

UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD

REPUBLIC SERVICES, INC.

and

Cases 25-CA-31683 Amended  
25-CA-31708 Amended  
25-CA-31709 Amended  
25-CA-31813 Amended

INTERNATIONAL UNION OF OPERATING  
ENGINEERS, LOCAL UNION NO. 150,  
AFL-CIO, a/w INTERNATIONAL UNION  
OF OPERATING ENGINEERS, AFL-CIO

ACTING GENERAL COUNSEL'S BRIEF IN SUPPORT OF EXCEPTIONS  
TO THE DECISION OF THE ADMINISTRATIVE LAW JUDGE

Respectfully submitted,

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ACTING GENERAL COUNSEL'S BRIEF IN SUPPORT OF EXCEPTIONS  
TO THE DECISION OF THE ADMINISTRATIVE LAW JUDGE

Comes now Counsel for the Acting General Counsel and respectfully submits to the Board this Brief in Support of Exceptions to the Decision of the Administrative Law Judge issued in the above-captioned cases on June 21, 2011.

I. STATEMENT OF THE CASE

Pursuant to charges filed by the International Union of Operating Engineers, Local 150, hereinafter referred to as the Union, a consolidated complaint was issued on February 28, 2011<sup>1</sup>. The consolidated complaint alleged that Republic Services, Inc., hereinafter referred to as Respondent, violated Section 8(a)(1) of the Act by informing employees that they were no longer represented by the Union; engaging in surveillance of employees engaged in Union and other activities; and interrogating its employees about their Union membership, activities, and

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<sup>1</sup> All dates herein refer to 2010 unless otherwise specified.

sympathies and the Union membership, activities, and sympathies of other employees. The consolidated complaint also alleged that the Respondent violated Section 8(a)(1) and (5) and 8(d) only as to unilateral changes by failing and refusing to recognize and bargain with the Union; withdrawing recognition from the Union as the exclusive collective-bargaining representative of its employees; initially denying and later limiting the access of Union official's to Respondent's facility; requiring Respondent's agents to accompany Union representatives while accessing Respondent's facility; ceasing the deduction of Union dues from employees' paychecks; ceasing and the utilization of the Union's hiring hall for hiring employees to perform bargaining unit work. The consolidated complaint further alleged that the Respondent violated Section 8(a)(1) and (5) by announcing and later implementing a 401(k) program for employees and announcing and later implementing a different health insurance program for employees.

An amendment to the consolidated complaint was issued on March 21, 2011. The amendment to the consolidated complaint alleged that the Respondent violated Section 8(a)(1) of the Act by informing employees that employees at Respondent's facility were no longer represented by the Union. The amendment to the consolidated complaint also alleged that the Respondent violated Section 8(a)(1) and (5) of the Act by failing to continue in effect all of the terms and conditions of the parties' collective-bargaining agreement. Pursuant to an amended charge filed by the Union in Case 25-CA-31813 Amended, a complaint was issued on May 5, 2011. The complaint alleged that the Respondent violated Section 8(a)(1) and (5) of the Act by unilaterally changing the method used to calculate vacation benefits for employees and providing employees with a merit pay bonus (raise) without first notifying the Union and affording the Union the opportunity to bargain over the changes.

A hearing was held regarding the allegations contained in the consolidated complaint and the amendment to the consolidated complaint on May 9, 10, and 11, 2011 before Administrative Law Judge Arthur Amchan. During the hearing, Judge Amchan granted the motion of Counsel for the Acting General Counsel to consolidate the complaint in Case 25-CA-31813 Amended with the outstanding consolidated complaint in Cases 25-CA-31683 Amended, 25-CA-31708 Amended, and 25-CA-31709 Amended.

On June 21, 2011, Judge Amchan issued his decision in the instant case finding that the Respondent violated Section 8(a)(1) and (5) of the Act. Specifically, the Judge correctly found that the Respondent violated Section 8(a)(1) of the Act by interrogating employees about Union support and activities and engaging in surveillance of employees engaged in Union and other activities. The Judge also correctly found that the Respondent violated Section 8(a)(1) and (5) of the Act by withdrawing recognition from the Union; denying Union officials access to Respondent's facility; requiring Respondent's agents to accompany Union representatives while accessing Respondent's facility; temporarily ceasing the deduction of Union dues from employees' paychecks; unilaterally offering employees 401(k) and health insurance benefits during the life of its collective-bargaining agreement with the Union; unilaterally providing health insurance benefits to employee Carleen Condon during the life of its collective-bargaining agreement with the Union; and dealing directly with employees when they are represented by a labor organization.

Judge Amchan, however, failed to find and conclude that the Respondent violated Section 8(a)(1) by informing employees that they were no longer represented by the Union and informing

employees that employees at Respondent's facility were no longer represented by the Union (GC Exception 1 and 2 ). Judge Amchan also incorrectly found and concluded that the Respondent did not violate Section 8(a)(1) and (5) and Section 8(d) by transferring Wayne Miller, an employee from a non-Union facility, to Respondent's Countyline Landfill to perform bargaining unit work on November 12, 2010 rather than contacting the Union to obtain a referred person from the Union hall to fill the position pursuant to the hiring hall procedures set forth in the parties' collective-bargaining agreement (GC Exceptions 3). Furthermore, Judge Amchan refused to find and conclude that Respondent could not withdraw recognition from the Union because Respondent cannot demonstrate a loss of majority support since grievances are pending regarding the termination of three employees (G.C. Exceptions 4). Additionally, Judge Amchan incorrectly found and concluded that Respondent did not violate Section 8(a)(1)and (5) of the Act by changing its vacation pay policy and implementing a wage increase after the expiration of the parties' collective-bargaining agreement without first notifying the Union and affording the Union the opportunity to bargain over the changes (GC Exceptions 5). Moreover, Judge Amchan failed to find and conclude that a bargaining order was the appropriate remedy for Respondent's unlawful withdrawal of recognition from the Union, subsequent unilateral changes, and unlawful statements pursuant to the Board's decision in Spectrum Health-Kent Community Campus, 355 NLRB No. 101 (Aug. 23, 2010), affirming 353 NLRB 996 (2009) (two-member decision), appeal pending Case 10-1260 (D.C. Cir.) (GC Exceptions 6).

