

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 29**

**DEEP DISTRIBUTORS OF GREATER
NY, INC. d/b/a THE IMPERIAL SALES,
Respondent**

and

**UNITED WORKERS OF AMERICA, LOCAL 660,
Charging Party**

Case No. 29-CA-147909

**DEEP DISTRIBUTORS OF GREATER NY,
INC. d/b/a THE IMPERIAL SALES, INC.
Respondent**

and

HENRY HERNANDEZ, an Individual

Case No. 29-CA-157108

**DEEP DISTRIBUTORS OF GREATER NY,
INC. d/b/a THE IMPERIAL SALES, INC.**

and

UNITED WORKERS OF AMERICA, LOCAL 660

Case No. 29-RC-146077

**GENERAL COUNSEL'S CROSS EXCEPTION TO THE DECISION OF THE
ADMINISTRATIVE LAW JUDGE AND ARGUMENT IN SUPPORT THEREOF**

On May 6, 2016, Administrative Law Judge Steven Davis issued a Decision and Recommended Order in Case Nos. 29-CA-147909, 29-CA-157108 and 29-RC-146077, wherein he found Deep Distributors of Greater NY, Inc., d/b/a The Imperial Sales, Inc., herein Respondent, to have committed numerous, serious unfair labor practices as alleged in the Amended Consolidated Complaint.

Counsel for the General Counsel respectfully urges the National Labor Relations Board to adopt those findings and conclusions of law of the Administrative Law Judge to which the General Counsel takes no exception, as those facts and conclusions of law are well-supported by the probative record evidence and by well-established Board law. However, pursuant to Section 102.46 of the Board's Rules and Regulations, Series 8, Counsel for the General Counsel respectfully takes a limited exception to the Order proposed by the Administrative Law Judge. Specifically, Counsel for the General Counsel takes exception to the Judge's recommended Order to the extent that it does not require Respondent to hold training sessions for its employees on their rights under the Act and does not require Respondent to hold training sessions for its supervisors and managers regarding employees' and Respondent's rights and obligations under the Act. (ALJD pg. 42. Ln. 15-22)

ARGUMENT IN SUPPORT OF LIMITED EXCEPTION

ALJ Davis correctly found that Respondent violated the Act as alleged in the Amended Consolidated Complaint and that good cause existed to warrant the imposition of enhanced remedies. (ALJD pg. 42 ln. 11-13) The record overwhelmingly supported ALJ Davis' finding that Respondent unlawfully terminated Jose Wilfredo Argueta, Jose Martin Torres, Jose Michel Torres, Henry Hernandez, Marvin Hernandez, Roberto Reyes, Javier Reyes and Augustin Sabillon because of their protected concerted activity and their activities on behalf of United Workers of America, Local 660, herein called the Union, in

violation of Section 8(a)(1) and (3) of the Act. Judge Davis also found that Respondent violated Section 8(a)(1) of the Act by engaging in the following conduct:

1. giving employees the impression that their Union activities were under surveillance;
2. threatening employees with unspecified reprisals if they chose the Union as their collective bargaining representative;
3. telling employees that it would be futile for them to select the Union as their collective bargaining representative;
4. threatening employees with discharge if they chose the Union as their collective bargaining representative;
5. interrogating employees about their involvement in filing a Fair Labor Standards Act lawsuit;
6. implementing new work rules and discipline for the use of cell phones and lateness;
7. While in a Board hearing room, threatening employees with legal action in retaliation for participating in a Board hearing and because of their Union activity; and
8. while in a Board hearing room, threatening to report employees to Government authorities in order to intimidate witnesses and to discourage them from participating in Board processes.

Despite finding that Respondent committed these numerous and egregious violations of the Act, ALJ Davis did not order¹ Respondent to conduct Board Agent run training sessions for employees and supervisors, on paid time, stating that there is no Board precedent ordering such training and that no details were given about the length and nature of the training. (ALJD pg. 42).

The administrative law judge's finding in this regard is erroneous.

