UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 12

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NOVA SOUTHEASTERN UNIVERSITY

and

Case Nos. 12-CA-25114
12-CA-25290
12-CA-25298

SERVICE EMPLOYEES INTERNATIONAL UNION, LOCAL 32BJ
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CHARGING PARTY'S ANSWERING BRIEF TO RESPONDENT'S EXCEPTIONS TO THE DECISION OF THE ADMINISTRATIVE LAW JUDGE

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A. INTRODUCTION

Charging Party, Service Employees International Union, Local 32BJ ("Union" or "Local 32BJ") submits this answering brief in opposition to the Exceptions to the March 16, 2009 Decision and Order ("ALJD") of Administrative Law Judge John H. West ("ALJ") filed by Respondent Nova Southeastern University ("Nova" or "Respondent").

Nova is a private university located primarily in Ft. Lauderdale, Florida. ALJD 2:25-26; Tr. 37:13-22. Since at least 2006, Nova maintained in its Campus Safety and Traffic Handbook ("Handbook") a rule providing that "[n]o solicitation is allowed on any NSU campus or facility without the permission of the NSU Executive Administration." ALJD 3:34-39; Tr. 55-57; General Counsel Exhibit ("GCX") 15, p. 3; GCX 16, p. 2.

For several years prior to February 19, 2007, Nova subcontracted its maintenance work to Unicco Services, Inc. ("Unicco"). ALJD 3:1-2; Tr. 40, 100. At the time Unicco held the contract, it employed Steve McGonigle as a painter on campus. ALJD 8:3-4; Tr. 100. As part of

an organizing campaign with the Union, in August, 2006, during non-work time, McGonigle handbilled his co-workers in the parking lot on campus concerning the health care needs of the Unicco employees. ALJD 8:3-16; Tr. 104-107; GCX 28-29. Nova security officers ordered him to stop pursuant to Nova's no-solicitation policy. ALJD 5:35-53; 6:1-20; 8:16-18; Tr. 63:18-25, 64:1-23. McGonigle was then issued two disciplinary warnings, one for handbilling, and the other for leaving his assigned work area. ALJD 9:29-53; 10:1-2; GCX 30-31.

The ALJ ruled that Nova violated Section 8(a)(1) of the National Labor Relations Act ("Act"), 29 U.S.C. § 158(a)(1) by maintaining an overbroad no-solicitation rule, and by enforcing that rule against McGonigle. Respondent takes exceptions to these rulings, arguing that its no-solicitation rule did not apply to its direct employees, that subcontractor employees, including McGonigle, have no right to engage in any solicitation on campus, and that the rule is justified by campus security concerns. Respondent's Brief in Support of its Exceptions to the Decision and Order of the Administrative Law Judge ("Nova Exceptions Brief"), pp. 3-13.

Local 32BJ's answering brief focuses on Nova's no-solicitation rule and its application to its subcontractor employees, including Steve McGonigle, but hereby adopts and incorporates by reference the arguments set forth in General Counsel's Answering Brief, as well. The Board should reject Nova's disingenuous claim that its no-solicitation policy was inapplicable to its own employees and find that the policy is unlawfully overbroad because it prohibits solicitation during non-work time and in non-work areas, reaffirm that employees do not lose their Section 7 rights simply because they are employed at the premises of their employer's client, and find that the no-solicitation rule lacks any nexus to Nova's purported security interests. *Republic Aviation Corp.*, 324 U.S. 793 (1945); *Teletech Holdings, Inc.*, 333 NLRB 402 (2001); *Gayfers Dept. Store*, 324 NLRB 1246 (1997); *The Presbyterian Med. Ctr.*, 227 NLRB 904 (1977), *enf'd, NLRB*

v. The Presbyterian Med. Ctr., 586 F.2d 165 (10th Cir. 1978). In addition, the Union urges the Board to adopt a simpler rule to govern the rights of subcontractor employees to engage in solicitation and distribution on the client employer's property, one that does not depend on whether the employees work exclusively, or on a long-term basis, on the premises, whether they seek to engage the public or their co-workers, whether they perform work that could be performed by the client, or whether the client supplies their equipment, materials, and supplies. Rather, subcontractor employees who work regularly on the premises of the client owner should have the presumptive right to engage in Section 7 solicitation and distribution in non-work areas and during non-work time. *Republic Aviation Corp.*, 324 U.S. 793.

