UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

Drivers, Chauffeurs, and Helpers, Local Union No. 639, a/w International Brotherhood of Teamsters Charging Party, And **Daycon Products Company, Inc.** Respondent.	:	Case No: 5-CA-35687 5-CA-35738, 5-CA-35965, 5-CA-35994

REPLY TO GENERAL COUNSEL'S OPPOSITION TO DAYCON'S MOTION TO REOPEN RECORD AND INCLUDE 10(J) TRANSCRIPT

Daycon Products Company, Inc. ("Respondent" or "Daycon") files this Reply to General Counsel's ("GC's") Response In Opposition to Daycon's Motion to Reopen the Record and Include the 10(j) Transcript ("the Motion").

General Counsel's core argument that the Motion should be denied because Respondent failed to demonstrate why the testimony from the 10(j) proceeding was not elicited at the administrative trial is irreconcilable with General Counsel's own admission that evidence from the 10(j) proceeding was "not germane to the administrative proceeding." See GC Resp. at 2. Indeed, the evidence introduced at the 10(j) proceeding emanated from questions solely related to the Board's petition for injunctive relief. ("the Petition") For instance, Doug Webber's ("Webber") admission that the resumption of bargaining hinged upon both the reinstatement of workers and the rescission of the wage increase employees received was in response to Daycon's inquiry regarding why the Union believed a bargaining order was necessary to prevent irreparable harm. See Motion at 6.

The focal point of the 10(j) proceeding was to determine if irreparable harm would ensue by maintaining the status quo ante pending judicial review, and the balance of equities between the parties to the Petition. See GC Resp. at 2. In support of the Petition, Webber testified to the irreparable harm Charging Party would suffer in the absence of interim relief. The issue of irreparable harm was not before the Administrative Law Judge ("the ALJ"). See id. Accordingly, evidence from the 10(j) proceeding which requires the reopening of the record came to light solely due to Webber's testimony regarding the necessity of interim relief – a matter never before the ALJ.

General Counsel also urges that reopening the record to include evidence regarding the Union's perception towards the Company's best offer three months after the administrative trial "opens the possibility of the Board's administrative proceedings always being reopened." See G.C. Res. at 3. This argument ignores the obvious. The new evidence regarding the Union's continued refusal to consider the Employer's best offer only became available *as a result* of the Board seeking 10(j) relief. The Board sought 10(j) relief at its own peril. It cannot pursue interim relief and simultaneously be relieved of the consequences of bringing to light further relevant evidence.

The Union's continued intransigence combined with its refusal to request that negotiations resume in tandem with a strike which is ongoing and with no apparent end in sight is contrary to the ALJ's speculative conclusion that the Employer "foreclosed" further negotiations. See Empire Terminal Warehouse Co., 151 NLRB 1359, (1965) aff'd Dallas General Drivers, Local 745 v. NLRB, 355 F.2d 842, 845 (D.C. Cir. 1966) ("[w]hen good faith bargaining has not resolved a key issue and where there are no definite plans for further efforts to break the deadlock, the Board is warranted ... and perhaps sometimes even required ... to make a

determination that an impasse existed"); cf Transport Co. of Texas, 175 NLRB 763 (1969) (recognizing that an impasse may be shown by a union's willingness to strike and the employer's willingness to weather a strike); compare Liefermann Enterprises, LLC D/B/A Harmon Auto Glass, 352 NLRB 152, 160 (2008) (implementation unlawful in light of the union's letter **offering to resume negotiations, and indicating areas where concessions could be explored**.) (emphasis added). On multiple occasions during the 10(j) proceeding Webber testified that reinstatement and rescission were (and remain) inextricably linked together. The evidence uncovered at the 10(j) proceeding was unavailable at the administrative trial, and when viewed in conjunction with evidence from the administrative trial fatally undermines the ALJ's recommended decision. Accordingly for the reasons stated herein and in the Motion, the record should be reopened for inclusion of the 10(j) transcript.[1]

Assuming *arguendo*, the Motion is denied, General Counsel's Motion to Strike should receive the same fate. As General Counsel acknowledges, the Board's rules and regulations require the Motion's inclusion in the record. See GC Resp. at 5 (According to Section 102.45(b) the record of this case includes Respondent's motion); see also NLRB Rules and Regulations 102.26 (All motions, rulings and orders shall become a part of the record).

In a misguided attempt to exclude the Motion from the record, the GC cites to Innovative Communications Corp, 333 NLRB 665 (2001). See GC Resp. at 5. Innovative, however, is inapposite. Specifically, in that case the 10(j) transcript was stricken from the record **because** the respondent had failed to file a motion to reopen the record for its inclusion. See Innovative 333 NLRB at 667, n.2. ("We strike the attachment because the transcript has not been

[1] The entire transcript was attached to give the Board sufficient context regarding testimony elicited at the 10(j) proceeding Assuming *arguendo* the full transcript is superfluous, than only those portions cited herein should be introduced.

made a part of the record in the instant case and the Respondent has not filed a motion to reopen the record to include the 10(j) transcript."). If a motion to reopen the record had been properly filed in Innovative, the 10(j) transcript would have remained in the record despite the denial of the motion to reopen the record. Accordingly, Innovative stands for the very proposition the GC seeks to refute: The record must include the Motion.

Authority supporting General Counsel's Motion to Strike cannot be found. As such, General Counsel's suggestion that the transcript be struck from the record must be DENIED.[2] An opposite finding would directly contravene the clear and plain language of Sections 102.45(b) and 102.26 of the Board's rules and regulations.

Respectfully submitted,

EPSTEIN BECKER & GREEN, P.C.

By: /s/ Paul Rosenberg

Mark M. Trapp
150 N. Michigan Ave., 35th Floor
Chicago, IL 60601
(312) 499-1425

Paul Rosenberg
1227 25th Street, NW.
Washington D.C., 20005
(202) 861-5327

Attorneys for Daycon Products Co., Inc.

[2] In its Response to the Motion, the GC goes to great lengths to explain why the transcript from the 10(j) proceeding would not require a different result than that which the ALJ reached. If this were true (which it is not) and the Motion is denied, its inclusion in the record would at worst be superfluous, and at best (from the General Counsel's viewpoint) include evidence consistent with General Counsel's theory the case. Nevertheless, in addition to opposing the Motion, the GC is requesting that it be stricken from the record. This request implies that the General Counsel recognizes that the 10(j) transcript is damaging to its case. Otherwise, a rational explanation for the General Counsel wanting the Motion struck from the record does not exist. Further, even if the Motion is denied, the relevant portions of the 10(j) transcript must be in the record such that the reviewing authority may make its own determination regarding whether remand is appropriate based on said denial.

CERTIFICATE OF SERVICE

I hereby certify that on the date shown below, copies of the foregoing **REPLY TO GENERAL COUNSEL's RESPONSE TO DAYCON'S MOTION TO REOPEN THE RECORD TO INCLUDE THE 10(j) TRANSCRIPT** were electronically filed and served by email upon the following:

Sean R. Marshall
Counsel for the General Counsel
National Labor Relations Board, Region 5
103 South Gay Street, 8th Floor
Baltimore, MD 21202
Sean.Marshall@nlrb.gov

Daniel M. Heltzer
Counsel for the General Counsel
National Labor Relations Board, Region 5
1099 14th St, NW
Washington DC 2005
Daniel.Heltzer@nlrb.gov

John Mooney
Mooney, Green, Saindon, Murphy & Welch P.C.
1920 L Street, NW
Washington, DC 20036
jmooney@mooneygreen.com

/s/ Paul Rosenberg
Paul Rosenberg

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