UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 7

SPECTRUM JUVENILE JUSTICE SERVICES

Respondent

and

CASE 07-CA-199731
07-CA-208944

INTERNATIONAL UNION, SECURITY POLICE, AND FIRE PROFESSIONALS OF AMERICA (SPFPA)

Charging Party SPFPA

And

LOCAL 120, INTERNATIONAL UNION, SECURITY, POLICE AND FIRE PROFESSIONALS OF AMERICA (SPFPA)

Charging Party Local 120

RESPONDENT'S MEMORANDUM IN SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT

I. INTRODUCTION

On August 30, 2018, Region 7 issued a Complaint against Spectrum Juvenile Justice Services ("SJJS" or Respondent) based on the principle, enunciated in *Total Security Management*, 364 NLRB 1148 (2016), that an employer has an obligation to bargain before imposing discipline even though the parties have not executed an initial collective bargaining agreement.

The only basis on which Region 7 is pursuing a Complaint against SJJS is its contention, based on *Total Security*, that SJJS had an obligation to negotiate with the Union over discipline even though no initial contract has been entered into. There is no allegation

that the Respondent has modified any of its disciplinary rules or practices, nor is there any allegation of 8(a)(3) violations. Further, the Respondent has "cause" for the discipline of each employee, as such, no reinstatement or back pay is appropriate under Section 10(c) of the Act.

The Respondent and the International Union, Security, Police and Fire Professionals of America ("SPFPA" or "Union") Respondent are engaged in negotiations for a first contract, and the parties have reached tentative agreement adopting the Respondent's past practices and rules in regard to discipline and a grievance, mediation and arbitration mechanism. Furthermore, the Respondent has provided the Union with all documents relevant to the discipline of the employees identified in the Complaint and has offered to negotiate with the Union in regard to same.

Key Procedural Dates and Relevant Facts

On March 3, 2016, in Case 07-RC-169521, a representation election was conducted among a bargaining unit consisting of youth workers and security workers at two maximum security juvenile detention facilities (jails) operated by SJJS (the "Unit").

Before the election, the Board's employees divided the list of eligible voters provided to it by SJJS into two lists, one for each jail. In doing so, the Board's employees omitted the names of 35 eligible voters from the lists. The mistakes by the Board's employees caused substantial confusion and consternation among not only the employees who were omitted from the lists, but also other employees who witnessed the chaos and

seeming disenfranchisement of 35 of their coworkers. The vote was in favor of unionization by a slim margin.[1]

SJJS maintains that because of the Board's mistakes, it is probable that some employees believed that SJJS purposely left them off the lists, and as a result, voted for the Union based on its apparent snub; and, that its conduct caused some employees to vote in favor of unionization.

On March 10, 2016, SJJS filed an Objection to Election because the administrative errors of Board employees destroyed the "laboratory conditions required for a fair and free election." 07-RC-169521. On March 24, 2016, the Board's Regional Director overruled SJJS's Objection to Election and certified SPFPA as the exclusive collective bargaining representative of the Unit. On April 5, 2016, SJJS filed a Request for Board Review of the Regional Director's Post-Election Decision.

Because SJJS believed that the errors made by the Board employees (and the chaos it caused) tainted the election and that the Union was improperly certified, it refused to recognize or bargain with the Union. On July 19, 2016, the Union filed an unfair labor practice charge alleging the Respondent failed and refused to deal with it as the representative of its employees. (07-CA-180451). On September 8, 2016, the General Counsel filed a Complaint on this Charge and filed a Motion for Summary Judgment on October 4, 2016. The Board's Decision and Order issued on November 22, 2016, and the General Counsel's Motion was granted. (364 NLRB No. 149 (2016)). On January 30, 2017, General Counsel made Application for Enforcement of the Order to the Sixth Circuit Court

[1] The vote was 74 to56. If only 9 employees switched their vote, the election result would have been against unionization.

of Appeals; and, on February 10, 2017 the Respondent filed its Answer to the Application and filed a Cross-Petition for Review.

On May 31, 2017, the Union filed a Charge in Case 07-CA-199731 alleging the Respondent disciplined employees without bargaining with it.

On November 27, 2017 the Sixth Circuit issued an Order granting the Board's petition for enforcement in Case No 07-CA-180451. (CTA6 Case No. 17-1098).

