:8-19; Appendix A].

5. The ALJ erred by failing to find and conclude that Respondent violated Section 8(a)(1) of the Act by Corporate Human Resources Manager Klea Jackson telling employee Karina Rodriguez on June 25, 2015, that because Respondent's employees are not represented by a union, protected concerted activity does not apply to them, and by failing to remedy that violation of the Act. [ALJD 18 at fn. 9].

II. QUESTIONS TO BE RESOLVED

These Exceptions concern paragraph 5(a) of the Complaint, which alleges the following violations of Section 8(a)(1) of the Act:

> On or about June 25, 2015, Respondent, by Klea Jackson, at its Jacksonville, Florida call center:
>
> (a) Prohibited employees from talking to their coworkers about working conditions on company property.
>
> (b) Threatened employees with discharge if they talked to their coworkers about working conditions on company property.

[GCX 1(d)].

Questions to be resolved in this case are as follows:

1. Did the ALJ err by failing to find that Respondent permits employees to talk to each other during working time and had no rule against talking during working time until June 25, 2015?

2. Did the ALJ err by failing to find that Respondent violated Section 8(a)(1) of the Act by telling employees that protected concerted activity did not apply to them and by failing to provide an appropriate remedy for that violation of the Act?

3. Did the ALJ err by failing to find and conclude that Respondent violated Section 8(a)(1) of the Act by Corporate Human Resources Manager Klea Jackson telling employee Karina Rodriguez on June 25, 2015, that because Respondent's employees are not represented by a union, protected concerted activity does not apply to them, and by failing to remedy that violation of the Act?

III. STATEMENT OF FACTS

Respondent's Jacksonville, Florida facility provides customer service to callers seeking assistance with gift cards and prepaid debit cards. [ALJD 6:34-37; Tr. 16-17, 48, 161, 164]. Respondent operates 24 hours a day, seven days a week and has customer service representatives ("CSRs") on duty at all times. [ALJD 6:34-7:2; Tr. 19, 114, 193-194]. Each year Respondent holds a shift bid for the CSRs based on employee rankings calculated by averaging CSRs' monthly "scorecards." [ALJD 7:1-8; RX 9, 11; Tr. 18, 164]. Although the rankings are posted for all CSRs to review, CSRs must meet with their supervisor if they want to see their individual scorecards. [ALJD 7:4-8; Tr. 55, 104-105]. In 2015, the shift bid process began in late June, and the rankings were posted on Friday, June 19. [ALJD 7:1-19; RX 11; Tr. 18, 164].

On Monday, June 22, Charging Party Karina Rodriguez emailed Manager of Human Resources Patricia Kitler regarding certain concerns she had about the accuracy of the scorecards and employees' rankings. Kitler responded the next day by directing her to speak with Customer Care Manager Kelly Liles. Rodriguez replied that she had tried to talk with Liles, but Liles was too busy. Kitler responded nine minutes later that Liles would speak with Rodriguez that day. Rodriguez emailed Kitler back, thanked her for her help, and asked that a "pop up" be sent to other employees letting them know that they could request copies of their scorecards.[2] Kitler did not reply to the request. [ALJD 7:14-8:24; GCX 2/RX 16;[3] Tr. 20-23, 68, 73, 165].

At the end of the day on June 23, having received no further response from Kitler, Rodriguez created a "ticket" in Respondent's computer system with a message inviting other employees to comment on the ticket in order to indicate their need for scorecards in advance of the shift bid. [ALJD 8:23-46; GCX 4; Tr. 23, 25-26]. Tickets are assigned a unique number and

[2] A pop up is akin to an instant messaging system which Respondent uses to communicate with its employees; however, only managers and supervisors are able to send pop ups. [Tr. 22-23, 126].
[3] RX 16 is identical to pages 3 and 4 of GCX 2.

stored in Respondent's computer system; the identifying number can be used to locate and read the ticket. [ALJD 8:30-35; Tr. 25, 51, 56]. Rodriguez left a slip of paper in the break room with the ticket number on it, which was removed by Respondent's managers within about two hours. [ALJD 9:12-13; RX 14; Tr. 27, 57-58].