As noted below, Judge Amchan incorrectly found that, according to paragraph 7(a) rather than paragraphs 7(c)(i) and 7(c)(ii) of the complaint, Respondent violated the Act by initially denying and later limiting the access of Union officials to Respondent's facility since on or about November 11, 2010 (G.C. Exception 7). Also, Judge Amchan incorrectly found and

concluded that, if arbitration resulted in reinstatement for the three discharged employees, Respondent would be obligated to resume recognition with the Union (G.C. Exception 8). Furthermore Judge Amchan incorrectly 's found and concluded that Respondent temporarily violated the Act by failing to deduct Union dues for pay periods November 14 thru 27, 2010 (G.C. Exception 9). Additionally, Judge Amchan incorrectly failed to find and conclude that Respondent failed to recognize and bargain with the Union in violation of Section 8(a)(1) and (5) of the Act based upon Respondent's unlawful withdrawal of recognition pursuant to paragraph 7(a) of the complaint and incorrectly failed to find and conclude that Respondent violated Section 8(d) of the Act even though the Judge Amchan found that Respondent made changes to employees' terms and conditions of employment during the term of the parties' collective-bargaining agreement. Moreover, Judge Amchan failed to provide for an appropriate remedy and Notice provision regarding the violations of the Act noted above.

## II. QUESTIONS PRESENTED

1. Whether the Judge's failure to find and conclude that Respondent, by Area Human Resources Manager Rodney Adkinson, informed employees that they were no longer represented by the Union on November 12, 2010 in violation of Section 8(a)(1) of the Act and the Judge's concomitant failure to provide for an appropriate remedy and Notice provision regarding the above violation of the Act, is contrary to Board policy and existing law?

2. Whether the Judge's failure to find and conclude that Respondent, by written memo, informed employees that employees at Respondent's facility were no longer represented by the Union on November 12, 2010 in violation of Section 8(a)(1) of the Act and the Judge's

concomitant failure to provide for an appropriate remedy and Notice provision regarding the above violation of the Act, is contrary to Board policy and existing law?

3. Whether the Judge's findings and conclusions that Respondent did not violate Section 8(a)(1) and (5) of the Act when Respondent transferred Wayne Miller, an employee from a non-Union facility, to Respondent's Countyline Landfill to perform bargaining unit work on November 12, 2010 rather than contacting the Union to obtain a referred person from the Union hall to fill the position pursuant to the parties' collective-bargaining agreement and the Judge's concomitant failure to provide for an appropriate remedy and Notice provision regarding the above violation of the Act, is contrary to Board policy and existing law?

4. Whether the Judge's refusal to find and conclude that Respondent could not withdraw recognition from the Union because Respondent cannot demonstrate a loss of majority support since grievances are pending regarding the termination of the three discharged employees, is contrary to Board policy and existing law?

5. Whether the Judge's findings and conclusions that Respondent did not violate Section 8(a)(1) and (5) by changing its vacation pay policy about February 4, 2011 and implementing a wage increase for employees about March 1, 2011 after the expiration of the parties' collective-bargaining agreement since the Respondent possessed evidence that the Union lost majority status and the Judge's concomitant failure to provide for an appropriate remedy and Notice provision regarding the above violations of the Act, is contrary to Board policy and existing law?

6. Whether the Judge's failure to find and conclude that a bargaining order was the appropriate remedy for Respondent's unlawful withdrawal of recognition from the Union, subsequent unilateral changes, and unlawful statements pursuant to the Board's decision in

Spectrum Health-Kent Community Campus and the Judge's concomitant failure to provide Notice provision regarding a bargaining order remedy, is contrary to Board policy and existing law?

7. Whether the Judge's finding that, according to paragraph 7(a) rather than paragraphs 7(c)(i) and 7(c)(ii) of the complaint, Respondent violated the Act by initially denying and later limiting the access of Union officials to Respondent's facility since on or about November 11, 2010, is contrary to Board policy and existing law?

8. Whether the Judge's finding and conclusion that, if arbitration resulted in reinstatement for the three discharged employees, Respondent would be obligated to resume recognition with the Union, is contrary to Board policy and existing law?

9. Whether the Judge's finding and conclusion that Respondent temporarily violated the Act by failing to deduct Union dues for pay periods November 14 thru 27, 2010, is contrary to Board policy and existing law?

10. Whether the Judge's failure to find and conclude that Respondent failed to recognize and bargain with the Union in violation of Section 8(a)(1) and (5) of the Act based upon Respondent's unlawful withdrawal of recognition pursuant to paragraph 7(a) of the complaint and the Judge's concomitant failure to provide for an appropriate remedy and Notice provision regarding the above violation of the Act, is contrary to Board policy and existing law?

11. Whether the Judge's failure to find that Respondent violated Section 8(d) of the Act even though the Judge found that Respondent made changes to employees' terms and conditions of employment during the term of the parties' collective-bargaining agreement, is contrary to Board policy and existing law?

### III. STATEMENT OF THE FACTS

#### A. Background

Respondent is a corporation with offices and places of business throughout the State of Indiana including Argos, Indiana, and is engaged in the business of waste disposal, collection, and recycling (TR 18; GC Ex 1(m)). Bill Meyer is the Area President of the Northern Indiana Area in the Midwest Region (TR 22). Jack Perko is the Senior Vice President of Operations for the Midwest Region (TR 20, 21). Holly Georgell is the Attorney and Midwest Region Labor Relations Director (TR 17). Rodney Adkinson is the Area Human Resources Manager for Northern Indiana (TR 22). Bob Walls is the General Manager (TR 21, 22). Michael Beckley is the Operations Manager (TR 21).

About January 1, 2009, Respondent merged with a company called Allied Waste. At the time of the merger, the Respondent assumed the operations of the Countyline Landfill in Argos, Indiana, whose employees have been represented by the Union for about 15 years (TR 18-20). Upon assuming the operations of the Countyline Landfill, Respondent recognized the Union and agreed to abide by the terms of the then-existing collective-bargaining agreement, which was effective from January 1, 2008, through December 31 (TR 20; JT Ex 1).

#### B. The Bargaining Unit

At the time of the merger, the Respondent employed seven employees: Shannon Pugh, Travis Pugh, Mike Fairchild, Carleen Condon, Bob Styles, Dennis Jaeger, and Jason Weigands. All of the employees held the position of operator except Weigands, who held the position of mechanic (TR 19). About October 1, Jaeger took a voluntary layoff because of economic conditions at the Countyline Landfill (TR 338, 343-344). On November 9, Respondent

discharged Travis Pugh, Fairchild, and Weigands for alleged misconduct and the Union grieved those terminations on November 10 (TR 95, 132, 197; GC Ex 4; GC Ex 5; GC Ex 6; GC Ex 7).<sup>2</sup> About November 9, Jaeger was recalled to work (TR 341, 344). As of November 10, the Respondent employed four employees: Shannon Pugh, Condon, Styles, and Jaeger. Sometime after November 11, Wayne Miller, an employee of Respondent, was transferred from the Wabash Valley Landfill, one of Respondent's other non-Union facilities, and began working at Countyline Landfill as an operator (TR 54-56, 119-120, 146, 173-174, 348-350; CP Ex 3).