On April 9, 2018, Respondent received a request to bargain from the Union. Shortly after that request, negotiations began and the parties are engaged in negotiations for a first contract. *See,* Declaration of Melissa Fernandez, Executive Director of SJJS.[2] The Union and Respondent have reached tentative agreement adopting the Respondent's past practices and rules in regard to discipline and a grievance, mediation and arbitration mechanism. *See* Declaration. Furthermore, the Respondent has provided the Union with all documents relevant to the discipline of the employees identified in the Complaint and has offered to negotiate with the Union in regard to same. *See* Declaration.

On May 31, 2018, the Union filed Charge 07-CA-208944 alleging the Respondent disciplined employees without bargaining with it. On August 30, 2018, the Acting Regional Director for Region Seven issued an Order Consolidating Charge 07-CA-199731 and 07-CA-208944, and issued a Consolidated Complaint. On December 7, 2018, the Regional Director for Region Seven issued a Second Order Consolidating Cases and a Consolidated Amended Complaint ("Complaint"). Respondent filed its Answer and Affirmative Defenses on December 8, 2018.

[2] Ms. Fernandez's Declaration will be referred to hereafter as "Declaration."

The Complaint alleges that during the period of April 1, 2017 through May 7, 2018 Respondent terminated 16 employees and suspended 44 employees without prior notice to the Union and without affording the Union an opportunity to bargain with it with respect to the disciplines. [Complaint ¶ 10][3] Five employees[4] were terminated because they failed or refused to attend trainings that are mandated by the Michigan Department of Licensing and Regulatory Affairs ("Licensing") which regulates Respondent's programs and operations and mandates certain trainings of staff. *See* Declaration. Nine[5] were terminated for misconduct which violated Licensing Rules and/or SJJS's rules which provide protection for the juvenile residents of the jail. *See* Declaration. One was terminated because he was unable to cover open shifts, and one because of poor attendance.[6]

Suspension of the 44 employees were for a variety of rule violations and violations of SJJS's time and attendance policies. The infractions for which suspensions were issued include, but are not limited to, failure to follow instructions, sleeping on the job, line of sight violations,[7] horseplay, and safety violations. *See* Declaration.

The Respondent had cause for the discipline of all Unit Employees identified in the Consolidated Complaint. Further, it had a reasonable good-faith belief that the continued

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[3] The Respondent and Counsel for the Board have agreed that three discharges were inadvertently included in the Complaint; and, that no claim will be pursued on behalf of Derrel Simpson, Joshua Tucker, and Ieshia Womack.
[4] Tariq Ali, Anthony Mays, Christopher Stanley, and Joshua Tucker.
[5] Zorana Averett (Violation of Personal Boundries and Ethics), Acacia Brown (Violation of Drug Free Environment and Drug Testing Policy), Crystal Bullock (Violation of Prohibited Conduct and Youth Supervision Rule (slap-boxing with resident)), Shavonne Calhoun (Violation of Professional Boundaries, PREA, Employee Ethics and Prohibited Conduct Policies), Shamika DeBerry (Failure to perform room check resulting in escape of resident from room and damage to SJJS property), Forrester Hatton (Using improper restraint on resident), Derrick King (Allowing resident in his care to assault, ridicule and abuse another resident), Philip Timms (Failure to de-escalate residents in his care, coloring on the job, and failure to perform job duties (residents were throwing chairs and blocking a door against security personnel); and Ieshia Womack (Violation of Workplace Violence and Ethics policies – verbal altercation with co-worker).
[6] Derrel Simpson and Shujrea Watson, respectively.
[7] Licensing requires a certain staff to resident ratio. When residents are in the care of staff, the staff must have direct line of sight to the residents.

presence of Zorana Averett, Acacia Brown, Crystal Bullock, Shavonne Calhoun, Shamika DeBerry, Forrester Hatton, Derrick King, Philip Timms, and Ieshia Womack in the jail presented a serious, imminent danger to the residents, employees and others in the facilities and posed a significant risk of exposing the Respondent to legal liability for the employee's conduct, or threatened safety, health and security in the workplace.

