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August 26, 2010

Via Federal Express

Lester A. Heltzer
Executive Secretary
National Labor Relations Board
1099 14th Street, N.W.
Washington, D.C. 20570

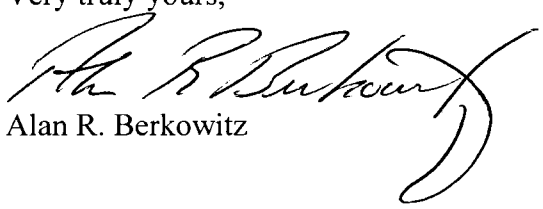
Re: 2 Sisters Food Group, Inc.
and
United Food and Commercial Workers
International Union, Local 1167
Case 21-CA-38915
21-CA-38932
21-RC-21137

Dear Mr. Heltzer:

Enclosed for filing are an original and eight copies of Respondent's Answering Brief to Charging Party's Exceptions.

Thank you for your attention to this matter.

Very truly yours,



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UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

2 SISTERS FOOD GROUP, INC. and UNITED FOOD AND COMMERCIAL WORKERS INTERNATIONAL UNION, LOCAL 1167	)	Case Nos. 21-CA-38915 21-CA-38932
2 SISTERS FOOD GROUP, INC. Employer and UNITED FOOD AND COMMERCIAL WORKERS INTERNATIONAL UNION, LOCAL 1167 Petitioner	)	21-RC-21137

RESPONDENT'S ANSWERING BRIEF TO CHARGING PARTY'S EXCEPTIONS

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I. INTRODUCTION

This Answering Brief responds to various issues raised by the Charging Party in its Exceptions to the ALJ's decision on the alleged unfair labor practices. In addition, this brief supports the ALJ's findings and conclusions with respect to the objections to the election which were dismissed.[1]

II. TERMINATION OF MS. TRESPALACIOS[2]

Charging Party Cannot Raise A Theory In Its Exceptions That Was Not Argued To The ALJ And Is Inconsistent With The General Counsel's Theory Of The Case

For the first time in its exceptions the Charging Party asserts that the termination of Ms. Trespalacios should be analyzed under *NLRB v. Burnup & Sims,* 379 U.S. 21, 23 (1964) rather than *Wright Line*. The factual predicate and legal analysis under those cases is entirely

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[1] Although the Charging Party takes exception to the ALJ's findings relating to objections that were dismissed, the following citations to the record support Respondent's assertion that the ALJ was correct in her dismissals of the objections at issue (*see also* citations to the record in Respondent's Post-Hearing Brief, relating to the objections):

- There were no captive audience meetings on election day. Tr. 510:18-23; 515:19-516:11; 536:2-19; 547:15-17; 577:24-578:12; 748:3-18; 749:1-5; 750:14-17; 807:12-14.
- The passing out t-shirts and beanies was not unlawful. Tr. 515:14-18; 519:12-15; 524:7-9; 553:16-18; 554:6-10; 561:2-562:10; 713:15-19; 714:12-14; 729:11-14; 729:23-24; 730:3-11; 730:15-731:3; 731:8-732:6; 732:8-15; 732:16-19; 737:23-25; 738:20-21.
- There was no improper surveillance by cameras on election day. Tr. 507:14-24; 752:20-23; 754:11-18; 755:16-19; 775:5-13; Emp. Ex. 1; 864:1-10; 864:12-17.
- There was no unlawful campaigning in the voting area. Tr. 508:6-12; Emp. Ex. 4; 527:13-20; 552:10-13.
- There was nothing unlawful about the delay experienced by certain voters and the escorting of certain voters. Tr. 540:1-25; 542:15-544:19; 609:11-14; 642:23-24; 762:1-5; 762:7; 762:14-22; 763:21-22; 849:6-15; 849:16-850:2; 850:3-9; 873:11-876:7; 876:10-13; 876:24-877:2; 882:14-24; 905:2-9.
- The presence of extra guards was not unlawful and was justified by the prior bombardment during the May 2009 demonstration. Tr. 612:12-13; 613:12-13; 666:6-14; 669:11-21; Emp. Ex. 2; 670:22-672:3; Emp. Ex. 1; 678:2-3; 685:6-14; 686:14-687:4; 745:17-746:5.
- The ALJ properly excluded pre-petition conduct relating to the termination of four employees. Tr. 216:6-217:18.