On June 24, to alert other employees of the existence of the ticket, Rodriguez made and hung posters with the ticket number and the message "Comment for your scorecards, Months Evaluated Nov-April (for shift bid)" in the employee break room and stairwell. [ALJD 9:2-10; GCX 3(a) through 3(d); Tr. 26-27, 59]. The ALJ properly found that Rodriguez's conduct constituted protected concerted activity because she was seeking to initiate group action. [ALJD 3 at fn. 2].

Shortly after hanging the posters, Rodriguez was called to a meeting with Kitler, Liles, and Senior Manager Eugenio Robleto. [ALJD 9:20-41; Tr. 32]. During the meeting, Respondent informed Rodriguez that she had violated its no-solicitation policy by hanging the posters. [ALJD 9:43-44; Tr. 33, 110, 179]. Rodriguez and Kitler discussed whether hanging the posters was permitted, whether Rodriguez was speaking on behalf of all employees, Rodriguez's scorecards, and Respondent's problem solving policy. [ALJD 9:43-11:23; Tr. 33-38, 64, 181, 203].

The ALJ properly found that the following events occurred the next day, June 25, 2015. Rodriguez was called to a meeting with Kitler and Corporate Human Resource Manager Klea Jackson to discuss the posters and company policy. [ALJD 15:22-28; Tr. 41-42, 189-190]. During the course of the meeting, as found by the ALJ, Jackson told Rodriguez that she was not permitted to discuss working conditions with other employees on Respondent's property. [ALJD 18:3-7; Tr. 42-43, 127-128, 203]. Jackson also told Rodriguez that if she did not follow

Respondent's policy she could leave or be terminated. [ALJD 18:9-18; Tr. 44, 191]. In addition, the ALJ found that Jackson told Rodriguez that Respondent was "a non-union workplace, so protected concerted activity didn't apply." [ALJD 18 at fn. 9, Tr. 44, 203].

III. ARGUMENT

A. The ALJ Erred by Failing to Find that the Undisputed Record Evidence Demonstrates that Respondent Permits Employees to Talk to Each Other about Non-Work-Related Subjects During Working Time. (Exceptions 1 and 2).

There is no evidence that Respondent had any rule or policy prohibiting employees from talking about non-work related subjects until June 25, 2015, when Jackson made the statement to employee Rodriguez prohibiting her from talking to coworkers about working conditions at any time on company property, and threatened her with discharge if she engaged in such conduct. Moreover, the testimony of both Rodriguez and Kitler demonstrates that although Respondent discourages employees from engaging in talking that may disrupt another employee's work, CSRs are routinely permitted to have casual discussions about non-work related subjects on the work floor during working time, in between calls. Respondent's only requirement is that such conversations not be disruptive to other CSRs who may be on the phone.

Rodriguez testified that she and her coworkers talk about a myriad of casual topics at their desks throughout the course of the work day: "We talk about family, TV shows, anything, politics, the lottery." [Tr. 45]. She also testified that she apprised Jackson of that fact during their meeting on June 25, 2015, while giving him a list of examples of things that would be protected, concerted activity on company property: "if we are on the floor talking about other things, then, you know, we are allowed to talk about other things [like working conditions] during our working time. There shouldn't be any reason why we can't talk about [working conditions]." [Tr. 42-43]. Similarly, in response to Respondent counsel's questions, Kitler

acknowledged that sometimes employees have down time when they are at work, and there are no calls waiting, and that during those times the employees are permitted to talk to their coworkers in the cubicle next to them or across from them, as long as they do not talk to someone who is far enough away from them to cause a disturbance to another coworker who may be on the phone with a customer. [Tr. 194-195]. Respondent offered no evidence to suggest that Respondent maintains or enforces a blanket prohibition on talking about non-work subjects during working time. Accordingly, the ALJ erred by failing to find that Respondent's employees are permitted to, and do, discuss non-work subjects with each other during "down-time" within their working time.

