UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

SYSCO GRAND RAPIDS, LLC		
Respondent,		
and	Cases:	07-CA-146820
		07-CA-148609
GENERAL TEAMSTERS UNION		07-CA-149511
LOCAL NO. 406, INTERNATIONAL		07-CA-152332
BROTHERHOOD OF TEAMSTERS		07-CA-155882
		07-CA-166479
Charging Party.		07-RC-147973

RESPONDENT'S REPLY BRIEF TO THE GENERAL COUNSEL'S OPPOSITION AND IN SUPPORT OF RESPONDENT'S MOTION FOR RECONSIDERATION

On May 13, 2019, the Counsel for the General Counsel (hereafter "General Counsel") filed its Response in Opposition to Sysco Grand Rapids, LLC's (hereafter "Sysco" or "Respondent") Motion for Reconsideration. Respondent now files its Reply Brief in response to the General Counsel's Opposition pursuant to the National Labor Relations Board's ("the Board's") Rules & Regulations § 102.24(c).

I. The Board Should Consider Sysco's Reinstatement Offer to George Brewster

Like the Charging Party Teamsters Union, Local No. 406 (hereafter "the Union" or "Charging Party"),[1] the General Counsel plainly recognizes the dispositive import of Respondent's offer of reinstatement to Brewster and the turnover in both employee population and supervisors/agents with respect to the propriety of the Board's special remedies. In the 10(j) proceeding, the Board (represented by the same counsel now

[1] The Charging Party filed its Brief in Opposition to Respondent's Motion for Reconsideration on May 2, 2019, and served its Brief on Respondent on May 7, 2019. Sysco filed its response to the Charging Party's brief on May 14, 2019 with the Board.

representing the General Counsel) found the lone fact that Brewster was offered reinstatement so compelling that the Board abandoned its attempt to pursue 10(j) injunctive relief because it recognized that "the reinstatement of the main union organizer is sufficient to preserve the power of the Board to remedy the underlying unfair labor practice *via its traditional means.*" (emphasis added). *See, e.g., Boydston Electric, Inc.*, 331 NLRB 1450, 1451 (2000) (statement in a pleading admissible as a party opponent admission). Naturally, Brewster's reinstatement has the same dispositive effect with respect to special remedies which are not the Board's traditional means of resolving unfair labor practice violations.

Indeed, the General Counsel and the Union's collective attempt to prohibit the Board from considering such facts is a tacit admission that they render the Board's special remedies unwarranted. Both adopt the same argument, alleging that these dispositive facts are "not in the record." In doing so, they take the untenable position that the Board must ignore what facts it knew and are not in dispute; and in the case of Brewster's reinstatement offer, one that occurred in a judicial proceeding to which the Board was a party. The notion that the record must be re-opened and the case remanded to establish operative facts about which there is no reasonable dispute is simply ludicrous.

Absent compelling reasons to the contrary, Board proceedings are to be governed by the Federal Rules of Evidence. *See* 29 U.S.C. § 160(b); Board's Rules & Regulations § 102.39; Board's Statements of Procedure § 101.10(a). This is particularly true where, as here, no specific controlling Board rule exists. Pursuant to Federal Rule of Evidence 201, a federal court may and should take notice of any adjudicative facts

that “are not subject to reasonable dispute;” and may do so “on its own.” FRE 201(b); FRE 201(c). Most significantly, the rule further provides that such notice may be taken “at any stage of the proceeding.” FRE 201(f). Thus, undisputed facts are subject to judicial notice on appeal. *See, e.g., In re Indian Palms Associates, Ltd.*, 63 F.3d 197, 731 (3d Cir. 1995). As here, outcome determinative facts are subject to judicial notice. *See Jeradi v. Myland Laboratories, Inc.*, 230 F.3d 594, 597 (3d Cir. 2000); *Ivezaj v. Immigration and Naturalization Service*, 84 F.3d 215, 218-219 (6th Cir. 1996).

There is simply no need for a motion to re-open the record. Such a process would result in a needless waste of judicial resources where no genuine issue exists. The Board can and should take notice of Brewster’s reinstatement offer, the retirement of Respondent’s alleged offending agent Thomas Barnes, and the massive post-hearing turnover of its workforce. As both the Charging Party and the General Counsel appear to understand, it is wholly evident that its special remedies are unwarranted.