B. ARGUMENT

1. Nova's No-Solicitation Rule is Unlawful as Applied to its Direct Employees.

Nova admitted, and the ALJ found, that Respondent maintained in its Handbook a rule providing that "[n]o solicitation is allowed on any NSU campus or facility without the permission of the NSU Executive Administration." ALJD 3:34-39; Tr. 55-57; GCX 15, p. 3; GCX 16, p. 2. The ALJ correctly concluded that the no-solicitation rule is invalid on its face because it restricts its own employees, and those of its contractors, from engaging in union solicitation/distribution during non-work time and in non-work areas without justification, and that Respondent failed to convey to employees that solicitation was, in fact, permitted during such times and in such areas. ALJD 19:36-51; 20:1-26. *See Republic Aviation Corp.*, 342 U.S. at 803; *Teletech Holdings, Inc.*, 333 NLRB at 403 ("distributing literature without proper authorization" unlawfully overbroad rule); *Laidlaw Transit, Inc.*, 315 NLRB 79, 82 (1994) (rule prohibiting solicitation during "company time" is presumptively invalid because "it does not clearly convey to employees that they may solicit on breaks, lunch, and before and after work.");

Comet Corp., 261 NLRB 1414, 1426-27 (1982) (rule prohibiting "soliciting, collecting contributions or distribution of literature, written or printed matter of any description on Company premises without specific Company authorization" unlawful); *Taylor Dunn Mfg. Co.*, 252 NLRB 799, 813-14 (1980) (rule providing that "vending, soliciting, or collecting contributions for any purpose whatsoever on Company time on the premises, unless authorized by Management" unlawful), *enf'd without opinion*, *NLRB v. Taylor-Dunn Mfg. Co.*, 679 F.2d 900 (9th Cir. 1982).

Although Nova argues in its exceptions that the no-solicitation rule as applied to subcontractor employees is lawful, it does not argue that the rule would be lawful as applied to its own employees. Instead, Respondent claims that the rule does not, in fact, apply to its own employees. Nova Exceptions Brief, pp. 3, 8-9. As the ALJ found, ALJD 19:12-24, 48-50, this claim is contradicted by the testimony of John Santulli, Nova's Vice President for Facilities Services, who confirmed that Nova requires any individual entering Nova property, including faculty and staff, to comply with the Handbook. Tr. 49-53. Moreover, the Handbook states explicitly that it is applicable to Nova staff, *see* GCX 16, p. 1, and there is nothing in the no-solicitation rule, itself, that suggests it is inapplicable. *Id.*, p. 2. Whatever ambiguity there is in this regard must be construed against Nova. *Teletech Holdings, Inc.*, 333 NLRB at 403; *The Times Publ'g Co.*, 231 NLRB 207, 211 n.4 (1977), *enf'd in relevant part*, *The Times Publ'g Co. v. NLRB*, 576 F.2d 1107 (5th Cir. 1978). Accordingly, putting aside for the moment the lawfulness of the rule as it is applied to subcontractor employees, it is unlawful for the independent reason that it restricts its own employees from soliciting during non-work time and in non-work areas, and requires prior authorization from Nova. *Republic Aviation*, 342 U.S. at 803; *Teletech Holdings, Inc.*, 333 NLRB at 403; *Laidlaw Transit, Inc.*, 315 NLRB at 82; *Comet*

Corp., 261 NLRB at 1426-27; *Taylor Dunn Mfg. Co.*, 252 NLRB at 813-14.