[2] The Charging Party's Brief in Support of Exceptions fails to make a single citation to the record as it relates to the termination of Ms. Trespalacios. *See* Section II of Charging Party's Brief in Support of Exceptions. The Board's Rules and Regulations section 102.46(b)(1)(iii) state that each exception "shall designate by precise citation of page the portions of the record relied on." The Charging Party's Brief in support of Exceptions, as it relates to the termination of Ms. Trespalacios, should be rejected for failing to cite to the record. *See BCE Constr., Inc.*, 350 NLRB 1047, 1047 (2007) (adopting the judge's finding that Respondent violated Section 8(a)(1) of the Act in part because Respondent failed to designate by precise citation of page the portions of the record relied on) (citing Board's Rules and Regulations § 102.46(b)(1)(iii)).

different. Under *Burnup & Sims*, the termination of an employee for misconduct arising out of protected activity violates section 8(a)(1) when it is shown that the misconduct did not occur despite the employer's good faith belief that the employee engaged in misconduct. On the other hand, where, as here, the employee is discharged for misconduct not arising out of protected activity, the employer's burden under *Wright Line* is to prove only that it had a reasonable good faith belief that the employee engaged in misconduct warranting termination.[3]

This case was not tried on a *Burnup & Sims* theory. Neither the General Counsel nor the Charging Party put on testimony or argued that Ms. Trespalacios was engaged in protected activity when the alleged misconduct occurred. Indeed, the trial briefs make no mention of *Burnup & Sims*.[4]

The Charging Party cannot raise for the first time in its Exceptions a theory which was never raised at trial. "A contention raised for the first time in exceptions to the Board is ordinarily untimely raised and, thus, deemed waived." *Yorkaire, Inc.*, 297 NLRB 401, 401 (1989); *Operating Eng'rs Local 520*, 398 NLRB 768, 768 n. 3 (1990) (rejecting contention raised by Respondent for first time in its exceptions as "untimely raised"); *see also Int'l Paper*

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[3]. *See In re Yuker Const. Co.*, 335 NLRB 1072, 1073 (2001) (noting that *Burnup & Sims* is inapplicable as misconduct did not clearly arise out of protected activity); *Mark Indus., Inc.*, 296 NLRB 463, 468 (1991) ("The conduct... did not occur in the course of union activity. Therefore, this purported reason for discharge should be analyzed under *Wright Line* principles").

[4] Even in its Exceptions, the Charging Party does not cite to a single page in the record supporting its assertion that Ms. Trespalacios was engaged in protected activity. Nor does the Charging Party identify the activity it contends was protected. But even if it had properly identified the alleged protected activity, it is simply too late to change the factual underpinnings and legal theory of the case. It is important to note that if the General Counsel had tried this case under a Burnup & Sims theory, the record would be different. The focus would have shifted from what provided the basis for Respondent's good faith belief to whether Trespalacios actually engaged in misconduct. In addition, Respondent's cross examination of Trespalacios would have focused on whether she was engaged in protected activity at the time of the event, which she essentially denied at trial. Arguably both the General Counsel and the Charging Party would have also presented a different case and the ALJ's rulings at trial may have been different. Allowing the Charging Party to change the theory of the case at this point in the process undermines well established notions of due process and fairness and cannot be allowed.

Co., 319 NLRB 1253, 1276 (1995) ("This defense was accordingly not considered by the administrative law judge, and it is inappropriate to be considered for the first time upon exceptions to the Board"), *denying enforcement on other grounds,* 115 F.3d 1045 (D.C. Cir. 1997).

Moreover, the General Counsel continues to control the theory of the Government's case, and a charging party does not have power to alter that theory. *Wal-Mart Stores, Inc.*, 348 NLRB 274, 294 (2006); *Planned Bldg. Servs., Inc.*, 330 NLRB 791, 793 (2000). Here, the Charging Party is impermissibly attempting to alter the General Counsel's theory of the case.