C. Withdrawal of Recognition

About August 23, Midwest Region Labor Relations Director Georgell and Union Representative James Gardner talked about the need to meet to negotiate a new collective-bargaining agreement. However, they did not talk specifically about meeting dates (TR 25). On October 5, the Union sent a letter to the Respondent requesting to meet to bargain a new collective-bargaining agreement (TR 26, 196-197; GC 24).

About November 9, after Travis Pugh, Fairchild, and Weigands were terminated, Condon told Operations Manager Beckley that she and some of the remaining employees no longer wished to be represented by the Union (TR 169-171). On November 9, after speaking with Condon, Beckley informed Area Human Resources Manager Adkinson that Condon, Styles, and Jaeger had stated that they no longer wished to be represented by the Union (TR 96-98).

About November 10, Adkinson informed Midwest Region Labor Relations Director Georgell that Condon, Styles, and Jaeger no longer wished to be represented by the Union (TR

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<sup>2</sup> The grievance concerning Travis Pugh's discharge was arbitrated about May 5, 2011 (TR 197-198). At the time of the hearing, the other grievances were still pending. None of the terminations was ever alleged to be an unfair labor practice.

29, 97). Later that same day, Georgell and Adkinson conducted two meetings with the employees to discuss their options if they decided to follow through their desire to no longer be represented by the Union and answer any questions that they had. Georgell was not present at the Countyline Landfill. However, she spoke to the employees by telephone. During the first meeting, Adkinson and Georgell spoke to Condon and Styles and answered questions about their health insurance benefits and pension in the event that they lost their Union benefits. Adkinson and Georgell also informed Condon and Styles that Respondent would see if the employees could receive benefits including a 401(k) plan through the Respondent if they lost their Union benefits. Georgell further informed Condon and Styles that they would need to place their desire not to be represented by the Union in writing. Adkinson provided Condon and Styles with pen and paper so that they could place their desire not to be represented by the Union in writing (TR 30-32, 98-101). During the second meeting, Adkinson met with Jaeger at the Countyline Landfill. Georgell was not present at this meeting. Adkinson answered questions about Jaeger's health insurance benefits and pension in the event that the employees lost their Union benefits. Jaeger informed Adkinson that he knew that he needed to sign something to express his intent not to be represented by the Union (TR 101-103).

About November 10 or 11, Area Human Resources Manager Adkinson gave Operations Manager Beckley a manila envelope containing letters from Condon and Styles stating that they no longer wished to be represented by the Union (TR 172). On November 11, Jaeger gave Beckley his letter stating that he no longer wished to be represented by the Union (TR 172; GC Ex 9). Also, on November 11, Condon, Styles, and Jaeger submitted letters to the Union stating that they no longer wished to be represented by the Union. Later that day, Midwest Region Labor Relations Director Georgell sent a letter to the Union withdrawing recognition. The

Union also sent an email to the Respondent requesting to schedule a meeting to commence the negotiation of a new collective-bargaining agreement. The Respondent did not respond (TR 33, 198-199, 216, 238; GC Ex 8; GC Ex 9; GC Ex 10, GC Ex 11; GC Ex 25).

On November 12, Midwest Region Labor Relations Director Georgell and Area Human Resources Manager Adkinson met with the Condon, Styles, Jaeger, and Shannon Pugh at the Countyline Landfill and informed them that Respondent had withdrawn recognition from the Union (TR 45, 108-109). Adkinson also informed the employees that the benefits offered through Respondent would take effect immediately, including a 401(k) plan and a different health insurance plan. During the meeting, Adkinson distributed information to the employees concerning the Respondent's medical, dental and vision plans (TR 117-119, 133-140, 297-299; CP Ex 2). Georgell and Adkinson further informed employees that Union dues may no longer be taken out of employees' paychecks and they could receive five personal days which had previously been made available to non-Union employees, but not to Union members (TR 46-51, 110-119). Prior to the withdrawal of recognition, the employees were previously receiving health insurance benefits and pension under the Union's pension and health insurance programs (TR 299-300). Also, on November 12, Senior Vice President of Operations Perko sent a memo to represented employees at other facilities notifying them of the withdrawal of recognition at the Countyline Landfill and that such a withdrawal had no impact on the contracts for these other employees (including any no-strike provisions) (TR 35-36; GC Ex 12).

D. Unilateral Changes and/or Failure to Abide by the Contract

Shortly after the meeting with employees on November 12 to inform them of the withdrawal of recognition, Union Representatives James Gardner and Mike DeWulf attempted to visit the Countyline Landfill facility to conduct Union business and speak to employees. Such a

visit is allowed pursuant to the language of Article 6.02 of the collective-bargaining agreement (JT Ex 1). However, Midwest Region Labor Relations Director Georgell informed Gardner that the Respondent had withdrawn recognition and he was not allowed to have access to the employees. Gardner recorded this conversation (TR 200-210; GC Ex 30; GC Ex 31). On December 9 or 10, Gardner sent an email to Area Human Resources Manager Adkinson and General Manager Walls requesting access to the Respondent's facility to conduct Union business. On December 10, Georgell sent an email to Gardner stating that he could visit the Respondent's facility on December 13 (TR 216-218; GC Ex 26).

On December 13, Union Representatives Garner and Tom Lanham went to the Respondent's facility. General Manager Walls told Gardner and Lanham that they were not allowed onto Respondent's facility because of weather conditions even though all of the employees were working. Walls also informed them that he wanted more management representatives present. Walls further informed them that they could return on December 16 (TR 218-221).

On December 16, Union Representatives Gardner and Lanham returned to the Respondent's facility. Upon their arrival, about eight representatives of Respondent including General Manager Walls escorted Gardner and Lanham through the Countyline Landfill. Also, before Gardner was allowed to speak to the employees Condon, Styles, and Jaeger, Walls first asked each employee if they wanted to speak to Gardner. Additionally, Walls remained about 15 feet away while Gardner spoke to employee Travis Pugh about work and Union business. Four representatives of the Respondent also stood roughly about 30 to 40 feet away from Gardner and employee Pugh while they spoke. Gardner recorded this conversation with Respondent's representatives and employee Pugh (TR 222-234, 306-307; GC Ex 32; GC Ex 33). After the

withdrawal of recognition, Respondent ceased deducting dues from employees' paychecks for about two weeks, before resuming the deductions until the contract expired on December 31 (TR 332; GC Ex 14; GC Ex 15; GC Ex 36(a)-36(f); Resp. Ex 3(a)-3(d)).