2. Nova's Rule is Unlawful as Applied to its Subcontractor Employees.

The ALJ correctly concluded that Nova's no-solicitation rule was unlawful as applied to its subcontractor's employees, including painter Steve McGonigle, ALJD 22-31, and properly analyzed the case in accordance with the principles of *Republic Aviation Corp.*, 324 U.S. 793, rather than *Babcock & Wilcox Co.*, 351 U.S. 105 (1956). *See New York New York Hotel, LLC (NYNY I)*, 334 NLRB 762 (2001), *enf. denied, New York New York Hotel, LLC v. NLRB*, 313 F.3d 585, 590-91 (D.C. Cir. 2002); *New York New York Hotel, LLC (NYNY II)*, 334 NLRB 772 (2001), *enf. denied, New York New York Hotel, LLC v. NLRB*, 313 F.3d 585 (D.C. Cir. 2002); *Gayfers Dept. Store*, 324 NLRB 1246; *Southern Servs., Inc.*, 300 NLRB 1154 (1990), *enf'd*, 954 F.2d 700 (11th Cir. 1992); *Fabric Servs., Inc.*, 190 NLRB 540 (1971). In its exceptions, Nova asks the Board to overrule these prior decisions and hold that employers may insulate themselves from any Section 7 solicitation or distribution by subcontracting their work. Nova Exceptions Brief, p. 9-10. However, the Board's current approach as set forth in *Gayfers Dept. Store* reflects a fairer balance between the rights of subcontractor employees to engage in organizing activity, and the property owner's interests, and the Board should take this opportunity to clearly articulate a rationale for the *Gayfers* rule.

There is no question that direct employees of Nova have a presumptive right of access to outside nonworking areas in order to engage in Section 7 activity. *Republic Aviation Corp.*, 324 U.S. at 803; *Tri County Med. Ctr.*, 222 NLRB 1089 (1976). Such employees would have no less an interest in organizing their co-workers if they were employed by a Nova subcontractor. Nova has not argued otherwise, but contends that those interests do not deserve protection at the work place. However, as the Supreme Court has recognized, the worksite is a "uniquely appropriate"

place for workers to engage in organizing activities, *Republic Aviation*, 324 U.S. at 803 n. 6, "the one place where [employees] clearly share common interests and where they traditionally seek to persuade fellow workers in matters affecting their union organizational life and other matters related to their status as employees," *Eastex Inc. v. NLRB*, 437 U.S. 556, 574 (1978). Nova has not explained why this would be less true for subcontractor employees. *Southern Servs. Co.*, 954 F.2d 700, 704 (11th Cir. 1992) (subcontractor employees have just as much of an interest in organizing *at the jobsite* as direct employees) (internal quotations and citation omitted).

In weighing Nova's property interest, the Board should affirm that by hiring a subcontractor to perform services on its premises, Nova must acquiesce to the same "inconvenience or even some dislocation of property rights," *Republic Aviation*, 324 U.S. at 803 n. 8, in order to facilitate the Section 7 rights of those employees as it would vis-à-vis its own employees. *Southern Servs., Inc.*, 300 NLRB at 1155 (subcontractor employees present on the client's property pursuant to their employment relationship share same Section 7 rights as client's direct employees). This approach is consistent with the Board's decisions in other contexts holding that once an employer invites a subcontractor onto its premises, the employer must submit some of its property interest to the Section 7 rights of its subcontractor's employees. *See CDK Contracting Co.*, 308 N.L.R.B. 1117, 1122 (1992) (contractor violated 8(a)(1) by denying union representatives access to meet with members employed by subcontractor under to a collective bargaining agreement containing access clause); *Villa Avila*, 253 N.L.R.B. 76, 81 (1980), *enf'd as modified*, 673 F.2d 281 (9th Cir. 1982) (same; "Respondents, by hiring subcontractors [. . .] have thereby invited these subcontractors to, in effect, maintain a temporary place of business on the site, at which locus the working conditions of the subcontractors' employees are necessarily established. . . [and] thereby necessarily submitted their own property

rights to whatever activity, lawful and protected by the Act, might be engaged in by union business agents in the performance of their duties. . .") (internal quotations omitted).

Moreover, there is no reason to believe that the Section 7 activities of subcontractor employees infringe to a greater degree on property or managerial interests than those of direct employees. Client employers choose whether or not to engage subcontractors, and hence determine the level of control they wish to retain over such subcontractors, including with respect to employee conduct. For example, as Nova did here, ALJD 3:34-42, client employers typically require that employees of their subcontractors comply with plant rules. *See e.g., Hychem Constructors,* 169 NLRB 274, 276 (1968). A client employer may also provide contractor employees with uniforms or ID badges or utilize other mechanisms so that it can readily ascertain whether they have a right to be on the premises. These types of contractual protections provide client-employers with all of the assurances they need that the subcontracted employees will not engage in serious misconduct in connection with their on-premises Section 7 activity. *Cf. Hillhaven Highland House,* 336 NLRB 678, 681 (2001) ("Surely it is easier for an employer to regulate the conduct of an employee – as a legal and practical matter – than it is for an employer to control a complete stranger's infringement on its property interests").