Had the General Counsel raised *Burnup & Sims* during trial, it would have changed the very nature of the General Counsel's factual case and also the legal analysis for all parties. It is simply too late for the Charging Party to assert this theory now. Consequently, *Burnup & Sims* is inapplicable and a reasonable good-faith belief by Ms. Reilly of the misconduct at issue suffices to justify the discharge.

III. THE ALJ CORRECTLY APPLIED *DELTA BRANDS* IN REFUSING TO SET ASIDE THE ELECTION ON THE BASIS OF THE WORK RULES[5]

The ALJ applied *Delta Brands* and refused to set aside the election based on the employer's maintenance of unlawful work rules, concluding that there was no showing that the rules could have affected the election results. ALJD 16:8-17. The Charging Party asserts that the maintenance of unlawful rules warrants setting aside the election and that *Delta Brands* should be overruled.

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[5] The Charging Party argues that Rule 6 regarding confidentiality is overbroad and notes that although not subject to an unfair labor practices complaint, the rules are subject to the objections. However, Rule 6 prohibits, "The possession or reporting for work under the influence of alcohol or drugs." Joint Ex. 1. The Charging Party is likely referring to Rule 36, not Rule 6, which is refers to confidentiality. Joint Ex. 1. Nonetheless, Rule 36 may not be considered as an objection to the election in this proceeding. The maintenance of Rule 36 was not set for hearing in the Report on Challenged Ballots and Objections and Order Consolidating Cases and Notice of Hearing ("Report on Objections"). It cannot be litigated now.

The ALJ's decision is well-supported. First, it is well-established that the Board will generally only consider conduct during the critical period. *See Teamsters Local 705 (K-Mart),* 347 NLRB 439, 445 (2006). Here, the ALJ found there was "no evidence the Employer implemented or enforced" the allegedly overbroad rules at any time during the critical period. ALJD 16:16-12-13. Second, employees freely distributed union flyers on company property in front of managers and supervisors, demonstrating that the no-distribution rule had no effect on employees during the critical period. Tr. 32:1-33:9. Third, *Delta Brands* is good law and has been subsequently upheld in other cases. *See e.g. Longs Drug Stores Cal, Inc.*, 347 NLRB No. 45, *5 n. 10 (2006) (overruling objections related to provisions in handbook and certifying election results and noting that it is not axiomatic that overbroad rules warrant setting aside election) (citing *Delta Brands*).

Delta Brands should not be overruled. The results of a Board-supervised election should not be easily overturned. Election results are presumptively valid and the burden is on the objecting party to prove that misconduct affecting election results warrants setting aside the election. *See In re Safeway, Inc.*, 338 NLRB 525, 525-26 (2002). Where, as here, there is no evidence that the rules were either promulgated or enforced during the critical period, or indeed that employees were even aware of the existence of the rules, it would be bad policy to set the election aside based on the mere maintenance of allegedly overbroad work rules. Doing so would allow Unions to do what the Charging Party did in this case -- find an arguably overbroad rule in an employee handbook, file a petition for election, engage in a full organizing campaign and proceed with the election, all with the knowledge that if it loses the election it will get a second election based on the existence of a rule that in all likelihood was not in anyone's mind when the ballots were cast. This "sandbagging" approach to Union organizing is a waste of the

resources of the Board and the parties and undermines, rather than protects, the integrity of the election process.

Thus, the ALJ correctly decided that the rules at issue are not a basis for setting aside the election, applying *Delta Brands.*

IV. MS. REILLY'S POST-TERMINATION SPEECH TO EMPLOYEES WAS NOT COERCIVE

The Charging Party asserts that the Board should prohibit captive audience meetings at any time during the critical period, pointing to Ms. Reilly's speech about the termination of Trespalacios which it contends was coercive. First, as argued in Respondent's Exceptions, the speech was neither unlawful nor coercive.

Ms. Reilly showed a video clip of what occurred at the plant and spoke about not tolerating the mistreatment of coworkers who disagree on the union question. Ms. Reilly stated,

> "I want you to know that you're all free to have your own opinions about the union or anything else without worrying that someone else is going to abuse you because you disagree with them... You have my word that 2 Sisters will protect your right to decide how you want to vote without being intimidated or threatened... I think you'll agree with me that this type of behavior cannot be allowed here. It doesn't matter who does it..." GC Ex. 4.