Around November 14, the Respondent transferred employee Miller from the Wabash Valley Landfill to the Countyline Landfill to fill an operator position rather than contacting the Union to obtain a referred person from the Union hall to fill the position. Thus, Respondent failed to utilize the Union's hiring hall procedures as required by Article X of the collective-bargaining agreement (JT Ex 1). In fact, Area Human Resources Adkinson posted a job description on [www.CareerBuilder.com](http://www.CareerBuilder.com) for an operator on November 13. Miller subsequently filled the position (TR 55, 120-123, 163, 173-176; GC Ex 19). As noted above, Respondent also informed employees, at a November 12 meeting, that they would be eligible for Respondent's 401(k) and health insurance programs immediately. Furthermore, paperwork to that effect was distributed to employees at the meeting (TR 133-140, 297-299; CP Ex 2). Additionally, Respondent mailed information concerning Respondent's 401(k) and health insurance benefits to employees about November and December (TR 302-306, 311-313; GC Ex 17; GC Ex 18; GC Ex 34; GC Ex 35). Starting about November 11, employee Condon began participating in the Respondent's medical, dental, and vision plan (TR 328-330; GC Ex 36(a)).

About February 4, 2011, Respondent announced to its employees that it was changing its vacation policy. In the past, employees accrued vacation time throughout the calendar year and then used that accrued vacation time the following calendar year. Respondent announced that vacation time would be accrued in an ongoing fashion and was to be used the year it was accrued. Also, about February 4, 2011, employees received a vacation buyout under the new vacation policy. In the past, only employees who had been laid off would be eligible for a

vacation buyout, a lump sum payment for unused vacation. Under the new policy, current employees received a vacation buyout for unused vacation (TR 125-128, 257-258, 307-309; GC Ex 20). About March 4, 2011, Respondent announced that employees would receive a merit pay increase, which amounted to an increase in the hourly rate of all of the employees in the bargaining unit. Also, about March 4, 2011, all of the employees in the bargaining unit received a merit pay increase of about \$0.34 per hour (TR 61, 129-130, 310-311; GC Ex 20; GC Ex 21).

#### IV. ARGUMENT

##### A. Judge Amchan Failed to Find and Conclude That The Respondent Violated Section 8(a)(1) Of The Act By Informing Employees That They Were No Longer Represented By The Union And Informing Employees That Employees At Respondent's Facility Were No Longer Represented By The Union (G.C. Exceptions 1 and 2)

In his decision, Judge Amchan found and concluded that the Respondent unlawfully withdrew recognition from the Union during the term of the parties' collective-bargaining agreement in violation of Section 8(a)(1) and (5) of the Act (Decision, page 9, lines 1-6). However, Judge Amchan failed to find and conclude that the Respondent violated Section 8(a)(1) of the Act as alleged in paragraphs 5(a)(i) and 5(a)(ii) of the complaint by informing employees that they were no longer represented by the Union and informing employees that employees at Respondent's facility were no longer represented by the Union. Counsel for the Acting General Counsel respectfully asserts that more than sufficient evidence exists in the record to demonstrate that the Respondent violated Section 8(a)(1) of the Act as alleged.

Record evidence demonstrates that, upon assuming the operations of the Countyline Landfill in January 1, 2009, Respondent recognized the Union and agreed to abide by the terms of the then-existing collective-bargaining agreement, which was effective from January 1, 2008, through December 31 (TR 20; JT Ex 1). On November 10, three of the four remaining

employees notified the Respondent and the Union that they no longer desired Union representation on November 11 (TR 172; GC Ex 9). Also, on November 11, Midwest Region Labor Relations Director Georgell sent a letter to the Union withdrawing recognition (TR 33, 198-199, 238; GC Ex 8; GC Ex 9; GC Ex 10; GC Ex 11). However, the parties' collective-bargaining agreement did not expire until December 31 (JT Ex 1). Thus, as a matter of law, the Respondent could not withdraw recognition from the Union until the collective-bargaining agreement had expired on December 31. See Syscon International, Inc., 322 NLRB 539 n.1 (1996), citing NLRB v. Burns Int'l Security Services, Inc., 406 U.S. at 290 n.12 (employer cannot use doubt about a union's majority as a defense to a refusal-to-bargain charge while a collective-bargaining agreement is in effect).

Furthermore, on November 12, Midwest Region Labor Relations Director Georgell and Area Human Resources Manager Adkinson informed all of its employees that Respondent had withdrawn recognition from the Union as the employees' collective-bargaining representative (TR 45, 109). Also, on November 12, Senior Vice President of Operations Perko sent a memo to represented employees at other facilities notifying them of the withdrawal of recognition at the Countyline Landfill and that such a withdrawal had no impact on the contracts for these other employees (including any no-strike provisions) (TR 35-36; GC Ex 12). Since the Respondent's withdrawal of recognition from the Union was unlawful, Respondent's statement to the employees and the memo sent to represented employees on November 12 also violated the Act. Spectrum Health-Kent Community Campus, supra. Thus, Judge Amchan erred by failing to find and conclude that the Respondent violated Section 8(a)(1) of the Act by informing employees that they were no longer represented by the Union and informing employees that employees at Respondent's facility were no longer represented by the Union on November 12.

B. Judge Amchan Incorrectly Concluded That The Respondent Did Not Violate Section 8(a)(1) And (5) And Section 8(d) Of The Act By Transferring An Employee From A Non-Union Facility To Respondent's Countyline Landfill To Perform Bargaining Unit Work Rather Than Contacting The Union To Obtain A Referred Person From The Union Hall To Fill The Position Pursuant To The Parties' Collective-Bargaining Agreement (G.C. Exceptions 3)

In his decision, Judge Amchan concluded that Counsel for the Acting General Counsel failed to establish that the Respondent violated the Union hiring hall provision in the parties' collective-bargaining by transferring Wayne Miller, an employee from a Respondent non-Union facility, to a bargaining unit position on November 12 without first contacting the Union and seeking a referral from the Union hiring hall to fill the bargaining unit position (Decision, page 6, line 40; page 7, lines 1-3). In his decision, Judge Amchan relied upon the Respondent's assertion that it did not violate the parties' collective-bargaining agreement since it merely transferred employee Miller, who already worked for Respondent. Judge Amchan also relied upon the Respondent's assertion that, since Respondent did not hire anyone, the hiring hall provision in the parties' collective-bargaining agreement is irrelevant. (Decision, page 6, lines 16-40). Counsel for the Acting General Counsel respectfully asserts, however, that Judge Amchan's ruling was in error and that more than sufficient evidence exists in the record to demonstrate that the Respondent ceased utilizing the Union's hiring hall for hiring employees to perform bargaining unit work in violation of Section 8(a)(1) and (5) of the Act.