3. Nova's Purported Security Interests Do Not Justify the Rule.

The ALJ also correctly rejected Nova's purported security justification for the no-solicitation rule. ALJD 19:10-37.

Although Nova defends the rule on security grounds insofar as it requires prior authorization to solicit, Respondent does not challenge the ALJ's determination that the rule is unlawful for the independent reason that it bars solicitation during non-work time and in non-work areas. Consistent with long-standing precedent, the Board may affirm the ALJ's

determination on this ground, alone. *See Teletech Holdings, Inc.*, 333 NLRB at 403; *Laidlaw Transit, Inc.*, 315 NLRB at 82.

Respondent offered no factual evidence, as it was required to do, in support of its claim that the rule was necessary to maintain security, but only the conclusory testimony of its safety director that it was. *See St. Luke's Hosp.*, 300 NLRB 836, 837 (1990) (employer's litter concern did not justify policy barring solicitation and distribution of literature under employee and patient windshield wipers in parking lot since testimony was not supported by "company records or reports documenting any past problems with litter or automobile damage resulting from the placement of literature on automobile windshields"); *The Presbyterian Med. Ctr.*, 227 NLRB at 905 (rejecting hospital's claim that rule prohibiting off-duty employees from accessing employer's premises after work was justified as a crime prevention measure since it offered no facts showing that past crimes were committed more frequently by off-duty employees); *Zenith Radio Corp. of Missouri*, 172 NLRB 1724, 1727 (1968) (employer's proffered safety justification for handbilling prohibition rejected for lack of factual support); *Armstrong Rubber and Tire Co.*, 119 NLRB 382, 383 (1957) (rule prohibiting truck drivers from soliciting at rest stops not justified by purported safety concerns; testimony of manager that accident rate had improved after rule was implemented insufficient absent actual accident reports), *enf'd, NLRB v. Armstrong Rubber and Tire Co.*, 262 F.2d 812 (5th Cir. 1959).

Nova's invocation of certain horrific acts of violence cannot mask, even as a theoretical matter, the lack of any nexus between its no-solicitation rule and its security concerns. It is difficult to see how requiring prior authorization to solicit is an effective crime prevention measure, since it is not likely that criminals would engage in solicitation as cover for their activities. Controlling access to campus, including by requiring visitors to present personal

identification, would seem to be a far more effective security measure and one that far better avoids infringement of Section 7 rights. *See First Healthcare Corp.*, 336 NLRB 646, 650 (2001), *enf'd, First Healthcare Corp. v. NLRB*, 344 F.3d 523 (6th Cir. 2003) (where employer demonstrates security or related business concern, less restrictive measures, such as requiring off-site employees to present identification, must be employed in lieu of excluding them); *ITT Indus., Inc.*, 341 NLRB 937, 940 & n. 35 (2004) (same), *enf'd in relevant part, ITT Automotive v. NLRB*, 188 F.3d 375 (6th Cir. 1999).

4. <u>The Board Should Adopt a Simpler Test than the ALJ did in Finding that Nova Enforced Its Unlawful Rule Against Steve McGonigle in Violation of 8(a)(1)</u>.

The ALJD should also be affirmed insofar as it found that Nova enforced its unlawful no-solicitation against Unicco employee, Steve McGonigle, in violation of Section 8(a)(1). ALDJ 31: 35-53. There was little factual dispute, and the ALJ found, that Mr. McGonigle was engaged in handbilling of his Unicco co-workers during non-work time and in a non-work area when a Nova security officer ordered him to cease pursuant to its no-solicitation rule. Nova Exceptions Brief, p. 2-3; ALJD 22:12-16; Tr. 104-107. In concluding that McGonigle's handbilling was protected, the ALJ relied on the fact that a) McGonigle was employed regularly, exclusively, and on a long-term basis on Nova's campus; b) he handbilled only co-workers and not Nova employees; c) he performed work which could be done by a Nova employee; and d) he performed work for which Nova supplied the equipment, materials and supplies. ALJD 36:12-21. While there is ample record support for these factual conclusions, the Board should affirm that McGonigle's activity was protected on simpler grounds, and in doing so, adopt a rule that more clearly advises workers of their rights.

