UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

DAYCON PRODUCTS COMPANY, INC.

and

DRIVERS, CHAUFFEUERS, AND HELPERS LOCAL UNION NO. 639 A/W INTERNATIONAL BROTHERHOOD OF TEAMSTERS

Cases 5-CA-35687
5-CA-35738
5-CA-35965
5-CA-35994

COUNSEL FOR THE ACTING GENERAL COUNSEL'S MOTION TO STRIKE RESPONDENT'S CITATION TO SUPPLEMENTAL AUTHORITY, AND/OR MOTION FOR LEAVE TO RESPOND

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Dated: August 25, 2011

On August 19, 2011, Respondent Daycon Products Company, Inc. ("Daycon" or "Respondent") filed with the National Labor Relations Board ("the Board") a "Citation to Supplemental Authority," including legal argument as to why the Complaint allegations—and the unfair labor practices found by Administrative Law Judge Joel P. Biblowitz—should be dismissed.[1] For the reasons identified below, the Respondent's "citation" should be stricken from the record, or the Board should grant the Counsel for the Acting General Counsel and the Charging Party leave to respond to Respondent's legal argument.

The Board's rules regarding exceptions and briefing are clearly spelled out at Section 102.46 of the Board's Rules and Regulations. Under Rule 102.46(a), a party has "28 days, or within such further period as the Board may allow, from the date of the service of the order transferring the case to the Board" in which to file exceptions and a brief in support of those exceptions. The opposing party then has the opportunity to file an answering brief (Sec. 102.46(d)(1)), and, within 14 days from the last date on which such a brief could be filed, the party who filed exceptions may file a reply brief, limited to replying to matters raised in the answering brief (Sec. 102.46(h)). That familiar "brief-answer-reply" three-step is the extent of briefing permitted under the Board's rules, without the Board's permission. As the Board's rules clearly state, "[n]o further briefs shall be filed except by special leave of the Board." Id.

Respondent violated Section 102.46(h) by filing its "Citation to Supplemental Authority." Respondent never even attempted to obtain leave from the Board prior to filing its "citation." On that basis alone, the Board should strike Respondent's "Citation to Supplemental Authority."

[1] As Respondent accurately notes, briefing in this case closed on April 12, more than four months before Respondent's Citation to Supplemental Authority (and nearly three months since the Board issued such authority). The administrative trial in the above-captioned matter was held before Administrative Law Judge Joel P. Biblowitz on November 17-22, 2010. On February 15, 2011, Administrative Law Judge Biblowitz published his decision, in which he found all unfair labor practices as alleged in the Complaint. On March 14-15, Respondent filed with the Board two motions, its exceptions, and a brief in support of its exceptions. The Charging Party filed its opposition to Respondent's two motions on March 21, and the Counsel for the General Counsel filed its oppositions on March 23-24. Both the Charging Party and the Counsel for the Acting General Counsel filed briefs in support of Judge Biblowitz's decision on March 29. Respondent replied to the oppositions to its motions on April 6, and to the briefs in support of Judge Biblowitz's decision on April 12.

Transit Management of Southeast Louisiana, Inc., 331 NLRB 248, n. 1 (2000). The rationale behind such a rule is obvious: it promotes administrative finality. As an administrative agency tasked with the exclusive role of administering and enforcing the National Labor Relations Act, the Board is constantly issuing cases, including cases which may be relevant to the issues presented to the Board in other cases that are then pending before the Board. The question is not of relevance, but of administrative efficiency. Should the Board permit Respondent's "Citation to Supplemental Authority," it would encourage parties to litigation before the Board to be constantly scouring the Board's decisions for newly-issued cases that are analogous or in contrast with the pending case. Such an approach would produce a stream of briefing to the Board that would only end with the Board's issuance of a decision. Accordingly, the Counsel for the Acting General Counsel moves to strike Respondent's "Citation to Supplemental Authority."

In the event that the Board allows Respondent's "Citation to Supplemental Authority" over the Counsel for the Acting General Counsel's objection, the Counsel for the Acting General Counsel alternatively seeks leave from the Board, under Sec. 102.46(h), to respond to what is additional briefing and argument from Respondent. Regardless of whether the Board allows Respondent's "Citation to Supplemental Authority" or not, Respondent has gotten an opportunity it should not have had under the Board's rules: the chance to further bolster its argument to the Board.