¹ To remedy the violations, Respondent was ordered to cease and desist from engaging in such misconduct "in any other manner," reinstate with back pay the terminated employees, expunge the discharges from the employees' files, rescind the newly implemented work rules about cell phones and lateness, provide the Union, upon request, with periodic, updated lists of the names and addresses of its employees, post notices written in English and Spanish, at its facility, that detail the actions the Respondent must take to remedy the violations found, hold meetings during times scheduled to ensure the widest possible audience where said notices are read by Respondent's officers or, in the alternative, a Board Agent, and publish in three publication of local interest, for a period of time determined by the Regional Director said Notices.

The Board Is Authorized To Order Training To Remedy Unfair Labor Practices

The lack of precedent does not preclude the Board from ordering Respondent to conduct training for its employees and managers to remedy its unfair labor practice violations. When it determines that a respondent has violated the Act, Section 10(c) of the Act authorizes the Board to issue an “order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without backpay, as will effectuate the policies of the Act.” The Supreme Court has interpreted this power broadly, noting that Congress intentionally left the task of fashioning remedies to effectuate the Act in “an infinite variety of specific situations” to the Board, subject to limited judicial review.² The Court has further stated that “the relief which the statute empowers the Board to grant is to be adapted to the situation which calls for redress,”³ and that the Board’s remedial authority “draw[s] on [its] enlightenment gained from experience.”⁴ Furthermore, “the task of evaluating the likely rate of dissipation of the coercive impact of [the respondent’s] conduct, like the task of evaluating its original potency, is one that Congress has entrusted to the Board and its expertise.”⁵ Thus, the Board has ordered additional remedies beyond its

² *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 194 (1941).

³ *NLRB v. Mackay Radio & Telegraph Co.*, 304 U.S. 333, 348 (1938).

⁴ *NLRB v. Seven-Up Bottling Co. of Miami*, 344 U.S. 344, 346 (1953).

⁵ *Excel Case Ready*, 334 NLRB 4, 5 (2001) (quoting *Kenrich Petrochemical, Inc. v. NLRB*, 907 F.2d 400, 408 (3d Cir. 1990), *cert. denied*, 498 U.S. 981 (1990)).

standard remedies where it concludes that standard remedies are “insufficient to dissipate the likely chilling effects of a respondent’s unlawful conduct.”⁶

Likewise, the lack of details on the length and nature of the training does not preclude the Board from ordering this training remedy. The Board can use its expertise to properly frame the training remedy. For example, with regard to the nature of the training, the Board can order that the training deal solely with the conduct it found to have violated the Act. With regard to the length of the training, the Board can assess the evidence and violations to determine the length of training required to reaffirm Section 7 rights to employees, supervisors, and managers. Finally, any issues that may arise regarding the interpretation and implementation of the training remedy can be resolved during the compliance stage of the case.

Respondent’s Numerous and Egregious Unfair Labor Practices Warrant The Training Remedy In Order To Dissipate the Chilling Effects of Respondent’s Conduct

Because of the extreme coercive and chilling effects of Respondent’s unfair labor practices, the training remedy is eminently appropriate to ensure that the chilling effect of Respondent’s egregious conduct, particularly its conduct of threatening employees with being reported to Immigration while at the Regional offices just prior to and during the hearing, is fully remedied. The Board has ordered additional remedies in circumstances where a notice posting was

⁶ *Pacific Beach Hotel*, 361 NLRB No. 65, slip op. at 2 (Oct. 24, 2014). See also, *Fieldcrest Cannon, Inc.*, 318 NLRB 470, 473 (1995), *enforced in relevant part*, 97 F.3d 65 (4th Cir. 1996); *J.P. Stevens & Co.*, 244 NLRB 407, 458-60 (1979), *enforced*, 668 F.2d 767 (4th Cir. 1982).