II. STANDARD

The Board uses the summary judgment standard outlined in Fed. R. Civ. P. 56(c). *Manville Forest Products Corp.,* 269 N.L.R.B. 390 (1984). Summary judgment therefore is appropriate when the evidence in the record demonstrates "that no genuine issues of material fact exist and that the movant is entitled to judgment as a matter of law." *L'Hoist North America of Tennessee,* 362 NLRB No. 110, slip op at 1 (2015); *In re Mellott*, 187 B.R. 578, 581 (Bkrtcy. N.D. Ohio, 1995). To prevail, SJJS must show the absence of genuine issues of material fact to support the non-moving party's case. *Mellott*, at 581; *Resolution Trust Corp. v. Fountain Circle Associates Ltd. Partnership*, 799 F.Supp. 48, 51 (N.D. Ohio 1992).[8]

In turn, to overcome SJJS's motion, the General Counsel must do more than "simply show that there is some metaphysical doubt as to the material facts." *Bennet v. State Farm Mut. Auto Ins. Co.*, 943 F.Supp. 821, 823 (N.D. Ohio 1996); *Matsushita Electrical Industrial Co. Ltd. v. Zenity Radio Corporation*, 475 U.S. 574, 586 (1986). Mere reliance upon the pleadings or allegations is insufficient. *Copeland v. Machulis*, 57 F.3d 476, 579 (6th Cir. 1995).

[8] Section 10(b) of the Act provides that Board hearings "shall, so far as practicable, be conducted in accordance with the rules of evidence applicable in the district court of the United States under rules of civil procedure for the district courts of the United States."

Further, while the General Counsel is entitled to inferences from evidence properly before the Board, judgment on motion for summary judgment must strive to separate the sham and insubstantial issues of fact from the real and genuine issues. *Bryant v. Com. Of Ky.*, 490 F.2d 1273, 1274-75 (6th Cir. 1974). As a result, SJJS's motion may not be defeated by reliance on "conclusory and unsupported allegations, rooted in speculation." *Escher v. BWXT Y-12, L.L.C.*, No. 3:06-CV-336, 2009 WL 2366464, *15 (E.D. Tenn., 2009). The General Counsel must produce a quality if evidence that would permit a reasonable trier of fact to find for it. *White v. Wyndham Vacation Ownership, Inc.*, 617 F.3d 472, 475-476 (6th Cir. 2010).

The Complaint, on its face, and in light of the supporting undisputed facts, fails to allege a violation of the Act and, as argued below, the Complaint should be dismissed accordingly. *Manville Forest Products Corp.*, 269 N.L.R.B. 390 (1984).

III. ARGUMENT

Employers, such as Respondent, that have no initial collective bargaining agreement in place, have no obligation to engage in bargaining before or after imposing discipline nor do they have any obligation to provide prior notice before imposing discipline.

The Board's decision in *Total Security* contradicts existing and controlling law. The new requirements upend existing principles governing conventional decision and effects bargaining, they require bargaining over actions that effect no change in the manner in which the employer has disciplined employees in the past and, they contradict existing law that disfavors single-issue negotiations, and they disregard the Board's longstanding position regarding the waiver of collective-bargaining rights.

1. The *Total Security* decision and the Board's position that Respondent's discipline of employees is subject to a "discipline bar" and "discipline bargaining" are precluded by express provisions of the NLRA.

The *Total Security* decision and the Board's position that Respondent's discipline of employees is subject to a "discipline bar" and "discipline bargaining" (as those terms are terms are used by Member Miscimarra's dissent in *Total Security)* are precluded by express provisions of the NLRA, specifically, Section 8(d), which precludes the Board from imposing substantive terms on parties under the guise of enforcing Section 8(a)(5) bargaining requirements and Section 10(c) which prohibits the Board from ordering backpay or reinstatement for any employee who was suspended or discharged for "cause." (Furthermore, the *Total Security* decision is contrary to Supreme Court decisions limiting the Board to "remedial" relief. In *Republic Steel Corp. v. NLRB*, the Supreme Court stated that Congress never intended to give the Board "virtually unlimited discretion" to impose "punitive measures," "penalties" or "fines" based on what "the Board may think would effectuate the policies of the Act." *Republic Steel Corp. v. NLRB*, 311 U.S. 7, 11 (1940).