Record evidence demonstrates that, on November 11, the Respondent withdrew recognition from the Union even though the parties' collective-bargaining agreement was still in effect.

Around November 14, the Respondent transferred employee Miller from Respondent's Wabash Valley Landfill, a non-Union facility, to the Countyline Landfill to fill a bargaining unit position as an operator without first contacting the Union to obtain a referred person from the Union hall to fill the bargaining unit position as required by Article X of the collective-bargaining

agreement (JT Ex 1).<sup>3</sup> In fact, Area Human Resources Adkinson posted a job description on [www.CareerBuilder.com](http://www.CareerBuilder.com) for an operator on November 13 instead of contacting the Union to obtain a referred person from the Union. Employee Miller subsequently filled the position pursuant to Respondent's job posting (TR 55, 120-123, 163, 173-176; GC Ex 19).

Since employee Miller was transferred from a non-bargaining unit position to a bargaining unit position at the Countyline Landfill, Miller should have been treated as a new hire subject to the provisions of Article X of the parties' collective-bargaining agreement. Otherwise, the Respondent could simply ignore letter and/or the spirit of the language contained in Article X and simply transfer employees from its non-Union facilities to Respondent's Countyline Landfill in order to create a majority of non-Union employees in an effort to get rid of the Union. Also, there is no evidence demonstrating that Respondent has transferred a non-bargaining unit employee into a bargaining unit position in the past. As discussed above, Respondent has engaged in unlawful conduct in an attempt to get rid of the Union. Also, Respondent's obligation to seek referred applicants from the Union pursuant to the Union hiring hall provision in the parties' collective-bargaining agreement was a mandatory subject of bargaining since it was related to employees' terms and conditions of employment. Thus, Respondent violated Section 8(a)(1) and (5) of the Act by failing to utilize the hiring hall provision contained in the parties' collective-bargaining agreement without first notifying the Union and affording the Union the opportunity to bargain regarding the change. Furthermore, the change made to the use of the Union's hiring hall violated a specific provision in the parties' collective-bargaining agreement, which was still in effect at the time the change was made. Respondent's

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<sup>3</sup> Article X provides: The Company recognizes the Union's referral offices are a valuable source for qualified applicants and the referral offices operate in a non-discriminatory manner. Consequently, whenever the company deems it necessary to hire an employee to perform work covered by this Agreement, the Company will obtain all such employees through the referral offices of the Union in accordance with the non-discriminatory provisions governing the operating of the union's referral offices set out in the current effective Addendum No. 1. The Union

modification of this provision in the collective-bargaining agreement without the consent of the Union also violated Section 8(d) of the Act. Grane Health Care, 337 NLRB 432, 435 (2002).

Also, it is well settled that an employer may not unilaterally change a term and condition of employment that is a mandatory subject of bargaining without first notifying the union and giving the union an opportunity to bargain over those changes. See, e.g., NLRB v. Katz, 369 U.S. 736, 742-43 (1962); Pleasantview Nursing Home, Inc., 335 NLRB 961, 962 (2001), enfd. in relevant part, 351 F.3d 747 (6th Cir. 2003). Mandatory subjects of bargaining are those related to employees' wages, hours, and other terms and conditions of employment. See, e.g., NLRB v. Borg-Warner Corp., 356 U.S. 342 (1958). Thus, Judge Amchan erred by failing to find and conclude that the Respondent violated Section 8(a)(1) and (5) when it failed to utilize Union's hiring hall procedures as required by Article X of the parties' collective-bargaining agreement without first notifying the Union and giving the Union an opportunity to bargain over that change and violated Section 8(d) by modifying the parties' collective-bargaining agreement without the Union's consent.

C. Judge Amchan Erred By Refusing To Find And Conclude that Respondent Could Not Withdraw Recognition From The Union Because Respondent Cannot Demonstrate A Loss Of Majority Support Since Grievances Are Pending Regarding The Termination Of The Three Discharged Employees (G.C. Exceptions 4)

In his decision, Judge Amchan refused to find and conclude that Respondent could not withdraw recognition from the Union because Respondent cannot demonstrate a loss of majority support since grievances are pending regarding the termination of the three discharged employees (Decision, 8, lines 1-47). Counsel for the Acting General Counsel respectfully asserts, however, that Judge Amchan's ruling was in error and Respondent failed to demonstrate

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shall have forty-eight (48) hours to refer to the Company a qualified applicant for a job opening. In the event the Union does not supply the Company with a qualified applicant within the time limit specified, the Company may hire any other applicant.

an actual loss of majority status under the Board's decision in Levitz Furniture Co., 333 NLRB 717 (2001).

In Levitz Furniture Co., the employer received a petition containing the signatures from what appeared to be a majority of bargaining unit employees stating that they no longer desired representation from the incumbent union. The employer subsequently informed the union that it intended to withdraw recognition at the end of the contract term. Within two weeks, the union informed the employer that it had objective evidence establishing that it retained majority support and was willing to show this evidence to the employer. However, the employer never examined the union's evidence and withdrew recognition from the union when the contract expired. The Board held that an employer is permitted to withdraw recognition "only on a showing that the union has, in fact, lost the support of a majority of the employees in the bargaining unit." Id. at 725. The Board also held an employer who withdraws recognition from an incumbent union in the honest but mistaken belief that the union has lost majority support still violates Section 8(a)(5) of the Act. Id. at 725. The Board concluded that an employer assumes the risk of violating Section 8(a)(5) of the Act if it withdraws recognition on evidence other than the results of an RM election even if the employer believes in good-faith that its evidence is conclusive. For this reason, the Board emphasized that Board-conducted elections are the preferred way to resolve questions concerning employees' support for unions and that an employer may obtain RM elections by demonstrating reasonable good-faith uncertainty as to an incumbent union's continuing majority status. Id. at 723. Thus, in adopting a more stringent standard for withdrawals of recognition and more lenient standard for obtaining RM elections, the Board was sending employers a signal that seeking RM elections is the best course of action

to pursue if the employer believes that it has evidence questioning an incumbent union's continued majority status.

