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

CUSTOM FLOORS, INC.	Case 28-CA-21226
and	
J&R FLOORING, INC. d/b/a J. PICINI FLOORING	Case 28-CA-21229
and	
FREEMAN'S CARPET SERVICE, INC.	Case 28-CA-21230
and	
FCS FLOORING, INC.	Case 28-CA-21231
and	
FLOORING SOLUTIONS OF NEVADA, INC. d/b/a FSI	Case 28-CA-21233
and	
INTERNATIONAL UNION OF PAINTERS AND ALLIED TRADES, DISTRICT COUNCIL 15	

**J&R FLOORING, INC.'S ("J&R") MOTION FOR  
LEAVE TO SUPPLEMENT ANSWERING BRIEF  
TO ADDRESS THE ISSUE OF REMEDIAL NOTICE**

1 Pursuant to Section 102.46(h) and 102.47 of the NLRB Rules and Regulations, J&R<sup>1</sup>  
2 respectfully requests leave from the Board to supplement its Answering Brief to address the issue  
3 of the method of posting remedial notices:

4 **1. INTRODUCTION**

5 On May 14, 2010, the NLRB News posted a notice inviting any interested parties to file  
6 briefs in this matter, among other matters, pertaining to the issue of whether Board-ordered  
7 remedial notices should be posted electronically. However, the Union has failed to properly  
8 request electronic posting of any remedial notice, and the Board should disregard such relief.  
9 Therefore, J&R respectfully requests leave to file this supplement as the Union's failure to  
10 request such relief in accordance with Board law directly impacts the type of relief which may be  
11 awarded.

12 **2. STATEMENT OF FACTS**

13 The Union raised the issue of the method of posting a remedial notice for the first time in  
14 its Exceptions to the Decision of the Administrative Law Judge (the "Exceptions"). In its  
15 entirety, the exception states: "To the failure of the ALJ to require an intranet and internet  
16 posting." Exceptions at 4. The Union provides the following reference to the Administrative  
17 Law Judge's ("ALJ") Decision: "*Passim.*" *Id.* The Union fails to support this exception with  
18 any argument in its Brief in Support of Exceptions. *See generally* Union's Brief in Support of  
19 Exceptions. Additionally, the issue of the method of posting a remedial notice was never  
20 mentioned (1) in the General Counsel's complaint filed against J&R and other respondents, (2) at  
21 the trial before the ALJ, (3) in the Union's post-trial brief, (4) in the General Counsel's post-trial  
22 brief, (5) in the ALJ's actual decision, or (6) in the Union's brief to the Board in support of its  
23 exceptions. *See generally* Order Consolidating Cases, Consolidated Complaint and Notice of  
24 Hearing dated March 30, 2007, Transcript of ALJ Hearing, Brief of Charging Party dated July  
25 12, 2007, Counsel for the General Counsel's Brief to the Administrative Law Judge dated July  
26

27 <sup>1</sup> This motion is submitted on behalf of J&R Flooring, Inc. Freeman's Carpet Service,  
28 Inc. and FCS Flooring, Inc. are not represented. Custom Floors, Inc. has been dismissed from  
the matter. Respondent FSI is represented by separate counsel.

1 13, 2007, the ALJ Decision, and the Union's Brief in Support of Exceptions dated October 30,  
2 2007. The first and only time the Union mentioned the type of posting of the notice was in its  
3 Exceptions to the Decision of the Administrative Law Judge. Exceptions at 4.

4 **3. LEGAL ARGUMENT**

5 a. Because the NLRB's Rules and Regulations Require All Exceptions be Supported  
6 by Argument, the Union's Exception to the Method of Posting Must Be  
7 Disregarded.

8 Pursuant to NLRB's Rules and Regulations Sec. 102.46(c), "[a]ny brief in support of  
9 exceptions shall contain . . . the following: . . . (3) The argument, presenting clearly the points of  
10 fact and law relied on in support of the position taken on each question, with specific page  
11 reference to the record and the legal or other material relied on." The NLRB has routinely  
12 overruled exceptions when they are not supported by argument or even discussed in the brief in  
13 support of exceptions. *See, e.g., New Concept Solutions, LLC v. Freight Drivers & Helpers*  
14 *Union No. 557*, 349 NLRB No. 106 (2007) (disregarding "procedurally deficient" exceptions as  
15 no argument was presented in support of the exceptions); *Sunshine Piping Inc. v. Plumbing &*  
16 *Pipe Fitters Local 366*, 351 NLRB 1371 (2007) (disregarding "bare" exceptions, of which no  
17 argument was presented in support); *St. Vincent Hosp. LLC v. Food & Commercial Workers*  
18 *Local 1445*, 344 NLRB 586 (2005) (overruling exceptions when the employer did not  
19 specifically except to certain portions of the judge's recommendation and the exceptions were  
20 not discussed in the exceptions brief).

21 The Union presents absolutely no argument in support of its exception requesting the  
22 remedial notice be posted on the intranet and internet. The Union fails to even mention the  
23 method of posting in its exceptions brief and could not conceivably provide a "specific page  
24 reference to the record" as no such reference exists. The Union has failed to comply with the  
25 Board's Rules and Regulations requiring exceptions be supported by argument. Accordingly, the  
26 Board should disregard this exception.