Because the video clip and the speech did not contain a threat of reprisal or force or promise of benefit, it is protected under Section 8(c) of the Act and cannot be used as evidence of an unfair labor practice. *See NLRB v. Gissel Packing Co.*, 395 US 375, 618 (1969).

There is nothing in Ms. Reilly's speech that would warrant setting aside the election. The test for setting aside an election is an objective one which considers whether the conduct would have a reasonable "tendency to interfere with employees' freedom of choice." *Hopkins Nursing Care Ctr.*, 309 NLRB 958, 958 (1992). Telling employees that an employee had been terminated for abusing a coworker and cautioning that intimidating behavior will not be tolerated

protects employee free choice and the election process. It cannot be reasonably interpreted as coercive conduct that interfered with the election.

Furthermore, because Ms. Reilly's statements fall within the protection of Section 8(c), they do not constitute objectionable conduct warranting setting aside the election. *See Shop-Rite Dev. Co., Inc.*, 215 NLRB 777, 778 (1974) (finding that employer's statements "are within the purview of Section 8(c) of the Act and therefore do not constitute objectionable conduct warranting setting aside the election").

Second, even if the Board were to conclude that Ms. Reilly's speech is grounds for setting aside the election, it would not justify modifying the Board's long standing 24 hour rule. If the Board wishes to change this rule through case law, it should do so only after giving the parties proper notice and an opportunity to fully litigate and brief this issue. This case is not the proper vehicle for such a major change in Board policy. Alternatively, if the Board wishes to modify the 24 hour rule it can do so through its rule making powers which would allow full consideration and comment by interested parties.

V. EXTRAORDINARY REMEDIES ARE NOT JUSTIFIED IN THIS CASE

The Charging Party seeks remedies including: (1) requiring Respondent to post the notice on intranet and with a hyper link, (2) requiring Respondent to read the notice to employees, (3) transmitting the ALJ's findings to the International Labor Organization and an appropriate international war crimes tribunal, (4) interest on the back-pay assessed on a daily compounded basis, and (5) that any new election be held off-site. The General Counsel did not argue for such remedies.

The remedies that the Charging Party seeks are indeed extraordinary and well beyond the remedies ordinarily ordered by the Board. *See e.g.*, *Chinese Daily News*, 346 NLRB 906, 909

(2006) (noting that requiring Respondent to read notice to employees is extraordinary remedy); *Rogers Corp. & Jeremiah Lamothe*, 344 NLRB 504, 504 (2005) (stating that current practice of Board is to assess simple interest on backpay and thus, refusing to deviate from current practice to award compound interest). Extraordinary remedies may be appropriate when a respondent's ULPs are "so numerous, pervasive, and outrageous" that such remedies are necessary to "dissipate fully the coercive effects of the unfair labor practices found." *Cintas Corp. & Unite Here*, 353 NLRB No. 81, *42 (2009).

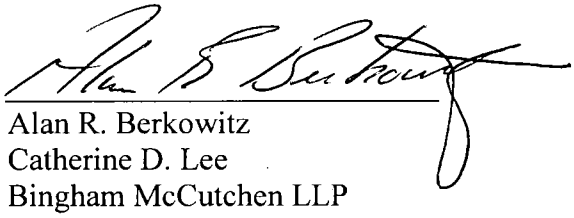
Here, even if the Board sustains ALJ's finding that the termination of one employee and the maintenance of allegedly overbroad rules are unlawful, they do not warrant the imposition of extraordinary remedies. There is no evidence of an on-going pattern of interference with employees' union activities. Nor are the unfair labor practices numerous, pervasive or outrageous. The Charging Party's requests for extraordinary remedies must be denied.

VI. CONCLUSION

For the reasons set forth above, the Charging Party's Exceptions should be rejected.

Dated: August 26, 2010

Respectfully submitted,

By: 

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CERTIFICATE OF SERVICE

I hereby certify that on this 26th day of August, 2010, I caused copies of the

RESPONDENT'S ANSWERING BRIEF TO CHARGING PARTY'S EXCEPTIONS to

be served on the following parties by Federal Express:

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