The Board should not limit the rights of subcontractor employees to engage in Section 7 activity on the client owner's property to circumstances in which the subcontractor employee is

employed "exclusively" at the premises. Neither the Board nor the courts have ever suggested that employees lose their access rights if they also have a second job. Likewise, subcontractor employees have no less an interest in organizing their co-workers at their jobsite because they happen to work at more than one location. Working at multiple worksites simply adds an additional potential condition of employment about which the employees may want to organize. Further, subcontractor employees are no less rightfully on the property pursuant to their employment relationship because they also work at another location, and their activities present no greater infringement of the owner's property interest because of this. The only potential significance in balancing the employees' Section rights against the owner's property interest is that the employee may have an alternative location for engaging in organizing activity. However, this may not always be the case. As Member Walsh noted in his dissent in *United States Postal Serv.*, 339 NLRB 1175 (2003), many employees are required work at multiple client sites, and never report to the premises of their direct employer. 339 NLRB at 1181 (Member Walsh, dissenting in part). This would be true in several industries, including the building service industry where "route" employees are assigned by a cleaning contractor to perform work for several different commercial office building owners. Thus, if the Board adheres to the exclusivity rule, it would effectively bar large groups of employees from exercising their rights at the jobsite. The Board should reject this limitation for the additional reason that there may be issues specific to a particular work location, for example safety concerns, around which employees may wish to organize, or there may be specific employees that work only at one particular location that an employee may wish to engage, which make that particular location a more compelling site for organizing. Furthermore, employees may wish to communicate with members of the public who have ties to a particular client. Accordingly, since

there are equally significant Section 7 interests at stake, but no additional burden on property interests, the Board should grant subcontractor employees solicitation rights regardless of whether they work exclusively on the client's premises.

Similarly, the ALJ need not have relied on the length of Unicco's contract with Nova, or McGonigle's tenure at the university, to find his activity protected. *See Gayfers Dept. Store*, 324 NLRB at 1250 n. 2 (rejecting employer's argument that electrical subcontractor employee had no distribution rights on client's premises because contract was temporary). The danger here is that in future cases, subcontractor employees will be unsure of, and therefore less likely to exercise, their Section 7 rights where they are newly hired, or where the subcontract is for a short duration.

Further, the Board should not limit Section 7 protection to subcontractor employees who address their concerns only to co-workers, but should reaffirm its holding in *Gayfers Dept. Store* that subcontract employees are protected also when they seek to engage the general public. 324 NLRB at 1250. As the Supreme Court recognized in *Eastex, Inc.*, Section 7 protects employees even when they seek to improve their lot "through channels outside the immediate employee-employer relationship." *Eastex, Inc. v. NLRB*, 437 U.S. 556, 565 (1978); *see NCR Corp.*, 313 NLRB 574, 576 (1993) ("[e]mployees have a statutorily protected right to solicit sympathy, if not support, from the general public, customers, supervisors, or members of other labor organizations"). Accordingly, the Board has never "drawn a substantive distinction between solicitation of fellow employees and nonemployees." *Stanford Hosp. and Clinics v. NLRB,* 325 F.3d 334, 343 (2003). Rather, the Board and the courts have repeatedly recognized that workers and their unions need to be able to appeal to the public as much as they need to appeal to fellow workers. *See, e.g., NLRB v. Servette,* 377 U.S. 46, 55 (1964) (noting that the Act expresses "a profound Senate concern that the unions' freedom to appeal to the public for support of their

cause be adequately safeguarded"); *Local 618, Automotive, Petroleum and Allied Industries Employees Union v. NLRB,* 249 F.2d 332, 337 (8th Cir. 1957) ("The scope of a strike is much broader than discouraging replacement employees. Among other things, a strike may properly publicize the union's difficulty with the employer"); *Professional Porter & Window Cleaning Co.,* 263 NLRB 136, 139 (1982) (recognizing that cleaners complaints to their employer's clients were protected even though they raised "delicate issues which [the employer] would understandably prefer to keep out of the public eye"), *enf'd, NLRB v. Professional Porter & Window Cleaning Co.*, 742 F.2d 1438 (2d Cir. 1983). Not only does Section 7 protect the right of employees to make appeals to the public, but the ability to publicize a dispute lies at the core of the Act, and it is recognized explicitly in the "publicity provisos" in Sections 8(b)(4) and 8(b)(7).