B. The ALJ Erred by Failing to Properly Remedy Respondent's Unlawful Conduct. (Exceptions 3 and 4).

In *Lutheran Heritage Village-Livonia*, 343 NLRB 646 (2004), the Board created a two-step inquiry for determining whether an employer's maintenance of a work rule violates the Act. First, if the rule expressly restricts Section 7 activity, it is simply unlawful. If the rule is not facially unlawful, it will nonetheless violate the Act upon a showing that: "(1) employees would reasonably construe the language to prohibit Section 7 activity; (2) the rule was promulgated in response to union activity; or (3) the rule has been applied to restrict the exercise of Section 7 rights." *Id.* at 647. Longstanding Board precedent has found that an employer violates Section 8(a)(1) of the Act when it prohibits employees from discussing union-related matters while allowing discussion of other non-work related subjects during working time. See, e.g., *Willamette Industries*, 306 NLRB 1010, 1010 at fn. 2 (1992).

In determining whether the existence of specific work rules violates Section 8(a)(1) of the Act, the ultimate inquiry is always into "whether the rules would reasonably tend to chill employees in the exercise of their Section 7 rights." *Lafayette Park Hotel*, 326 NLRB 824, 825

(1998), enfd. 203 F.3d 52 (D.C. Cir. 1999). The inquiry is an objective one; where the rules are likely to have a chilling effect on Section 7 rights, "the Board may conclude that their [mere] maintenance is an unfair labor practice, even absent evidence of enforcement." *Id.* at 825.

Although he did not discuss it in the context of a workplace rule, ALJ Locke properly found that Respondent's prohibition against discussing working conditions with coworkers on company property was unlawful. Considered as a rule, the prohibition is expressly unlawful because it prohibits employees from engaging in Section 7 activity: talking to other employees about working conditions at any time on company property. In addition, this no talking rule was promulgated in response to protected concerted activity, was applied to restrict the exercise of Section 7 rights, and would be reasonably construed by employees to prohibit Section 7 activity. Accordingly, viewed as an orally promulgated rule, Jackson's statements violated Section 8(a)(1) of the Act.

The Board has consistently held that rules against talking about unions during working time violate Section 8(a)(1) of the Act when they discriminatorily prohibit talk about union related speech during work time or in work areas, while permitting talk about other non-work related subjects. *Oberthur Technologies of America Corp.*, 362 NLRB No. 198, slip op. 1 at fn. 4 (2015); *Jensen Enterprises, Inc.*, 339 NLRB 877, 878 (2003). General Counsel submits that the same rationale is as applicable to talk among employees during working time about wages, hours, and other terms and conditions of employment, as it is to employee union talk during working time.

In the instant case, as noted above, the ALJ properly found Jackson's prohibition against talking about working conditions unlawful. However, in his recommended Order and Notice to Employees, the ALJ failed to adequately remedy Respondent's violations of the Act because the

language he used would permit Respondent to prohibit all talk about working conditions between employees during working time. The proposed Notice to Employees reads:

> **WE WILL NOT** prohibit employees from discussing wages, hours, or other terms and conditions of employment with other employees while on our property ***during nonworking time.***
>
> **WE WILL NOT** threaten employees with discharge if they discuss wages, hours, or other terms and conditions of employment with other employees while on our property ***during nonworking time.***

[ALJD Appendix A, emphasis added to the words "during nonworking time"]. Similar language is in the recommended Order. [ALJD 19:13-19]. This language improperly restricts talk about wages, hours, and other terms and conditions of employment to non-working time – even though it is undisputed that Respondent permits employees to talk about non-work related topics on the work floor during working time, as long as the employee is not actively on a customer call.