Additionally, the Board imposed moratorium on discipline, or "discipline bar" and "discipline bargaining", as putatively established in *Total Security* and asserted by the Board against Respondent in this case, violates existing legal principles and is contradicted by the Board's representations and Supreme Court decision in *NLRB v J. Weingarten,* 420 U.S. 251 (1975) and other cases. Discipline was the central focus of *Weingarten* and that decision indicates that "the employer has *no duty to bargain* with any union representative who may be permitted to attend [an] investigatory interview," and the Court stated that it was "*not giving the Union any particular rights with respect to predisciplinary* discussions

which it otherwise *was not able to secure during collective-bargaining negotiations." Id. at* 259.

Additionally, *Weingarten* indicated that the imposition of discipline was among the "legitimate employer prerogatives," and held that an employer, when faced with an employee's request to have a union representative attend a disciplinary interview, could cancel the meeting, refuse to meet with the union representative and the employee, and impose the discipline "on the basis of information obtained from other sources." *Weingarten*, 420 U.S. at 258-259.

Also instructive here is the *Weingarten* Court's quotation, taken from the Board decision in *Quality Manufacturing Co,* 195 N.L.R.B. 197 (1972), explaining why an employer can refuse to meet with the union representative and employee and proceed on its own with discipline based on whatever other information the employer previously obtained:

> "This seems to us to be the only course *consistent with all of the provisions of our Act.* It permits the employer to *reject a collective course* in situations such as investigative interviews *where a collective course is not required* but protects the employee's right to protection by his chosen agents. Participation in the interview is then voluntary. . . . *And . . . the employer would, of course, be free to act* on the basis of whatever information he had and without such additional facts as might have been gleaned through the interview."

Weingarten 420 U.S. at 259 (quoting *Quality Mfg. Co.,* 195 N.L.R.B. at 198-199.)

The Supreme Court in *Weingarten* and the Board in *Mobil Oil ,* 196 N.L.R.B 1052, 1052 (1972) and *Quality Manufacturing*, directly addressed when and how an employer could impose discipline on unionized employees. These decisions make clear that (i) the union's involvement is limited to attendance at a pre-disciplinary investigative meeting with the employee, which the employer has the right to cancel without explanation; (ii) the employer has "no duty to bargain" with the union representative who attends any such

meeting, and (iii) the employer is otherwise "of course, free to act," which means free to impose discipline." *Id.* Moreover, the *Weingarten* Court stated that imposing discipline is among "legitimate employer prerogatives" (consistent with industrial practice), that the Board has not afforded a union "'any particular rights with respect to predisciplinary discussions which it otherwise was not able to secure during collective-bargaining negotiations," and that possible unilateral action by the employer is "'consistent with all of the provisions of [the] Act"' and "'a collective course is not required." *Weingarten,* 420 U.S. at 259 (quoting *Quality Manufacturing,* 195 NLRB at 198-199). The Board was equally direct in its *Weingarten* Supreme Court brief, which stated that "the duty to bargain does not arise prior to the employer's decision to impose discipline." *NLRB v. J. Weingarten, Inc.,* Brief for the Board, 1974 WL 186290 (U.S.).

2. The *Total Security Decision* Violates Section 8(d) of the Act by Dictating Terms That Should Be Agreed to by the Parties.

One of the cornerstone principles of the NLRA in relation to collective bargaining is that the Board is to act as a neutral overseer of the bargaining process, without dictating the terms that should be agreed to by the parties. As set forth in Section 8(d) of the Act, the duty to bargain collectively does not compel either party to agree to a proposal or require the making of a concession. As stated in *H.K. Porter Co. v. NLRB,* 397 U.S. 99 (1970), the Board may not, "either directly or indirectly, compel concessions or otherwise sit in judgment upon substantive terms of collective bargaining agreements." It concluded:

> It is implicit in the entire structure of the Act that the Board acts to oversee **and referee the process of collective bargaining,** ***leaving the results of the contest to the bargaining strengths of the parties*** **.... While the parties' freedom of contract is not absolute under the Act,** ***allowing the Board to compel*** *agreement when the parties*

> *themselves are unable to agree world violate the fundamental premise on which the Act is based* – private bargaining under governmental supervision of the procedure alone, *without any official compulsion over the actual terms of the contract.* Id. at 107-108 (emphasis added).

