

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

SEARS, ROEBUCK AND CO.,

Respondent,

- and -

LOCAL 881, UNITED FOOD AND
COMMERCIAL WORKERS,

Charging Party.

Case No. 13-CA-191829

**Respondent's Answering Brief
to the General Counsel's and Union's
Cross Exceptions**

Introduction

It is well-established Board law that an employer does not violate the Act by providing ministerial aid to employees seeking to get rid of a union. The ALJ in this case correctly found that Respondent, through Store Manager Anthony Harris, provided no more than ministerial assistance to an employee who on her own initiative asked the store manager for help. (ALJD 11:22-29.) Backroom Associate Barbara Gregory, the General Counsel's chief witness, testified that she approached Harris and, having already made it clear to Harris that she personally did not want the Union to represent her, asked him how to "eliminate" three autistic employees from "anything to do with the union."¹ (ALJD 3:22-24.) In response to her

¹ There are two somewhat different versions of what happened — one from Harris and one from Gregory. Where the two testimonies were contradictory, the ALJ credited Gregory's testimony over Harris's testimony. (ALJD 5:29-30.) Respondent is not seeking review of the ALJ's credibility determination in this regard. Accordingly, where the two versions were contradictory, Respondent provides only Gregory's version of events.

unsolicited inquiry, several days later, Harris told her “there was a form that they could sign stating that they no longer wanted to be associated with the Union” and that he would leave the form in his desk drawer so she could retrieve it if she so desired. (ALJD 3:28-33; Tr. 38:2-13.)

Based on Gregory’s testimony, and as found by the ALJ, Harris did nothing more than respond to an employee’s question about how to remove a union with rudimentary information about the process for doing so and then leaving it up to the employee to decide, what if anything, to do with the information. (ALJD 11:22-28.) Harris engaged in “no threat of reprisal or force or promise of benefit,” 29 U.S.C. § 158(c); therefore, he committed no violation of the Act.

Despite this, the General Counsel contends in its exceptions that Harris behaved unlawfully. In support of those exceptions, the General Counsel predominantly contends that the ALJ erred by not finding *Craftool Mfg. Co.*, 229 NLRB 634, 637 (1977) controlling, but instead relying on two more recent cases, *Ernst Home Centers*, 308 NLRB 848 (1992), and *Bridgestone/Firestone, Inc.*, 335 NLRB 941 (2001), to find that the facts in this case, like the facts in these two latter cases, required a finding of no violation. (G.C. Brief at 2.)

In fact, the ALJ correctly applied the law. The material facts in *Ernst* and *Bridgestone/Firestone* are very similar to those presented by the instant case and require dismissal of the allegation that Harris unlawfully supported the employees’ effort to remove the Union. The ALJ also correctly determined that the relevant facts in *Craftool* are distinguishable. The ALJ thoroughly considered all three cases

and correctly held that Respondent did not violate the Act by offering an employee ministerial aid after the employee initiated the request.

Furthermore, although the ALJ did not need to reach this issue (and the Board need not, either), any conclusion that Harris's conduct violated the Act would violate both Section 8(c) of the Act and the First Amendment to the United States Constitution.

Simply put, Respondent merely provided lawful ministerial assistance to Gregory who had already approached Harris on her own initiative and inquired about how to remove the Union. The ALJ's findings and recommended decision with respect to this allegation should be adopted by the Board.

Statement of Relevant Facts

I. Certification of the Union

The Board certified the Union on November 30, 2015, as the exclusive bargaining representative of “[a]ll full-time and regular part-time Backroom Associates employed by [Sears] at its facility currently located at 6501 West 95th Street, Chicago Ridge, IL.” (ALJD 2:22-24; RX 1.)

II. Anthony Harris and Barbara Gregory

Anthony Harris has served as the Chicago Ridge Store Manager since March 2016. (Tr. 99:11-100:9.) Barbara Gregory works as a Backroom Associate in the Chicago Ridge store. (ALJD 3:4; Tr. 30:15-31:6.) Gregory reports to Operations Manager Shannon Evans, who in turn reports to Harris. (ALJD 3:5-6; Tr. 31:9-22.)