General Counsel seeks to simply remedy the violations found by deleting the phrase "during nonworking time" from each of the above-quoted paragraphs of the Notice to Employees, and from paragraph 1(a) of the recommended Order, where that phrase also appears twice. In this regard, the Board has long considered "non-working time" to mean meal periods and break times, and before and after and employees scheduled work time. *Our Way, Inc.*, 268 NLRB 394 (1983). Thus, "non-working time" does not include down-time during an employee's work time. If the phrase "during nonworking time" is in the Notice to Employees it will leave employees with the wrong impression that Respondent is permitted to prohibit conversations about wages, hours, and other terms and conditions of employment during working time, and that they may lawfully be threatened with discharge if they engage in such conversations during working time but while they are not on the phones.

The Board should therefore affirm ALJ Locke's conclusion that Respondent violated Section 8(a)(1) of the Act by prohibiting employees from discussing wages, hours, or other terms and conditions of employment, and by threatening employees with discharge, but modify his recommended Order and Notice to Employees by removing the words "nonworking time" from paragraph 1(a) of the recommended Order and from the Notice provisions set forth above.

C. The ALJ Erred by Failing to Find and Conclude that Respondent Violated Section 8(a)(1) of the Act by Telling Employees that, Because they are Not Represented by a Union, Protected Concerted Activity Does Not Apply to Them, and by Failing to Provide a Remedy for that Violation of the Act. (Exception 5).

As noted above, the ALJ properly found that on June 25, 2015, in the same conversation during which Corporate Human Resources Manager Klea Jackson told employee Karina Rodriguez that she was prohibited from talking to other employees about working conditions while on company property and threatened her with discharge if she did so, Jackson also told Rodriguez that Respondent was a non-union workplace, so protected concerted activity did not apply. However, the ALJ erred by declining to find that this last statement violated the Act because it was not alleged in the Complaint.

> It is well settled that the Board may find and remedy a violation of the Act even in the absence of a specific allegation in the complaint if the issue is closely connected to the subject matter of the complaint and has been fully litigated. This rule is applied with particular force where the finding of a violation is established by the testimonial admissions of the Respondent's own witnesses.

Pergament United Sales, 296 NLRB 333, 334 (1989), enfd. 920 F.2d 130 (2d. Cir. 1990) (internal citations omitted).

Allegation 5(a) of the Complaint, quoted above, alleges that on June 25, 2015, Human Resources Manager Klea Jackson prohibited employees from talking to their coworkers about working conditions on company property. This allegation sufficiently put Respondent on notice that the statements of Jackson that prohibited employees from taking about working conditions

on company property were at issue, including Jackson's statement to Rodriguez that because Respondent is a non-union workplace, protected concerted activities does not apply to its employees. This last statement by Jackson is part and parcel of the unlawful prohibition against discussing working conditions alleged in paragraph 5(a) of the Complaint.

All issues concerning this conversation, the related conversation on the June 24, 2015 (which did not involve Jackson), and the surrounding circumstances were fully litigated by the parties during a two day hearing. All of the statements made by the same person, Jackson, occurred in the same conversation on June 25, 2015, with the same witnesses present: Jackson, Kitler and Rodriguez. Respondent counsel cross-examined Rodriguez at length, including about her conversation with Jackson on June 25. [Tr. 127-130]. Respondent chose not to call Jackson to testify. Respondent witness Kitler testified about the June 25 conversation between Jackson and Rodriguez; she admitted that Jackson said that it was a non-union workplace. [Tr. 190-192, 203-204]. Thus, the parties fully and fairly litigated the entire conversation between Jackson and Rodriguez.