Also, in the context of representational cases, the Board has held that, as a general rule, a discharge is presumed to be for cause unless a charge has been filed and is pending concerning the discharge. In such a case, the discharged employee is allowed to vote under challenge. Dura Steel Co., 111 NLRB 590 (1955). This same policy applies with respect to pending grievances and other litigation where reinstatement is possible. Pacific Tile & Porcelain Co., 137 NLRB 1358 (1962); Machinists (IAM Representatives Association), 159 NLRB 137 (1996).

In the instant case, the Respondent employed six employees on November 8: Condon, Fairchild, Shannon Pugh, Travis Pugh, Styles, and Wiegands. On November 9, the Respondent discharged Travis, Fairchild, and Weigands and the Union filed a grievance protesting their discharge on November 10. About November 9, Jaeger was recalled to work (TR 95, 132, 197, 341, 344; GC Ex 4; GC Ex 5; GC Ex 6, GC Ex 7). In applying the principle in Pacific Title & Porcelain Co., supra, to the instant case, the eligibility of the three discharged employees, Travis Pugh, Fairchild, and Weigands, cannot be determined until an arbitrator rules on the validity of their discharges (i.e. an arbitration award sustaining the grievance would mean the three individuals should never have been discharged, and they would be eligible to count towards the size of the unit). Therefore, when the Respondent withdrew recognition on November 11, there were as many as seven employees in the bargaining unit: Condon, Fairchild, Jaeger, Shannon Pugh, Travis Pugh, Styles, and Wiegands. The notice from the employees that they did not want to be represented by the Union was signed by three employees: Condon, Jaeger, and Styles.

Therefore, under a strict reading of Levitz, the Respondent cannot prove actual loss of majority status at the time of the withdrawal of recognition, and the withdrawal was therefore unlawful.

Even assuming that the Respondent had an honest belief as to the Union's continued majority status, Respondent's belief was nonetheless mistaken because only three out seven bargaining unit employees indicated a desire to no longer be represented by the Union. Thus, the Respondent assumed the risk of its possible honest albeit mistaken belief by withdrawing recognition from the Union immediately rather than seeking an RM election through Board procedures, the Board's preferred way to resolve questions regarding employees' support for unions. Had Respondent filed an RM petition, the three discharged employees would have been considered eligible voters because of the pending grievances. Pacific Title & Porcelain Co., supra and Machinists (IAM Representatives Association), supra. Also, it should be noted that the Respondent may win the arbitrations if an arbitrator upholds the three discharges (or even just one of them). However, the Respondent cannot prove that, at the time of the actual withdrawal, there was an actual loss of majority status since at the time of the withdrawal only three out of seven bargaining unit no longer wished to be represented. Thus, Respondent was not privileged to withdraw recognition from the Union while the grievances concerning the discharges employees are pending.

D. Judge Amchan Incorrectly Found And Concluded That The Respondent's Unilateral Change of Its Vacation Policy and Implementation of A Wage Increase Did Not Violate The Act Because Respondent Was Not Obligated To Bargain With The Union After The Expiration Of The Parties' Collective-Bargaining Agreement Since Respondent Had Evidence That The Union Had Lost Majority Status (G.C. Exceptions 5 and 8)

In his decision, Judge Amchan found and concluded that the Respondent changed its vacation policy previously pertaining to bargaining unit employees to conform to the vacation policy at its other non-Union facilities in February 2011 and implemented a wage increase for its

employees in March 2011. However, Judge Amchan found and concluded that these unilateral changes did not violate the Act because the Respondent was not obligated to recognize and bargain with the Union after the expiration of the parties' collective-bargaining agreement since the Respondent had evidence that the Union had lost majority status (Decision, page 7, lines 35-43; page 8, lines 1-40; page 8, lines, 45-47; page 9, lines 6-9). Counsel for the Acting General Counsel respectfully asserts, however, that Judge Amchan's ruling was in error and Respondent failed to demonstrate an actual loss of majority status under the Board's decision in Levitz, supra.

As discussed above, the Respondent cannot prove actual loss of majority at the time of the actual withdrawal of recognition from the Union. Thus, the Respondent was obligated to continue to recognize and bargain with the Union before and after the expiration of the parties' collective-bargaining agreement. As such, even though the parties' collective-bargaining agreement expired on December 31, the Respondent was not privileged to unilaterally change its vacation policy in February 2011 or unilaterally implemented a wage increase for employees in March 2011 without first giving notice to the Union and affording the Union an opportunity to bargain over the changes. Since the Respondent failed to do so, Respondent's actions clearly violated Section 8(a)(1) and (5) of the Act under Levitz, supra.

Also, as in Spectrum Health -Kent Community Campus, supra, a bargaining order is the appropriate remedy for Respondent's unlawful withdrawal of recognition and subsequent unlawful unilateral changes. As such, Respondent should be required to recognize and bargain with the Union even after the expiration of the parties' collective-bargaining agreement. Thus, the Respondent's unilateral change in its vacation policy in February 2011 and unilateral implementation of a wage increase for employees in March 2011 without first giving notice to

the Union and affording the Union an opportunity to bargain over the changes violated Section 8(a)(1) and (5) of the Act. Therefore, under a theory based upon the Board's decision in Levitz or Spectrum Health -Kent Community Campus, Judge Amchan erred by finding and concluding that the Respondent did not violate Section 8(a)(1) and (5) of the Act by unilaterally change its vacation policy in February 2011 or unilaterally implemented a wage increase for employees in March 2011 without first giving notice to the Union and affording the Union an opportunity to bargain over the changes.

E. Judge Amchan Erred By Refusing To Grant A Bargaining Order Remedy (G.C. Exceptions 6)

In his decision, Judge Amchan concluded that a bargaining order was not warranted pursuant to the Board's decision in Burger Pits, Inc., 273 NLRB 1001 (1984) (Decision, page 10, lines 38-43; page 11, lines 1-46; page 12, lines 1-30). Counsel for the Acting General Counsel respectfully asserts that Judge Amchan's ruling was in error. In Burger Pits, Inc., the employer prematurely withdrew recognition from the union during the term of the parties' collective-bargaining agreement based on a disaffection petition submitted by a majority of unit employees. Immediately after the withdrawal, the employer instituted a new health and welfare coverage, ceased making contractually required contributions to the existing health and welfare fund and pension plans, and refused to grant the Union access to the kitchen areas of its facilities. In finding that an affirmative bargaining order was not appropriate to remedy the violations, the Board explained that the employer would have been privileged to announce an intention not to bargain with the Union for a new contract and that it was obligated to administer the old contract until its expiration in view of its reasonable, good-faith doubt of the Union's majority. The

Board also explained that the employer would have been privileged to withdraw recognition from the union and implement unilateral changes upon the expiration of the contract.