III. Gregory Asks Harris How To Get Rid of the Union and Ends Up With a Blank Form Requesting the Union's Removal

Before the Company's withdrawal of recognition from the Union, Gregory had spoken to Harris on multiple occasions about "the concept of the Union no longer representing employees." (ALJD: 3:8-10; Tr. 100:24-101:11.) In fact, Gregory testified that it was "pretty common knowledge" that she did not vote for the Union during the representation election in November 2015, and she also conceded that she had "expressed dissatisfaction with the Union" to Harris on more than one occasion during the course of the contract negotiations. (ALJD 6:3-5; Tr. 63:5-64:2.) On each occasion, it was Gregory, not Harris, who raised the subject. (Tr. 101:14-16.) Indeed, the ALJ noted that "[p]rior to October [2016], Gregory had asked Harris about the progress of negotiations, stated that she had not voted for the Union, and expressed her belief that they did not need a union." (ALJD 3:8-10.)

In October 2016, Gregory asked Harris if they could speak in his office. (ALJD 3:19-26; Tr. 54:17-21; 55:6-8; 103:10-16; 104:19-105:8.) Harris agreed, and when they met in his office, Gregory raised a concern that a group of autistic co-workers in the bargaining unit were being "confused or overwhelmed with all the information about the Union" and asked "if there was anything that the company could do to protect three of the associates that I worked with. They're autistic, and they get very confused. If they could just be eliminated with anything to do with the union." (ALJD 3:22-24; Tr. 36:14-18.)

Harris responded to her question about removing her co-workers from the Union by telling her that he would need to talk to "corporate" and get back to her.

(ALJD 3:25-26; Tr. 36:19-23; 55:14-16.) She testified that he got back to her a day or two later when he once again spoke to her in his office and told her “there was a form they could sign stating that they no longer wanted to be associated with the Union.” (ALJD 3:30-31; Tr. 37:6-38:4; 55:17-19.) “Harris told her that he would not be there to give her the form but it would be in the top drawer of his desk and that she could go into the drawer to get it.” (ALD: 31-33; Tr. 38:9-13.) “The next day that she worked, which was on November 8, she went into Harris[’s] office and removed the decertification petition form from his middle desk drawer.” (Tr. 38:17-25.)

There, Gregory found a petition that read as follows:

**PETITION FOR DECERTIFICATION (RD) --
REMOVAL OF REPRESENTATIVE**

The undersigned employees of _____
(employer name) do not want to be represented by
_____ (union name).

Should the undersigned employees make up 30% or more (and less than 50%) of the bargaining unit represented by _____ (union name), the undersigned employees hereby petition the National Labor Relations Board to hold a decertification election to determine whether a majority of employees no longer wish to be represented by this union.

Should the undersigned employees make up 50% or more of the bargaining unit represented by _____ (union name), the undersigned employees hereby request that _____ (employer name) withdraw recognition from this union immediately, as it does not enjoy the support of a majority of employees in the bargaining unit.

(GCX 2.) The foregoing text was followed by multiple blank spaces for signatures, printed names, and dates. (GCX 2.)

Gregory signed and dated the form on November 8 and took the form out to her work area, where she told seven or eight co-workers that she had “requested a form to help kind of protect the three associates with autism and that if anyone wanted to sign it they could sign it.” (ALJD 4:1-5; Tr. 41:21-42:1; 43:5-13; 55:23-25, 56:8-10; 59:16-20.) She then placed the form on the table, where the employees “could have read it to themselves.” (ALJD 4:6.) Six other members of the bargaining unit signed and dated the form right then and there. (ALJD 4:7; Tr. 44:5-47:6; 62:16-19; 91:18-93:17; GCX 2; RX 3.) Gregory then took the form and locked the form in her work locker. (ALJD 4:7-8.)

One additional bargaining unit employee signed the petition on November 10, 2016, after Gregory showed it to him and told him “that if he didn’t want to join the union he could sign it or not.” (ALJD 4:10-13; Tr. 50:2-51:18; 62:23-25; 91:18-93:17; GCX 2; RX 3.) “Immediately thereafter Gregory took the petition and placed it in the middle drawer of Harris’ desk as he told her that he would not be there and she could return it to his desk drawer after getting it signed.” (ALJD 4:13-15.)