Total Security creates statutory obligations forcing employers to adopt an up-front agreement giving away three of the most important issues addressed in any set of contract negotiations (discipline, grievances, and arbitration). Any employer who fails to adopt such an agreement will lose their right to impose immediate discipline (except in very few cases involving "exigent" circumstances (whatever they are).

Unquestionably, the *Total Security* decision nearly mandates an up-front interim agreement, permitting grievance and, potentially, arbitration challenges over discipline, as a "desirable settlement." *H.K. Porter Co.,* 397 U.S. at 104. In fact, substantive issues, such as discipline, grievances, and arbitration, typically are only resolved in negotiations when parties finally enter into complete collective bargaining agreements. *Total Security* undermines what the Supreme Court in *H.K. Porter* called the "fundamental premise on which the Act is based," which is supposed to involve "private bargaining . . . without any official compulsion over the actual terms of the contract." *H.K. Porter Co.,* 397 U.S. at 108. The obligations placed on employers by *Total Security* are contrary to Section 8(d) and exceed the Board's remedial authority.

3. The *Total Security* decision and the Board's position that Respondent's discipline of employees is subject to a "discipline bar" and "discipline bargaining" are precluded by express provisions of the NLRA, specifically Section 10(c), which prohibits the Board from ordering backpay or reinstatement for any employee who was suspended or discharged for "cause."

Section 10(c) of the Act states, in relevant part: "No order of the Board shall require the reinstatement of any individual as an employee who has been suspended or discharged,

or the payment to him of any backpay, if such individual was suspended or discharged for cause." However, *Total Security* imposes the new discipline-bar and discipline-bargaining requirements on employers, even when cause exists for an employee's suspension or discharge of an employee. If an employer does not engage in discipline bargaining, the Board will proceed on the presumption that the employer does not have cause for the discipline and it will seek reinstatement and backpay for the disciplined employee(s) based on that presumption. The employer will have no avenue to challenge the Board's presumption until after years of litigation and expense during the compliance proceedings when the employer may attempt to establish the existence of "cause," which, if proven, will reduce or eliminate the employer's backpay liability and/or preclude reinstatement.

It is contrary to the intention of Congress, as reflected in the "cause" language in Section 10(c), for the Board in *Total Security* to make such new requirements applicable to all discharges and suspensions, while leaving the issue of "cause" unaddressed until the very end of the Board's lengthy litigation process. The decision in *Total Security* needlessly imposes onerous burdens on large numbers of employers, unions and employees, and on the Board itself, by applying the new bargaining requirements to all discharges and suspensions, even where "cause" exists, resulting in many years of litigation in hundreds or thousands of cases, where parties will learn only at the very end of the litigation process, in the compliance proceedings, whether the employees are eligible for reinstatement or back pay.

The *Total Security* decision places the burden of proving "cause" on employers, contrary to Section 10(c) of the Act. Both the text and legislative history of Sec. 10(c) show that the General Counsel bears the burden of proof that disputed discipline violates the Act,

which also entails establishing there was no "cause" for the discipline in question. The Supreme Court in *N.L.R.B. Transportation Management*, 462 U.S. 393 (1983) decided "that Sec. 10(c)'s "preponderance of the testimony" language meant the General Counsel has the burden "throughout the proceedings" of proving "the elements of an unfair labor practice," 462 U.S. at 401, and the Court stated that the "preponderance of the testimony" requirement was "*closely related*" to Sec. 10(c)'s provision "that no order of the Board reinstate or compensate any employee who was fired for cause," *id.* at 401 fn. 6 (emphasis added)."

Therefore, Sec. 10(c) and its legislative history indicate that Congress intended the General Counsel to bear the burden of proving alleged violations, including the statutory requirement that the employee in question was *not* disciplined for "cause."

4. An Employer, such as Respondent, that has no contract with the Union, is not required to negotiation with the Union prior to imposing discipline where there has been no change in existing discipline standards and procedures.