deemed insufficient to effectively counteract the effect of unfair labor practices. For example, the Board has ordered Notice readings to “ensure effective communication of the substance of the notice”⁷ and to effectively reassure employees where an employer’s conduct has created a chilling atmosphere.⁸ The Board has also required that supervisors and managers attend such readings to expose them to information concerning their own substantive obligations under the Act.⁹ Further, the Board has on occasion required that an employer provide written instructions to supervisors on compliance with the Act.¹⁰ Moreover, while the Board has not previously ordered a training remedy, training has been included in a number of Board settlements.¹¹

In the instant case, the training remedy is necessary to ensure that the harm caused by the Respondent’s conduct does not become “indelibly etched” into the minds of employees, supervisors, and manager.¹² Specifically, training by a Board agent for employees will directly and immediately inform employees

⁷ *Teamsters Local 115 v. NLRB*, 640 F.2d 392, 401 (D.C. Cir. 1981).

⁸ *J.P. Stevens & Co. v. NLRB*, 417 F.2d 533, 540 (5th Cir. 1969) (“reading requirement is an effective but moderate way to let in a warming wind of information and, more important, reassurance”); *United Dairy Farmers Cooperative Assn.*, 242 NLRB 1026, 1029 & n.14 (1979), *enforced in relevant part*, 633 F.2d 1054 (3d Cir. 1980). *See also, Domsey Trading Corp.*, 310 NLRB 777, 780 & n.13, 813 (1993) (requiring that manager read the remedial notice in English and remain nearby for the readings in other languages so that employees will be assured that promises are coming from him), *enforced*, 16 F.3d 517 (2d Cir. 1994).

⁹ *Pacific Beach Hotel*, 361 NLRB No. 65, slip op. at 8.

¹⁰ *See id.*, slip op. at 7 (requiring that employer mail notice and explanation of rights to all current supervisors and managers); *J.P. Stevens & Co.*, 244 NLRB at 408 (requiring employer to provide written instructions to supervisors on compliance with the Act); *S. E. Nichols, Inc.*, 284 NLRB 556, 561 (1987) (ordering employer to give its supervisors the remedial notice and written instructions to comply with the provisions of the notice), *enforced in relevant part*, 862 F.2d 952 (2d Cir. 1988).

¹¹ *See, e.g., NLRB v. Howard University Hospital*, No. 99-1465 (D.C. Cir. Feb. 24, 2015), para. 10 at p.5 (requiring that all managers and supervisor complete collective bargaining training on a variety of topics and that all newly hired or promoted managers and supervisors complete training within 30 days of employment or promotion). *See also, Benjamin Realty*, Case No. 22-CA-090473 (informal settlement requiring supervisors and managers to attend training on the E-Verify system conducted by DOJ’s Office of Special Counsel).

¹² *Viracon, Inc.*, 256 NLRB at 247.

of their rights under the Act and permit questions and discussion regarding their rights and Respondent's violations, and the remedies for those violations. It will do so in a way that provides reassurance to employees by the very entity responsible for the enforcement of those rights. Likewise, training by a Board agent for Respondent's supervisors and managers will ensure that they fully understand why Respondent's conduct violated the Act, its remedial obligations, employees' rights under the Act, and Respondent's obligations going forward. The Board's "remedial goal is to reaffirm to employees their Section 7 rights and to reassure them that the Respondents will respect those rights in the future."¹³

Finally, training is a common remedy for violations of other federal employment statutes. The Office of Special Counsel for Immigration-Related Unfair Employment Practices, which has specific statutory authorization to seek a remedy of educating an employer's hiring personnel,¹⁴ commonly requires that employers who have violated the Immigration and Nationality Act's anti-discrimination provisions receive training.¹⁵ The Equal Employment Opportunity Commission, which enforces a statute with a remedial provision modeled after Section 10(c) of the Act¹⁶ and which does not grant explicit authority to seek a

¹³ Pacific Beach Hotel, slip op. at 3, citing *Guardsmark, LLC*, 344 NLRB 809, 812 (2005), *enfd.* in relevant part 475 F.3d 369 (D.C. Cir.2007); see also *Tiidee Products, Inc.*, 196 NLRB 158,159 (1972), *enfd.* sub nom. *International Union of Elec.,Radio & Mach. Workers, AFL-CIO v. NLRB*, 502 F.2d349 (D.C. Cir. 1974), cert. denied 417 U.S. 921 (1974).