IV. The Company Receives the Signed Petition, Verifies the Signatures, and Withdraws Recognition from the Union

Based on Gregory’s prior conversations with Harris and the fact that her signature appeared first on the petition, Harris assumed that Gregory was the one who placed the petition in his desk drawer and tracked her down to discuss it the same day he found it. (Tr. 108:1-10; 109:18-25.) Harris asked her, “[A]re you sure this is what you guys want to do?” (Tr. 108:5-10.) Gregory responded in the affirmative. (ALJD 5:9-11; Tr. 108:1-10.) In fact, Gregory testified that no one who

signed the petition ever told her that he wished to rescind his signature. (Tr. 61:7-12.) Based on their conversation, and Respondent's verification of the employee signatures on the form, Respondent withdrew recognition from the Union on December 2, 2016. (ALJD: 9:4-6; Tr. 89:22-93:17; RX 3; GCX 3.)

Argument

I. **Controlling Board Case Law Requires Affirming the ALJ's Decision: Harris Did Not Unlawfully Assist the Employees' Effort To Remove the Union.**

It is well-established Board law that an employer, in response to an employee's inquiry about removing a union, may provide that employee with basic information about the legal process required to accomplish the employee's objective. *See, e.g., Roosevelt Mem. Med. Ctr.*, 348 NLRB 1016, 1034 (2006) ("The employer may provide general information about the [decertification] process in response to employees' unsolicited inquiries . . ."); *Bridgestone/Firestone, Inc.*, 335 NLRB 941, 942 (2001) (lawful for employer to suggest that employee prepare a written document and provide a sample decertification petition for the employee to use); *Ernst Home Ctrs.*, 308 NLRB 848, 848 (1992) (lawful for employer to provide employee with language for decertification petition); *Eastern States Optical Co.*, 275 NLRB 371, 371-72 (1985) (lawful for employer to provide wording for decertification petition as well as the unit description, the names of the employer's officials, and the number of employee signatures that would be needed). Nothing more than this happened here. Gregory testified that she asked Harris about eliminating her three autistic coworkers "with anything to do with the union," and Harris responded by

making basic information about the process available to her (in the form of a blank petition for removal of a labor organization)—at which point, Gregory voluntarily coordinated the employees’ effort to remove the Union. (ALJD 3:19-26; 4:2-15.) Harris did not unlawfully assist Gregory in circulating the petition or otherwise unlawfully support the employees’ effort to remove the Union. (ALJD 11:22-28.) Accordingly, the ALJ correctly held that Harris provided no more than ministerial aid to Gregory in response to her own inquiries about ousting the Union. (ALJD 11:22-25.) That holding should be adopted by the Board.

A. The ALJ Rightly Concluded that *Craftool Manufacturing Company* Is Distinguishable and Not Controlling Here.

The General Counsel’s entire argument rests on the notion that the proper outcome in this case is controlled by *Craftool Manufacturing Company*. It is true that the Board found the employer’s conduct in *Craftool* unlawful, but the General Counsel’s summary of that case in its brief omits critical facts from the *Craftool* case—facts that create a material distinction between that case and this one. In *Craftool*, after the employees had ratified the collective bargaining agreement, but before the parties executed the agreement, the employer’s general manager approached several employees individually and read to them a prepared script, stating that he knew they were displeased with the union and explaining how to circulate a decertification petition. 229 NLRB at 635. One of the employees then went to his supervisor’s desk, asked for paper and a pencil, and started circulating a petition on company letterhead. *Id.* The day after he started circulating the petition, the employee’s supervisor told him that the general manager had suggested it

would be a “good idea” if he got a female employee, whom the supervisor named, to also circulate the petition because the female employees would be able to identify more readily with her. *Id.* The employee did as suggested, and the female employee circulated the petition and turned it in the next day. *Id.* Several petitions were ultimately turned in to the employer in response to the general manager’s various conversations with employees. *Id.*

Furthermore, not only did the employer in *Craftool* initiate the entire effort to remove the union, and then follow up on the initial spark with specific strategic direction on how to get the petition signed, but the employer also simultaneously engaged in various other misconduct. For example, one of the employees who had circulated a decertification petition changed his position about a month later and began to circulate a pro-union petition. *Id.* In response, he received a warning for excessive conversation during working time on one of the days he circulated the petition—even though previously he had been allowed to do the same thing in support of the decertification petition. *Id.* The employer also threatened several employees. *Id.* That same month, as the pro-union petition circulated, the employer and the union entered into a collective bargaining agreement to be effective for about a 3-month period, expiring one year after the date of the union’s certification. *Id.* About a month later, or about two months after obtaining the decertification petitions, the employer filed a petition with the NLRB asserting that the petitions circulated two months earlier showed that the majority of the employees did not wish to be represented by the union. *Id.*