The case Respondent points to, California Pacific Medical Center, 356 NLRB No. 159 (2011), is a case, like the instant case, that involves an alleged premature impasse and unilateral implementation. Furthermore, the relevant bargaining in California Pacific Medical Center involved employees' wages and healthcare costs, just as the instant case featured hard bargaining over employees' wages and healthcare costs. In California Pacific Medical Center, the parties began bargaining for a successor collective-bargaining agreement in April 2007. After 15 bargaining sessions, the employer implemented portions of its then-last, best and final offer on October 24, 2007. Id. at 2. Although the parties bargained on occasion in 2008, the parties did not bargain at all

between July 31, 2008 and May 29, 2009, when the employer requested to resume bargaining, largely spurred by a desire to enact cost-savings measures for employees' wages and healthcare. Id. at 2. The parties met for bargaining five times between July 8, 2009 and October 1, 2009, where the employer presented its last, best, and final offer. Id. at 3. In this timeframe, the union did not present a wage proposal; regarding employees' healthcare, the union agreed in principle on the employer's proposed provider, but otherwise refused to modify the health benefits that had been in effect in 2006. Id. at 3. The employer clearly rejected the union's counterproposal at the next bargaining session, on September 15. Id. at 3. On October 1, 2009, the employer presented its last, best, and final offer, and it confirmed as much in an October 8 letter to the union. The following day, the union replied, disputing that there was an impasse, indicating that it was willing to continue bargaining, but not giving any indication of movement on its part; rather, the union acknowledged there was no value in meeting at the parties' next scheduled bargaining session. Id. at 3-4. The parties met again, on October 26, 2009, but, despite its statements about flexibility, the union proposed a significant wage increase and a regressive proposal regarding employees' healthcare. Id. at 4-5. The following day, the employer wrote a letter to the union, declaring that the parties were at impasse and that the employer would implement portions of its October 1 offer. Id. at 4. While the parties subsequently met, neither party made any bargaining proposals. Id. at 4-5.

The Board adopted the Administrative Law Judge's finding that the parties were at impasse by the end of their October 26 bargaining session. In doing so, the Board adopted the finding that, under the record evidence, it was "abundantly clear…that as of the end of the October 26 negotiating session the parties believed further bargaining would be futile regarding the two issues of overriding significance, namely, healthcare and wages." Id. at 6. Furthermore, the Board rejected the argument that there was no impasse because of the union's asserted flexibility, because "the union's purported continued flexibility was dependent upon a condition precedent, namely a demonstration of flexibility" by the employer. Id. at 7. Significantly, both parties recognized the firmness of each

other's respective positions, and, when given the opportunity, neither modified their proposals. Id. at 1, n. 1, and 7.

Contrary to Respondent's "citation to supplemental authority," California Pacific Medical Center does not present a parallel factual situation justifying that the Board reverse Judge Biblowitz's decision. Instead, California Pacific Medical Center presents a distinguishable fact pattern that supports the notion that each bargaining-impasse case is unique and can only be judged under its own specific facts. Respondent, for its part, largely ignores the specific facts of the above-captioned case in its effort to analogize to California Pacific Medical Center. Choosing to key its argument to one specific letter taken out of context, Respondent conveniently ignores that its unilateral declaration of impasse was made by letter, mere hours after it chose to sneak away from the bargaining table where the Charging Party sat, under the impression that Respondent was evaluating the Charging Party's most recent revised bargaining proposal. Rather than address the entirety of the parties' bargaining to determine if the parties both were at the end of their respective "ropes,"[2] Respondent instead chooses to parse out language from the Charging Party's response to Respondent's unilateral declaration of impasse, in a strained effort to analogize to California Pacific Medical Center. In the Charging Party's letter, its chief negotiator referenced his proposal from earlier that same day and indicated that the Charging Party was flexible, as there were "numerous issues that allowed for movement by the Union." (GC 39). Contrary to Respondent's argument in its "citation to supplemental authority," the Charging Party did not indicate its own inflexibility, but rather highlights that it was the Charging Party itself which modified its position on that date, and Respondent which aborted the parties' bargaining. Additionally, Respondent also ignores other record evidence indicating that the Charging Party's position was *not* like the union's inflexible position in California Pacific Medical Center. For one, the Charging Party obviously did not believe

[2] Significantly, Respondent bears the burden of establishing that the parties were at impasse. North Star Steel Co., 305 NLRB 45 (1991), *enf'd* 974 F.2d 68 (8th Cir. 1992).

the parties were at impasse. Furthermore, the Charging Party was prepared to modify its proposals, if Respondent had not aborted the parties' negotiations and unilaterally declared impasse. In contrast with California Pacific Medical Center, where the union did *not* modify its bargaining proposal after the employer declared impasse, the Charging Party presented Respondent with a modified bargaining proposal when the parties next met after Respondent's unilateral declaration of impasse and implementation of new terms and conditions of employment. Thus, the facts of the above-captioned case do not present an analogous situation to California Pacific Medical Center, but rather present a distinguishable set of circumstances—where Respondent failed to meet its burden of establishing that both parties were at impasse and that further discussions would have been fruitless.

CONCLUSION

For the foregoing reasons, the Counsel for the Acting General requests that the Board strike Respondent's "citation to supplemental authority," or, in the alternative, grant leave to the Counsel for the Acting General Counsel to respond to Respondent's additional argument.

Dated at Baltimore, Maryland, this 25th day of August 2011.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed this Counsel for the Acting General Counsel's Motion to Strike Respondent's Citation to Supplemental Authority and/or Motion for Leave to Respond on August 25, 2011, and, on that same day, copies were electronically served on the following individuals by electronic mail:

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