¹⁴ 8 U.S.C. § 1324b(g)(2)(B)(vi).

¹⁵ See, e.g., OSC Settlement Agreement, *Real Time Staffing Services, LLC., d/b/a Select Staffing*, para. 12 at pp. 6-8 (Aug. 12, 2014) (requiring human resources personnel to attend training session conducted by Office of Special Counsel regarding unfair immigration-related employment practices, among other things), available at <http://www.justice.gov/crt/about/osc/pdf/publications/Settlements/SelectStaffing.pdf>.

¹⁶ 42 U.S.C. § 2000e-5. See *Local 28, Sheet Metal Workers v. EEOC*, 478 U.S. 421, 446 n.26 (stating that the remedial provision in Title VII of the Civil Rights Act was modeled after Section 10(c) of the Act).

training remedy, regularly seeks court orders requiring respondents to provide training as a remedy as well.¹⁷ The Department of Labor has also sought training remedies¹⁸ in enforcing the Fair Labor Standards Act, a statute that does not explicitly authorize a training remedy and that grants narrower remedial authority than the Act with respect to fashioning discretionary remedies.¹⁹

Based on the above, it is respectfully requested that the Administrative Law Judge's recommended Order be modified to (ALJD p.44) to replace current item (h) and (i) with the following and renumber accordingly:

(h) Schedule training, during paid work time and conducted by a Board Agent, for all employees on their rights under the Act.

(i) Schedule training, during paid work time and conducted by a Board Agent, for all supervisors and managers on employees' rights under the Act and Respondent's obligations under and compliance with the Act.

CONCLUSION

In conclusion, Counsel for the General Counsel respectfully urges the National Labor Relations Board to adopt those findings of fact, conclusions of law

¹⁷ See *EEOC v. Mid-Am. Specialties, Inc.*, 774 F. Supp. 2d 892, 898 (W.D. Tenn. 2011) (ordering employer to conduct two-hour training session for employees and managers regarding Title VII's prohibitions against sexual harassment). See also *EEOC v. Serv. Temps*, 2010 WL 5108733, at *5 (N.D. Tex. Dec. 9, 2010) (ordering employer to provide one hour of training to managers regarding obligations under Americans with Disabilities Act), *aff'd sub nom.*, *EEOC v. Serv. Temps Inc.*, 679 F.3d 323 (5th Cir. 2012). We note that the remedial provision under the Americans with Disabilities Act mirrors the remedial provisions under Title VII. 42 U.S.C. § 12117(a).

¹⁸ Consent Judgment, *Perez v. Fat Law's Farm, Inc., et al.*, Case No. 1:14-cv-00154 (Apr. 15, 2014), 21-22 (requiring defendants to permit representatives from Department of Labor to conduct training session for all individuals performing work at defendants' farms), available at <http://www.hawaiireporter.com/wp-content/uploads/2014/04/Fat-Law-Consent-Judgment.pdf>.

¹⁹ 29 U.S.C. § 216. See *Colon v. Major Perry St. Corp.*, 987 F. Supp. 2d 451, 458-59 (S.D.N.Y. 2013) (explaining that while the Board has broad remedial discretion under the Act, the Fair Labor Standards Act provides statutorily defined damages, leaving courts without discretion to refashion remedies).

and those portions of the Order of the Administrative Law Judge to which General Counsel takes no exception, as those findings and conclusions are fully supported by the probative record evidence and by well-settled Board law. Counsel for the General Counsel also asks the Board to grant its limited exception and issue a Notice to Members and Employees that appropriately reflects the Remedy and Order.

Respectfully submitted,

/s/

Henry J. Powell

/s/

Emily A. Cabrera
Counsel for the General Counsel
National Labor Relations Board
Two MetroTech Center, 5th Fl.
Brooklyn, New York 11201