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1           b.     The Union Has Waived its Posting Exception by Raising it for the First Time in  
2                 its Exceptions.

3           The Union's failure to raise the issue of the method of notice posting until its Exceptions  
4           has prejudiced J&R's ability to fully respond to the allegations against it. The NLRB  
5           consistently has refused to entertain issues contained in a party's exceptions when those issues  
6           were not properly litigated before the ALJ. See, e.g., *Int'l Alliance of Theatrical State*  
7           *Employees and Moving Picture Machine Operators, Local No. 249 v. Gen. Cinema Corp. of Tx.*,  
8           265 NLRB 637 (1982) (because the issues in the exceptions were not contained in the complaint  
9           nor litigated at the hearing, the Board held the moving party's motion for reconsideration of its  
10           exceptions lacked merit); *Asia Garden Restaurant of San Francisco, Inc. v. Davis*, 205 NLRB  
11           882, 882 (1973) (affirming the ALJ's decision as the issues were raised for the first time in the  
12           exceptions and were not litigated at the hearing and entertaining those exceptions would be  
13           prejudicial); *Nat'l Maritime Union of Am., AFL-CIO v. Graston Firmin-Guyon*, 177 NLRB 615,  
14           615 (1969) (finding the matter raised in the exceptions was not properly litigated below and as  
15           the respondent was not put on notice of this issue nor given an opportunity to defend, the Board  
16           overruled the exceptions); *Bilinski Sausage Manufacturing Co., Inc. v. Amalgamated Meat*  
17           *Cutters, Butcher Workmen & Affiliated Crafts of North Am., Dist. Union Local No. 1., AFL-CIO*,  
18           132 NLRB 229, 229 (1961) (refusing to consider exceptions when the issues raised in the  
19           exceptions were not fully litigated or developed in the underlying hearing). See also *Plastic Film*  
20           *Products Corp. v. Cleveland Joint Board, Amalgamated Clothing and Textile Workers Union,*  
21           *AFL-CIO*, 238 NLRB 135, 135 (1978) (affirming the ALJ's decision finding that certain issues  
22           were not fully litigated as they were not alleged in the complaint nor discussed during the  
23           hearing and as such the respondent did not receive "adequate and timely notice" of the  
24           allegations); *Singer Sewing Machine Co. v. Retail, Wholesale, and Department Store Union,*  
25           *Local 101, AFL-CIO*, 150 NLRB 1319, 1320 (1965) (reversing a portion of trial examiner's  
26           decision as the findings contained therein were not "sufficiently litigated or so fully developed in  
27           the course of the hearing").

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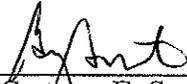
1 The Union's offhand request for intranet and internet posting of a remedial notice for the  
2 first time in its Exceptions is too little, too late. J&R never had an opportunity to address this  
3 request before the ALJ as the Union never sought this relief until it submitted its Exceptions.  
4 The Union never even mentioned the method of posting a remedial notice at the ALJ hearing or  
5 even in its post-trial brief. Rather, the Union raises this bare, unsubstantiated exception for the  
6 first time in its Exceptions. The whole purpose of a judicial appellate system is to review the  
7 decision of the subordinate entity; to consider the arguments made below and the rationale and  
8 treatment of cited authority in the decision below. The Union's attempt to bypass this method of  
9 refining issues cannot be accepted or condoned. J&R has been prejudiced by the Union's failure  
10 to raise this issue before the ALJ and the ALJ never had the opportunity to consider and rule on  
11 the issue. The Board should not consider this exception filed by the Union.

12 **4. CONCLUSION**

13 Based on the foregoing, J&R respectfully requests leave to supplement its answering  
14 brief with the argument above.

15 Respectfully submitted,

16 LIONEL SAWYER & COLLINS

17  
18 By:   
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22 Las Vegas, Nevada 89101

23 Attorneys for J&R Flooring, Inc.  
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1 **CERTIFICATE OF SERVICE**

2 I hereby certify that a true and correct copy of the **J&R FLOORING, INC.'S ("J&R")**  
3 **MOTION FOR LEAVE TO SUPPLEMENT ANSWERING BRIEF TO ADDRESS THE**  
4 **ISSUE OF REMEDIAL NOTICE** was served via E-Gov, E-Filing, on this 26th day of May  
2010, on the following parties:

5 Lester A. Heltzer  
6 Executive Secretary  
7 National Labor Relations Board  
8 Office of the General Counsel  
1099 14<sup>th</sup> Street, N.W.  
Washington, D.C. 20570

9 And a true and correct copy was served via e-mail on this 26th day of May, 2010 to the  
10 following:

11 Mara-Louise Anzalone  
12 Counsel for the General Counsel  
13 National Labor Relations Board  
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24 Freeman Carpet Services, Inc.  
25 3150 Ponderosa Way  
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26 E-mail: freemancarpet@aol.com

27 /s/ Rosalie Garcia

28 An employee of LIONEL SAWYER &  
COLLINS