Based on the decision in *Total Security*, an employer may not lawfully discipline represented employees based on preexisting disciplinary standards and procedures, even if the employer makes no changes in those standards and procedures, even if the employer has always imposed the same discipline in similar circumstances, and even if the employer does not discriminate on the basis of union membership or other protected activity when it imposes discipline. This decision is contrary to established Court and Board law. Further, such a "discipline bar", prohibits discipline for an open-ended period until the employer gives the union the opportunity to engage in a new, specialized type of discipline

bargaining. Member Miscimarra's analysis of the new obligations for employers is persuasive:

> These new obligations are subject to an array of complex exceptions and qualifications that make matters worse by requiring parties to meticulously evaluate *all* aspects of *every* disciplinary decision, and nobody can possibly know when disciplinary actions can be taken. Only one thing is certain: nearly everyone is likely to disagree over what may or must be done and when, and in far too many cases, this process will end only with the conclusion of Board and court litigation that will take years to complete.

An employer has no 8(a)(5) obligation to bargain over discipline when there is no change in existing discipline standards or procedures. Conversely, an employer does not violate the Act by taking action actions *consistent with* as occurred in the past. To the extent the employer imposes disciplinary standards and procedures that have existed in the past, this maintains the *status quo* and is not a "change" that requires bargaining.

In this case, discipline is lawful because no "change" has occurred. The Board and the courts have long held that an employer violates the Act if it unilaterally decides to change employment terms. However, a change does not occur, and bargaining is not required, if the employer's actions are similar in kind and degree to its past actions. *See, e.g. N.L.R.B. v Katz,* 369 U.S. 736, 743 (1962); *Shell Oil Co.,* 149 NLRB 283, 288 (1964), and *Westinghouse Electric Corp.,* 150 N.L.R.B. 1574, 1576-1577(1965).

5. The Board's *Total Security* single-issue bargaining requirement contradicts the Board's "overall impasse" doctrine.

The Board and the courts have long held that parties are prohibited from making changes absent an "*overall* impasse" in bargaining regarding all mandatory subjects. *RBE Electronics of S.D.*, 320 N.L.R.B. 80 (1995)). However, the decision in *Total Security* now requires single-issue bargaining over discipline decisions (and over the implementation of the decision following the completion of single-issue discipline bargaining) when parties

have not reached an "overall impasse," and indeed, where the parties remain actively engaged in other discipline-related bargaining.

The Board and the courts disfavor a party's insistence that single issues be addressed separately in bargaining, in isolation, as a precondition to the discussion of other mandatory bargaining subjects. See, e.g., *Eastern Maine Medical Center*, 253 N.L.R.B. 224 (1980) (unlawful refusal to bargain in good faith where, among other things, employer refused to negotiate seriously on economic issues until non-economic issues were resolved to its satisfaction), enfd. 658 F.2d 1 (1st Cir. 1981); *Lustrelon, Inc.*, 289 N.L.R.B. 378 (1988) (unlawful refusal to bargain in good faith where, among other things, employer conditioned further bargaining on withdrawal of union demands), affd. 869 F.2d 590 (3d Cir. 1989). See generally *Bottom Line Enterprises*, 302 NLRB at 374 ("[A]n employer's obligation . . . encompasses a duty to refrain from implementation at all, unless and until an overall impasse has been reached on bargaining for the agreement as a whole."); *RBE Electronics of S.D.*, 320 NLRB at 80 (same).

Allowing individual discipline actions to be addressed by employers and unions as "stand-alone issues", that would be separate and distinct from the issues to be resolved in contract bargaining, represents a clear departure from existing Board law, because *Bottom Line* and *RBE Electronics* (and their progeny) clearly hold that parties cannot satisfy bargaining obligations on a single-issue basis during periods when there is no contract in effect. Rather, the duty is a duty to bargain to an overall impasse or agreement, subject to extremely limited exceptions that would be inapplicable in most situations.

IV. CONCLUSION

For the reasons outlined above, the Board should grant SJJS's Motion for Summary Judgment and dismiss the Consolidated Complaint in its entirety.

Respectfully submitted,

BERRY MOORMAN P.C.

/s/ Sheryl L. Laughren
Sheryl L. Laughren (P34697)
Attorney for Respondent
535 Griswold, Suite 1900
Detroit, MI 48226
(313) 496-1200
slaughren@berrymoorman.com

Date: December 10, 2018

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 10th day of December, 2018, a copy of the foregoing was filed electronically. Notice of this filing will be sent by operation of the NLRB's electronic filing system to all parties indicated on the electronic filing receipt. Parties may access this filing through the NLRB's system. A hard copy has been served upon the Union, SPFPA Representative and the NLRB Executive Secretary via regular U.S. Mail.