II. <u>The Board’s Proposed Remedies Are Legally Unsupported Due to a Lack of a Bargaining Relationship</u>

Respondent has never had a bargaining relationship with the Charging Party. However, the Board’s Order provides that for a two-year period, if Respondent lawfully expresses its views on unionization under Section 8(c) of the Act, Respondent must provide the Charging Party with: (1) notice of such a meeting; (2) the right to enter Respondent’s property; (3) use of Respondent’s private facilities; and (4) “equal time” for third-party Union representatives in attendance to respond.

The remedy proposed by the Board is inappropriate in the absence of a bargaining relationship. There is no evidence that special remedies are necessary to dissipate any lingering effects of any alleged unfair labor practices, or to ensure a fair

election can be held. The General Counsel argues that special remedies are necessary for employers "who engage in severe unfair labor practices." However, all the cases cited by the General Counsel concern recidivists with long histories of labor infractions. The Board recently affirmed an ALJ's determination that the cases cited by the General Counsel to support his assertion that an access remedy is necessary are inapposite in situations without a recidivist history, and do not require access to the employer's facilities or equal time for Union representatives to respond to the employer's statements. As the ALJ in that case noted, "the Board has typically granted [an access] remedy in circumstances different than those present in the instant case. For example, while the Board granted such a remedy in *United States Service Industries, Inc.,* 319 NLRB 231 (1995), the employer in that case was a third time recidivist with a long history of opposition to the statutory rights of its employees." *UMPC Presbyterian Hosp.*, 366 NLRB No. 185, *367-368 (2018).

Here, there is no history of opposition to the statutory rights of employees. Instead, the Board found violations that occurred over a brief period of eight months, which were followed by forty-two months of lawful conduct by Respondent. Furthermore, most of the employees employed at Respondent were not employed at the time of the Charging Party's organizing campaign. Accordingly, there is no need for union access to ensure a fair election.

A. <u>The Board's Remedy Would Violate Section 8(a)(2) of the Act</u>

The Board's remedy makes Sysco risk flouting Section 8(a)(2) of the Act by providing the Union with special organizing assistance and requires Sysco to effectively endorse the Union in violation of Section 8(a)(2) of the Act. By requiring Sysco to

provide equal access to the Union, the Board actually puts in jeopardy employees' free exercise of their rights in a second election, the Board's espoused remedial aim. The General Counsel claims that there is no risk of violating Section 8(a)(2) of the Act because "employees will be allowed to make an unfettered choice *after* Respondent's unfair labor practices are fully remedied." However, contrary to the General Counsel's assertion, the Board's Order specifically directs Respondent to proceed "directly to a second election." Further, Respondent is directed for a period of two years or "until the Regional Director has issued an appropriate certification *following* a fair and free election" to allow union representatives access to Respondent's bulletin boards, to be present at meetings concerning union representation, and to have equal time and facilities to address employees.

As a result of this remedy, employees will not have an unfettered choice on union representation. The Board's remedy forces Respondent to actively support the Charging Party's campaign, but does not impose the same preference for rival unions. Contrary to the Board's stated intent, this remedy actually undermines the Board's claimed remedial aim.

B. <u>The Board's Proposed Notice Reading and "Notice, Equal Time, and Facilities" Remedies Are Unnecessarily Punitive</u>

Special remedies are necessary only if it can be demonstrated that the Board's traditional remedies will not adequately eliminate the effects of unfair labor practices and ensure a fair election. *See Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 235-36 (1938) ("[t]he power to command affirmative action is remedial, not punitive, and is to be exercised in aid of the Board's authority to restrain violations and as a means of removing or avoiding the consequences of violation where those consequences are of a

kind to thwart the purposes of the Act"). Any proposed remedy must be "tailored to the unfair labor practice that it is intended to redress" and "the relief which the statute empowers the Board to grant is to be adapted to the situation which calls for redress." *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 900 (1984).

The Board's remedies are not tailored to the facts here. First, the notice reading is unnecessary. The offending agent the Board identified, Thomas Barnes, no longer works for Respondent. See Ex. 1 (Declaration of Chris Jasper). The notice posting requirement effectively informs employees about Respondent's unfair labor practice violations. The purpose of a notice reading is punitive; there is no remedial aim, and it only serves to humiliate the employer in the nature of a public confession of sins. *See NLRB v. Loney & Duke Storage Warehouse Co.*, 369 F.2d 859, 869 (5th Cir. 1966); *Conair Corp v. NLRB*, 721 F.2d 1355, 1401 (D.C. Cir. 1983) (Ginsburg, J., dissenting). There is no evidence that the notice reading would aid the Board's authority to restrain violations.