Despite Judge Amchan's reliance on Burger Pits, Inc., the Board recently found that an affirmative bargaining order extending beyond the expiration of a collective-bargaining agreement was warranted as a remedy for the employer's unlawful withdrawal of recognition in circumstances very similar to those in the instant case as discussed above. Spectrum Health-

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Community Campus, supra. In Spectrum Health-Kent Community Campus, the Board recently found that an affirmative bargaining order extending beyond the expiration of a collective-bargaining agreement was warranted as a remedy for the employer's unlawful withdrawal of recognition in circumstances very similar to those in the instant case.<sup>4</sup> In Spectrum Health-Kent Community Campus, the employer prematurely withdrew recognition from the union during the term of the parties' collective-bargaining agreement based on a disaffection petition submitted

by

a majority of unit employees. Immediately after the withdrawal, it stopped deducting dues from employees' paychecks and ceased utilizing the collectively-bargained grievance procedure. In finding that an affirmative bargaining order was appropriate to remedy the violations, the Board explained that "[s]ince the Union was never given an opportunity to reach a successor agreement with the Respondent, it is only by restoring the status quo ante and requiring the Respondent to bargain with the Union for a reasonable period of time that the employees will be able to fairly

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<sup>4</sup> See also Syscon, 322 NLRB at 544-45 (finding affirmative bargaining order required to remedy employer's unlawful withdrawal of recognition).

assess for themselves the union's effectiveness as a bargaining representative.”<sup>5</sup> As in Spectrum Health -Kent Community Campus, the Respondent's withdrawal of recognition and subsequent unfair labor practices in the instant case, including the denial of Union access to its facility and unilateral changes to its employees' pension and health insurance plans, effectively precluded the Union from reestablishing majority support prior to the December 31 expiration of the parties' collective-bargaining agreement. Furthermore, as in Spectrum Health -Kent Community Campus, a bargaining order is the appropriate remedy for Respondent's unlawful withdrawal of recognition and subsequent unlawful unilateral changes. Additionally, as in Spectrum Health-Kent Community Campus, the Respondent's withdrawal of recognition and subsequent unfair labor practices in the instant case, including the denial of Union access to its facility and unilateral changes to its employees' pension and health insurance plans, effectively precluded the Union from reestablishing majority support prior to the December 31 expiration of the parties' collective-bargaining agreement.<sup>6</sup>

Both Burger Pits, Inc. and Spectrum Health-Kent Community Campus are very similar factually. Both cases stand for the proposition that an employer's withdrawal of recognition from a union during the term of a collective-bargaining agreement and subsequent unilateral changes are violations of the Act. The only difference between the two cases is the amount of time which elapsed between the employer's withdrawal of recognition and the expiration of the

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<sup>5</sup> Id.; Cf. Rock-Tenn Co., v. NLRB, 69 F.3d 803, 810 (7<sup>th</sup> Cir. 1995) (finding the Board justified in extending the certification year after the employer unlawfully anticipatorily withdrew recognition without an objective, good faith doubt; “we are mindful that the extension imposes a potential burden on employee free choice . . . however, that burden is justifiable in light of the company's interference in the initial certification year”).

<sup>6</sup> See, e.g. HQM of Bayside, LLC, 348 NLRB 758, 761-62 (2006), *enfd.* 518 F.3d 256 (4<sup>th</sup> Cir. 2008); Parkwood Developmental Center, Inc., 347 NLRB 974, 976-77 (2006), *enfd.* 521 F.3d 404 (D.C. Cir. 2008).

parties' collective-bargaining agreement. In Burger Pits, Inc., the employer withdrew recognition from the union 24 days prior to the expiration of the parties' collective-bargaining agreement. In Spectrum Health-Kent Community Campus, the employer withdrew recognition from the union 83 days prior to the expiration of the parties' collective-bargaining agreement. In the instant case, the Respondent withdrew recognition from the Union 50 days before the expiration of the parties' collective bargaining agreement. However, since the Board's decision in Spectrum Health-Kent Community Campus is the more recent case, the current Board should rely on Spectrum Health-Kent Community Campus and expressly overrule Burger Pits, Inc. and accordingly grant an affirmative bargaining order in the instant case.

Also, in Spectrum Health-Kent Community Campus, the Board discussed that, even though an affirmative bargaining order is the traditional, appropriate remedy for an 8(a)(5) refusal to bargain with the lawful collective-bargaining representative of an appropriate unit of employees, the United States Court of Appeals for the District of Columbia Circuit has required in several cases that the Board justify the imposition of such a remedy. See e.g. Vincent Industrial Plastics v. NLRB, 209 F.3d 727 (D.C. Cir. 2000); Lee Lumber & Bldg. Material v. NLRB, 117 F. 3d 1454, 1462 (D.C. Cir. 1997); and Exxel/Atmos v. NLRB, 28 F.3d 1243, 1248 (D.C. 1994).<sup>7</sup> The Board also discussed that, in Vincent, supra, the United States Court of Appeals for the District of Columbia Circuit summarized its requirement that an affirmative bargaining order must be justified by a reasoned analysis that includes the following considerations: (1) the employees' Section 7 rights; (2) whether other purposes of the Act override the rights of employees to choose their bargaining representatives; and (3) whether alternative remedies are adequate to remedy the violations of the Act.

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<sup>7</sup> It should be noted that all of these cases post-date the Board's decision in Burger Pits, Inc.

As in Spectrum Health-Kent Community Campus, an affirmative bargaining order in the instant case vindicates the Section 7 rights of the employees who were denied the benefits of collective-bargaining by the Respondent's withdrawal of recognition and resulting refusal to collectively bargain with the Union. Since the Union was never given an opportunity to reach a successor agreement with Respondent, it is only by restoring the status quo ante and requiring the Respondent to bargain with the Union for a reasonable period of time that the employees will be able to fairly assess for themselves the Union's effectiveness as a bargaining representative. Also, as in Spectrum Health-Kent Community Campus, a cease-and-desist order, alone would be inadequate in the instant case to remedy the Respondent's withdrawal of recognition and refusal to bargain with the Union since the Union was unlawfully denied access to employees and was not given the opportunity to reestablish its majority. In his decision, Judge Amchan quotes that "Unit employees had the right to talk to union representatives in private, without Respondent knowing that they did so. Had Respondent not interfered with that right, it is possible that the Union could have addressed and remedied the reasons for which they had indicated their desire to withdraw from the Union and/or demonstrated to at least some of the unit employees that the benefits of continued union representation outweighed the reasons for their dissatisfaction with that representation." (Decision, page 10, lines 1-6).