In balancing the Section 7 rights of employees to engage the public against the employer's property interest, there is no basis to conclude that subcontractor employees impair that interest more so than direct employees of the property owner. In *Eastex*, the Supreme Court rejected an employer's claim that employees were not protected by Section 7 when they distributed a handbill to the general public at the worksite concerning right-to-work and minimum wage laws. 437 U.S. at 572-73. The Court concluded that such activity is protected even when conducted on the employer premises, noting that the "only cognizable property right in this respect is in preventing employees from bringing literature onto its property and distributing it there – not in choosing which distributions protected by § 7 it wishes to suppress." *Id.* at 573. Since subcontractor employees, like direct employees, are present on the property pursuant to their employment relationship, and since they share the same statutory right to engage the general public, there is no reason to strike the balance any differently than the

Supreme Court did in *Eastex*.

Finally, the ALJ's findings that McGonigle performed work which could have been performed by a Nova employee, and that Nova provided McGonigle supplies and equipment, are wholly unnecessary to conclude that he enjoyed a Section 7 right to solicit on Nova property. ALJD 26:21-31; 27: 1-4. The ALJ sited these factors in an effort to distinguish this case from *New York New York Hotel and Casino*, 313 F.3d 585 (D.C. Cir. 2002). However, in ordering remand, the Circuit Court in no manner suggested that the balance between property interests and Section 7 rights should differ depending on whether subcontractor employees performed work that could have been performed by the property owners, or depending on whether the owner provided the subcontractor employees with supplies and equipment. Further, none of the Board's decisions affording solicitation rights to subcontractor employees relied on such factors. *See NYNYI*, 334 NLRB at 762 n. 3 (specifically declining to address General Counsel's argument that subcontractor and property owner had "symbiotic relationship," since such finding was unnecessary in holding that subcontractor employees enjoyed handbilling rights on property); *NYNY II*, 343 N.L.R.B. at 773; *Gayfers Dept. Store*, 324 NLRB at 1249-50; *Southern Servs., Inc.*, 300 NLRB at 1155; *Fabric Servs., Inc.*, 190 NLRB at 541-42. There is no reason to draw such distinctions, since subcontractor employee rights are based on their interest in organizing for better terms and conditions of employment, *id.*, an interest that is not diminished simply because the owner-client does not provide the subcontractor with equipment and supplies, or because the work is not work that normally would be performed by the owner. While these factors may be relevant in making a joint-employer determination, the right of subcontractor employees to engage in Section 7 activity on the client owner's premises has never been limited to circumstances in which the owner is a joint-employer with the contractor.

As a practical matter, workers are far less likely to exercise their Section 7 rights if they are forced to analyze a complicated set of factors to determine if they enjoy such rights. *Ingram Brook Co.*, 315 N.L.R.B. 515, 516 n.2 (1994) ("Rank-and-file employees do not generally carry lawbooks to work or apply legal analysis to company rules as do lawyers, and cannot be expected to have the expertise to examine company rules from a legal standpoint"). With the simplifications discussed above, the Board would not only reaffirm the principles set forth in *Republic Aviation*, but provide workers greater clarity. Hence, the Board should adopt the following rule to govern subcontractor employee solicitation rights: subcontractor employees who work regularly on the premises of the client owner have a presumptive right to engage in Section 7 solicitation and distribution in non-work areas and during non-work time.

C. CONCLUSION

Based on the foregoing, Local 32BJ respectfully requests that the Board affirm the ALJ's findings that Nova violated Section 8(a)(1) by maintaining an overly broad no-solicitation rule, and by enforcing that rule against its subcontractor's employee, Steve McGonigle.

Dated: May 29, 2008

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the attached Charging Party's Answering Brief to Respondent's Exceptions to the Decision of the Administrative Law Judge and Cross Exceptions to the Decision of the Administrative Law Judge is being electronically filed with the National Labor Relations Board at www.nlrb.gov and duly served electronically upon the following named individuals on the 29th day of May, 2009:

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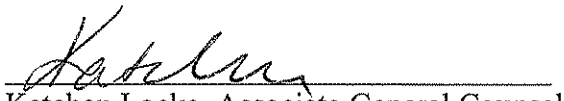

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