The facts here are materially distinguishable. As explained above, Harris did not initiate any conversations with any employees; Gregory approached Harris to talk about the Union and raised the subject herself. (Tr. 35:12-16; 36:12-18; 101:14-16.) Harris also did not make any suggestions as to how or to whom Gregory should circulate the petition. Moreover, it is undisputed that Respondent was bargaining in good faith, (ALJD 11-12; 13:9-12), whereas in the *Craftool*, the employer instigated the circulation of decertification petitions at a time when the employees had already ratified the agreement, made threats to employees, and disciplined one of the employees when he changed his mind and circulated a pro-union petition. None of these facts exist here.

While not addressing any of these distinctions, the General Counsel suggest four supposed bases for concluding that the ALJ erred in finding no violation here: 1) Harris “prepared the petition with decertification language and provided the petition to Gregory who neither implicitly nor explicitly raised the issue of decertification”; 2) “Respondent provided Gregory with the decertification petition with no explanation of employee rights, including the right to an insulated period to effectuate their choice of collective-bargaining representative during the certification year,” 3) Gregory was allowed to circulate the petition on work time; and 4) “unlike in *Craftool* wherein employees had expressed some actual dissatisfaction with the Union, neither Gregory nor any other employee in the instant case expressed such sentiment prior to Respondent’s unsolicited provision of the petition.” (G.C. Brief at 3-5.) This argument is based on a mischaracterization of

the record, and it is contrary to governing case law and the Act. The argument should be rejected out of hand.

First, the General Counsel argues that Gregory did not specially ask to “decertify” the Union but asked Harris only “if there was anything that the company could do to protect three of the associates that I worked with.” (G.C. Brief at 3-4) To begin with, this characterization ignores the fact that Gregory did ask Harris how her co-workers could be “eliminated” from the Union. (ALJD 3:22-24.) That may not be the technical phraseology a labor lawyer would use, but it is most certainly a request that could be satisfied only by decertification or (as happened here) a unilateral withdrawal of recognition. In any event, the fact that Gregory did not specifically request a petition or ask to decertify the Union is not a basis for finding that Harris violated the law. As the ALJ noted:

[T]he only way for a few of the employees in the Unit to be freed from the benefits, limits, obligations, and decisions that come with union representation is for the Union to be decertified. Thus, Harris provided Gregory information on how to achieve her predetermined objective to exclude certain of her coworkers from having to deal with issues arising out of unionization.

(ALJD 11:9-14.) Gregory’s request was similar to that made by an employee in *Bridgestone/Firestone*, where the employee expressed only that he did not want to join the union; there, the Board held that the employer was privileged to respond by (among other things) providing the employee with a sample decertification petition to circulate among employees. 335 NLRB at 942. There is simply no Board precedent requiring an employer to refrain from providing any ministerial aid until an employee uses magic words like “decertification” or “petition.” Requiring such

sophistication from employees would effectively prohibit them from exercising their statutorily protected right to freely choose whether to be represented by a union. The General Counsel's argument here is contrary to Board precedent and provides no basis to find a violation here.

With respect to the General Counsel's second point—that Harris never explained Gregory's "employee rights, including the right to an insulated period to effectuate their choice of collective-bargaining representative during the certification year employee rights," (G.C. Brief at 3)—no such requirement has ever existed. (Nor is there an "employee right" to the certification-year bar, which exists to protect unions, not employees. Regardless, that issue is a separate one, presented by *Respondent's* exceptions to the ALJ's decision.) Indeed, in *Bridgestone/Firestone*, decided 24 years after *Craftool*, the Board directly rejected the General Counsel's argument here:

While acknowledging that the Respondent had no affirmative duty to inform [employee] regarding his obligations toward the Union and the range of options available to provide relief from those obligations, our dissenting colleague faults the Respondent for not doing so. It is not surprising that the Respondent did not so inform [employee]. In light of the Respondent's reasonable understanding that [employee] did not want to be represented by the Union, the Respondent would not have seen the need to discuss any other options. In any case, the [Board] has never held that an employer has a duty to provide this kind of advice.