Second, contrary to the General Counsel's assertions, the Board's remedy violates Respondent's constitutional property, privacy, and First Amendment interests. These constitutional issues weigh especially heavy because the facts here do not support special remedies in any event. The General Counsel failed to properly consider the extraordinary nature of a two-year remedy granting the Charging Party access to Respondent's facilities and its employees as a result of conduct that occurred over a fraction of that time. In granting access as a remedial measure, the "burden lies upon the Board to substantiate its conclusion that access is necessary to offset the

consequences of unlawful employer conduct." *Steelworkers v. NLRB*, 646 F.2d 616, 639 (D.C. Cir. 1981).

The Board failed to meet its burden here. It has failed to establish why the Board must require access, rather than traditional remedies, to ameliorate any alleged unfair labor practices, none of which directly obstructed the Charging Party's access to employees. Respondent's employees are not inaccessible beyond the usual channels. Instead of a purely remedial aim, this remedy punitively restricts Respondent's constitutional property and privacy rights. *See Hudgens v. NLRB*, 424 U.S. 507, 521-22 (1976) (approving *Babcock's* admonition that accommodation between employees' labor rights and employer's property rights "must be obtained with as little destruction of one as is consistent with the maintenance of the other"). Accordingly, there is no evidence that the Board's notice reading and access remedies advance a remedial aim.

C. <u>The Board's Remedy Would Violate Section 302 of the Taft-Hartley Act</u>

Contrary to the General Counsel's assertions, the Board's remedy plainly gives something of value to the Charging Party. The General Counsel's attempt to manipulate the words "taking" and "thing of value" does not diminish from their statutory and constitutional definitions. Section 302 of the Labor Management Relations Act (Taft-Hartley Act) prohibits any employer from "pay[ing], lend[ing], or deliver[ing], or agree[ing] to pay any money or other thing of value […] to a labor organization." 29 U.S.C. § 186(a)(2). The Charging Party's access to Respondent's employees is undoubtedly valuable. See *Mulhall v. United Here Local 355*, 667 F.3d 1211, 1213 (11th Cir. 2012) ("organizing assistance can be a thing of value that […] could constitute a violation of § 302"). In fact, union access to employees is so important that the Board

typically considers union access rights to be a mandatory subject of bargaining. *Oaktree Capital Management, LLC*, 335 NLRB 1272 (2010). Providing the Charging Party with unfettered access to Respondent's employees is in essence "buying and selling [] labor peace" in violation of Section 302 of the Act to remedy unfair labor practice violations. Moreover, the Board's own admission in the Section 10(j) proceeding that these allegations were fully amenable to remediation through traditional means casts the Section 302 implications in a particularly harsh light.

III. CONCLUSION

Respondent moves the Board to abide by its previous admission that the unfair labor practices which underlie its decision may be remedied by traditional means, and rescind the Order of all special remedies in its Opinion. *See*, NLRB Rules §102.49. Moreover, it moves that the Board immediately reconsider and rescind the special remedies in its Decision and Order on the grounds that such Decision and Order does not account for intervening facts, and most importantly, contravenes the Act, the U.S. Constitution, and federal law.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that Respondent's Reply Brief To The General Counsel's Opposition and In Support of Respondent's Motion for Reconsideration was filed electronically and was electronically served by e-mail upon the following persons on this 20th day of May 2019:

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DECLARATION OF CHRIS JASPER

Pursuant to 28 U.S.C. § 1746, I, Chris Jasper, make the following declarations:

1. I am the President of the Midwest Market of Sysco Corp. In fulfilling the duties of this position, I and my staff provide administrative services to wholly owned subsidiaries of Sysco Corp. within the region. One of those subsidiaries is Sysco Grand Rapids LLC. I assumed the position of Midwest Market President on July 1, 2018.

2. The previous President of the Midwest Market of Sysco Corp. was Tom Barnes. Mr. Barnes retired on or about September 1, 2018 after working with me for two months after I assumed the same position. At the time I assumed the position, Mr. Barnes' duties were the same as my current duties.

I DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE UNITED STATES OF AMERICA THAT THE FOREGOING IS TRUE AND ACCURATE.

EXECUTED ON May 1**, 2019.**

Chris Jasper

Chris Jasper

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Exhibit 1