In his decision, Judge Amchan also quotes that "Respondent violated employees' rights by not allowing them to decide freely whether or not to speak to their bargaining representative. By doing so, Respondent interfered with their right to decide without coercion whether they wished to be represented by the Union beyond the expiration of the collective bargaining agreement. As the Board noted in *Spectrum Health*, quoting from [Union Fish, 156 NLRB 187 at 191 \(1965\)](#), the contract bar rule serves two objectives: industrial stability and *the opportunity to*

*select bargaining representatives at reasonable and predictable intervals.* The latter right is similar to the right of the electorate in American elections. The popularity of our elected officials may ebb and flow, but it is only their popularity among the voters on election day that determines whether they remain in office. To use a historical analogy, by all accounts had the presidential election of 1948 been held in September rather than November, President Truman would almost certainly have been handily defeated by Governor Dewey. However, by election day, President Truman had recaptured the support of a plurality of the electorate. In interfering with the Union's access to unit members, Respondent prohibited the Union from attempting to recapture its majority status. Moreover, by interfering with employee access to their bargaining representatives, Respondent interfered with the right of employee free choice at the intervals mandated by the Act.” (Decision, page 12, lines 1-22). A bargaining order remedy is also appropriate in the instant case since Respondent cannot prove that, at the time of its withdrawal of recognition, there was an actual loss of majority status. Thus, Judge Amchan erred by refusing to issue a bargaining order in the instant case.

F. Judge Amchan Erred By Finding That, According To Paragraph 7(a) Rather Than Paragraph 7(c)(i) Of The Complaint, Respondent Violated The Act By Initially Denying And Later Limiting The Access Of Union Officials To Respondent’s Facility Since On Or About November 11, 2010 (G.C. Exception 7)

In his decision, Judge Amchan erred by finding that, according to paragraph 7(a) of the complaint, Respondent violated the Act by initially denying and later limiting the access of

Union officials to Respondent's facility since on or about November 11, 2010 (Decision, page 7, lines 15-18). According to the complaint, paragraph 7(c)(i) rather than paragraph 7(a) alleges that Respondent violated the Act by initially denying and later limiting the access of Union officials to Respondent's facility since on or about November 11, 2010.

G. Judge Amchan Incorrectly Found And Concluded That Respondent Temporarily Violated the Act By Failing To Deduct Union Dues For Pay Periods November 14 Thru 27, 2010 (G.C. Exception 9)

In his decision, Judge Amchan incorrectly found and concluded that Respondent temporarily violated the Act by failing to deduct Union dues for pay periods November 14 thru 27, 2010 (Decision, page 9, footnote 7, lines 42-48). Counsel for the Acting General Counsel respectfully asserts, however, the Judge Amchan's ruling was in error. Despite Judge Amchan's ruling, Respondent's failure to deduct dues was not cured based upon Respondent's subsequent conduct because the Respondent committed other violations of the Act in the instant case.

Passavant Memorial Area Hospital, 247 NLRB 138 (1978). In Passavant, the Board found that, in order to cure a statutory violation, the charged party's repudiation of its violative conduct must be: (1) timely; (2) unambiguous; (3) specific to the coercive conduct; and (4) free from other prescribed illegal conduct. As discussed above, the Respondent's subsequent conduct was not cured because it had engaged in other prescribed illegal conduct by making unlawful statements, unlawfully withdrawing recognition from the Union, and unilaterally changing employees' terms and conditions of employment without first notifying the Union and affording the union an opportunity to bargain over the changes.

H. Judge Amchan Failed to Find and Conclude That Respondent Failed To Recognize And Bargain With The Union Based Upon Respondent's Unlawful Withdrawal Of Recognition Pursuant To The Complaint (G.C. Exception 10)

In his decision, Judge Amchan correctly found and concluded that the Respondent unlawfully withdrew recognition during the term of the parties' collective-bargaining agreement in violation of Section 8(a)(5) of the Act (Decision, page 9, lines 3-9; page 12, line 30).

However, Judge Amchan failed to find and conclude that Respondent failed to recognize and bargain with the Union in violation of Section 8(a)(5) of the Act based upon Respondent's unlawful withdrawal of recognition pursuant to paragraph 7(a) of the complaint (Decision, page 13, lines 21-42; page 14, lines 1-15). Since the Respondent unlawfully withdrew recognition from the Union in violation of Section 8(a)(5) of the Act, a finding that Respondent also failed and refused to recognize and bargain with Union should be made as discussed above.

I. Judge Amchan Failed To Find And Conclude That Respondent Violated Section 8(d) Of The Act (G.C. Exceptions 11)

In his decision, Judge Amchan concluded that the Respondent unilaterally changed employees' terms and conditions of employment during the term of the parties' collective-bargaining agreement denying Union officials access to Respondent's facility; requiring Respondent's agents to accompany Union representatives while accessing Respondent's facility; temporarily ceasing the deduction of Union dues from employees' paychecks; unilaterally offering employees 401(k) and health insurance benefits during the life of its collective-bargaining agreement with the Union; unilaterally providing health insurance benefits to employee Carleen Condon during the life of its collective-bargaining agreement with the Union; and dealing directly with employees when they are represented by a labor organization (Decision, page 12, lines 33-48; page 13, lines 1-8). However, Judge Amchan failed to find and conclude that the Respondent violated Section 8(d) of the Act as a matter of law. As discussed above, the Respondent made changes to employees' terms and conditions of

employment while the parties' collective-bargaining agreement was still in effect without first notifying the Union and affording the Union the opportunity to bargain over the changes. Thus, as a matter of law, Respondent's modification of the provisions in the collective-bargaining agreement without the consent of the Union violated Section 8(d) of the Act. Grane Health Care, supra. Therefore, Judge Amchan erred by failing to find and conclude that the Respondent violated Section 8(d) of the Act as a matter of law.

V. CONCLUSION

For the foregoing reasons, Counsel for the Acting General Counsel respectfully requests that Acting General Counsel's Exceptions to the Decision of the Administrative Law be granted and that an appropriate order issue.

DATED at Indianapolis, Indiana, this 19th day of July 2011.

Respectfully submitted,

/s/ Raifael Williams

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CERTIFICATE OF SERVICE

**The undersigned hereby certifies that a copy of Acting General Counsel's Exceptions to the Decision of the Administrative Law Judge and Brief In Support of Exceptions has been E-filed on NLRB internet site ([www.nlr.gov](http://www.nlr.gov)) and served by Electronic Transmission on July 19, 2011 upon the following persons, addressed to them at the following addresses:**

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