335 NLRB at 941. Accordingly, this argument also is not a basis for finding a violation here.

Third, the General Counsel also contends that "as in *Craftool*, Gregory was allowed to circulate the petition on work time." (G.C. Brief at 4.) This is the only

sentence in the General Counsel’s entire brief addressing this issue. The General Counsel provides absolutely no analysis as to why this is relevant or why this fact alone, even if true, would require finding a violation in this case. It does not. First, in *Craftool* the Board and the ALJ focused on the fact that the employees were able to solicit signatures for the decertification petition during working time only because the employer later disciplined one of the employees for engaging in the exact same conduct when he tried to solicit signatures for a pro-union petition. Here, there are no similar allegations.

Moreover, the record does not even establish that anyone *allowed* Gregory to circulate the petition during working time. The ALJ found that the “record is silent as to whether any supervisor or manager was present when she solicited the other employees to sign the petition.” (ALJD 10:1-8.) Gregory specifically testified that when she solicited the other employees in the room, the only people present were seven or eight associates—all hourly employees. (Tr. 42:12-21). She did not testify that any management personnel were present. (*See generally* Tr. 42:2-43:4.) Further, Gregory testified that Harris informed her that he would not be present when the form would be ready and that she could obtain it from his desk drawer. (ALJD 3:30-31; Tr. 38:23-25.) Gregory obtained the petition without Harris being present. (ALJD 3:33-35.) Gregory also testified that when she asked the last employee to sign on November 10, no one else was present. (ALJD 4:10-15; Tr. 51:3-7.) She testified that right after the last employee signed, she left the document in Harris’s office because he was not at the store on that day. (ALJD

4:13-15; Tr. 52:10-12.) In short, there is absolutely no evidence that any manager or supervisor knew the solicitation took place during working time. (In point of fact, there is no record evidence proving that Gregory and the other employees were not on a rest break when the petition was signed. This was not an issue at the hearing and may not be raised on appeal, in the absence of record evidence.)

Finally, the General Counsel contends that the facts of this case support finding a violation because “unlike in *Craftool* wherein employees had expressed some actual dissatisfaction with the Union, neither Gregory nor any other employee in the instant case expressed such sentiment prior to Respondent’s unsolicited provision of the petition.” (G.C. Brief at 4.) Again, the record flatly contradicts this erroneous assertion. Gregory testified as follows:

Q. Well, even during negotiations you would occasionally ask Mr. Harris how the negotiations were going, right?

A. Oh, yeah, I did. Occasionally I asked him if he heard anything.

Q. In at least some of those conversations you would express dissatisfaction with the union, wouldn’t you?

A. It was pretty common knowledge that I voted against the union when they were voted in, so yeah.

Q. And you continued to make it known that you did not like the union even after they were voted in?

A. Yeah. On occasion I probably did. I just didn’t want to join the union.

Q. Ms. Gregory, prior to the conversation with Mr. Harris about your autistic coworkers, you had, in fact, on at least

one occasion indicated to him that you wanted the union to go away, true?

A. Well, yeah.

(Tr. 63:17-64:2; 65:2-6.) Accordingly, there is no merit to the General Counsel's contention.

Craftool is plainly distinguishable, and the General Counsel's four-point argument is entirely without merit—factually and legally. The General Counsel's exceptions should be denied.

B. The ALJ Correctly Held That *Ernst Home Centers* and *Bridgestone/Firestone* Are Controlling and Require Dismissal of the Union's Allegation Concerning Respondent's Alleged Support of the Employees' Effort To Remove the Union.

Not only is *Craftool* distinguishable, and not only is the General Counsel's legal argument unavailing, but the ALJ correctly concluded that there *is* controlling case law here and that the case law (*Ernst* and *Bridgestone/Firestone*) fully supports Respondent's position. The General Counsel contends that those cases are distinguishable because, there, "individual employees initially sought information from their employer about how they could individually avoid or get out of the union." (G.C. Brief at 6.) With respect to *Ernst*, more specifically, the General Counsel contends that the employee in question "took an active role in seeking out decertification information" and "had a predetermined goal," as demonstrated by asking more than once for assistance and then asking for "verbiage" to use in a petition. (G.C. Brief at 6.) With respect to *Bridgestone/Firestone*, the General Counsel contends that the employee in that case made a "precise" request when he

asked “if there was any way that he could get out of being the union.” (G.C. Brief at 7.) The General Counsel contends that this is different from the instant case because Gregory “made a single inquiry regarding her concerns about how to assist her co-workers” and “did not seek information about decertifying the Union.” (G.C. Brief at 6-7.) The General Counsel is wrong.