For these reasons, General Counsel submits that the Board should find that Respondent further violated Section 8(a)(1) of the Act when Jackson told Rodriguez that because Respondent is a non-union workplace, protected concerted activity does not apply. In effect, Jackson stated that because Respondent does not recognize a union as its employees' representative, the employees are prohibited from engaging in concerted activities with their coworkers for their mutual aid or protection. Accordingly, Respondent should further be ordered to cease and desist from telling employees that because they are not represented by a union, they are prohibited from engaging in concerted activities with their coworkers for their mutual aid or protection. General Counsel further urges the Board to add the following sentence to the Notice to Employees:

WE WILL NOT tell employees that they are prohibited from engaging in concerted activities with their coworkers for their mutual aid or protection.

IV. CONCLUSION

For the reasons set forth above, the General Counsel respectfully urges the Board to grant General Counsel's Exceptions in their entirety and amend the ALJ's recommended findings of fact, conclusions of law, and recommended Order and Notice to Employees[4] accordingly, and as further deemed appropriate by the Board.

Dated at Tampa, Florida on April 19, 2016.

Respectfully submitted,

/s/ Caroline Leonard

Caroline Leonard, Esq.
Counsel for the General Counsel
National Labor Relations Board, Region 12
201 E. Kennedy Blvd., Suite 530
Tampa, Florida 33602
Telephone No. (813) 228-2662
Email caroline.leonard@nlrb.gov

[4] A proposed revised Notice to Employees is attached hereto as Appendix A.

Appendix A

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 federal labor law and has ordered us to post and abide by this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO:

- Form, join or assist a union
- Choose representatives to bargain with us on your behalf
- Act together with other employees for your benefit and protection
- Choose not to engage in any of these protected activities.

WE WILL NOT interfere with, restrain or coerce our employees in the exercise of these rights, guaranteed to them by Section 7 of the National Labor Relations Act.

WE WILL NOT prohibit employees from discussing wages, hours, or other terms and conditions of employment with other employees while on our property.

.

WE WILL NOT threaten employees with discharge if they discuss wages, hours, or other terms and conditions of employment with other employees while on our property.

WE WILL NOT tell employees that they are prohibited from engaging in concerted activities with their coworkers for their mutual aid or protection.

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

INTERACTIVE COMMUNICATIONS INTERNATIONAL, INC. d/b/a INCOMM

Dated: _____ **By:** _____
(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. We conduct secret-ballot elections to determine whether employees want union representation and we investigate and remedy 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 or you may call the Board's toll-free number 1-866-667-NLRB (1-866-667-6572). Hearing impaired persons may contact the Agency's TTY service at 1-866-315-NLRB. You may also obtain information from the Board's website: www.nlrb.gov.

NLRB Region 12
201 E. Kennedy Blvd., Suite 530
Tampa, FL 33602-5824

Telephone: (813)228-2641
Hours of Operation: 8 a.m. to 4:30 p.m.

The Board's decision can be found at www.nlrb.gov/case/12-CA-155362 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.

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.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on April 19, 2016, she electronically filed the foregoing **Counsel for the General Counsel's Exceptions to the Decision of the Administrative Law Judge and Incorporated Brief in Support of Exceptions** and electronically served said document on the below-named parties, by the following means:

By Electronic Filing:

Hon. Gary W. Shinners
Executive Secretary
National Labor Relations Board
1099 14th Street, N.W.
Washington, D.C. 20570

By Electronic Mail:

James W. Walters, Esq.
Fisher & Phillips, LLP
1075 Peachtree Street, NE, Suite 3500
Atlanta, Georgia 30309
jwalters@laborlawyers.com

Corey J. Goerdt, Esq.
Fisher & Phillips, LLP
1075 Peachtree Street, NE, Suite 3500
Atlanta, Georgia 30309
cgoerdt@laborlawyers.com

Karina Nilda Rodriguez
11471 Stinger Way
Jacksonville, FL 32223
karinarodriguez@love.com

/s/ Caroline Leonard
Caroline Leonard, Esq.
Counsel for the General Counsel
National Labor Relations Board, Region 12
201 E. Kennedy Blvd., Suite 530
Tampa, Florida 33602
Telephone No. (813) 228-2662
Email caroline.leonard@nlrb.gov