The General Counsel is making distinctions where none exists and imposing requirements that are not grounded in extant law. Notably, in neither one of these two cases did the employees ask their employer to decertify the union. For example, in *Bridgestone/Firestone*, as the General Counsel quoted, the employee specifically asked if there was a way he, personally, could “get out of being in the union.” His request to get out of being in the union was not a request to get rid of the union or to get the entire bargaining unit out of the union; it was a request, taken literally, that sought his own individual release from the union. Of course, that is not how it works, so the employer explained the decertification process. Logically, this is no different from what happened here. Gregory specifically asked how her autistic co-workers employees “could just be eliminated with anything to do with the union.” (ALJD 3:22-25.) Similarly, Gregory’s repeated statements to Harris over the months that she did not want to be represented by the Union demonstrated clearly what her objective was.

As addressed above, the General Counsel is placing too high a burden on employees who are far from labor law experts and attempting to draw lines where no line exists. In fact, the Board in *Bridgestone/ Firestone* specifically addressed

this argument and rejected it: “the dissent seeks to distinguish *Ernst* on the ground that the employee there came up with the idea of a written petition. We recognize that, in the instant case, the Respondent suggested a written petition. However, Respondent was simply responding to [an employee’s] query which, as reasonably understood, was about decertifying the union.” *Id.* at 942.

There is no merit to the General Counsel’s argument. The ALJ correctly held that existing case law dictates dismissal of the Union’s allegation. When an employee asks how to get rid of a union, an employer is permitted to provide basic information about how to accomplish that task. *See, e.g., Bridgestone/Firestone*, 335 NLRB at 942 (employer lawfully provided a sample decertification petition for the employee to use); *Ernst Home*, 308 NLRB at 848 (employer lawfully provided employee with language for decertification petition); *Eastern States Optical*, 275 NLRB at 371-72 (employer lawfully provided wording for decertification petition). Because nothing more happened in this case, the ALJ’s conclusion on this issue should be adopted by the Board.

II. The Board Cannot Find a Violation of the Law Without Running Afoul of Section 8(c) of the Act and the First Amendment to the Constitution.

Employers (and, indeed, individual managers) have a statutory and constitutional right to communicate with employees on the subject of union representation. It would violate this free speech principle to find that the Act prohibits a manager from doing as Harris did in this case. *See* U.S. Const. amend I (“Congress shall make no law . . . abridging the freedom of speech”); *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 617 (1969) (observing that “Section 8(c) merely

implements the First Amendment”); 29 U.S.C. § 158(c) (“The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice . . . if such expression contains no threat of reprisal or force or promise of benefit.”). Here, it is undisputed that Harris did not threaten Gregory, force her to do anything, or promise her any benefit in exchange for attempting to remove the Union. He merely responded to her unsolicited question about removing the Union by giving her basic information about how to do it—and then let her do as she pleased with that information. The federal government is not entitled to muzzle Respondent and Harris and prohibit them from providing employees with simple information necessary for them to exercise their right to self-determination under federal law. *See generally id.*; *see also Citizens United v. Federal Election Commission*, 558 U.S. 310, 432 (2010) (“we have long since held that corporations are covered by the First Amendment.”)

At the very least, the Board has an obligation to adopt the ALJ’s reasonable interpretation of the Act (an interpretation the Board itself has used in prior cases, *see Bridgestone/Firestone* and *Ernst Home, supra*), so as to avoid unnecessarily addressing difficult constitutional questions. *See Edward J. DeBartolo Corp. v. Florida Gulf Coast Building & Constr. Trades Council*, 485 U.S. 568, 575 (1988) (noting that “where an otherwise acceptable construction of a statute would raise serious constitutional problems, the Courts will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress,” and

avoiding a First Amendment issue by adopting a limited construction of the NLRA's relevant provisions).

Harris's actions were quintessential protected speech under the Constitution and the Act—providing a curious employee with basic information about the contours of federal law and relevant processes followed and enforced by the federal government. Any ruling finding his conduct to violate the Act would be constitutionally (and statutorily) indefensible. The General Counsel's exceptions should be denied for this reason alone.

Conclusion

The ALJ correctly found that Respondent's actions through its general manager constituted no more than ministerial aid and, accordingly, that Respondent's conduct did not violate the Act. The Board should adopt the ALJ's findings in this regard and dismiss the complaint in its entirety.

Respectfully submitted,

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