UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
WASHINGTON, D.C.

REPUBLIC SERVICES, INC.

Respondent,

and

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

Charging Party

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

RESPONDENT'S CROSS-EXCEPTIONS TO ADMINISTRATIVE LAW JUDGE'S DECISION WITH SUPPORTING BRIEF

Respondent, Republic Services, Inc. ("Republic" or "Respondent"), pursuant to Section 102.46 of the Board's Rules and Regulations, respectfully submits the following Cross-Exceptions to Administrative Law Judge Arthur Amchan's Decision with supporting brief.[1]

1. Exception is taken to the ALJ's finding that Respondent's November 11, 2010 notice of withdrawal of recognition violates Section 8(a)(5) and (1) and that "all that Respondent was entitled to do on November 11, 2010 was to inform the Union that it would not negotiate a successor agreement and announce that it would not recognize the Union after its contract with the Union expired on December 31, 2010." (ALJD p. 9, lines 4-9).

2. Exception is taken to the ALJ's finding that on November 12, 2010, Respondent "engaged in direct dealing with its represented employees by offering them benefits to which they were entitled as unrepresented employees." (ALJD p. 9, lines 11-12; see also ALJD p. 12-13).

[1] The following abbreviations are sometimes used herein: Administrative Law Judge – ALJ; Administrative Law Judge's Decision – ALJD. The Charging Party is sometimes referred to as "Local 150" or "Union."

3. Exception is taken to the ALJ's finding that Respondent violated the Act by "unilaterally providing medical, dental and vision insurance benefits to Carlin (sic) Condon almost immediately after the November 12 meeting . . ." (ALJD p. 9, lines 13-14).

4. Exception is taken to the ALJ's finding that Respondent "temporarily violated the Act in failing to deduct union dues for the pay periods November 14-27." (ALJD p. 9, fn 9).

5. Exception is taken to the ALJ's finding that Respondent violated Section 8(a)(5) and employees' Section 7 rights by requiring that union agents have a management escort at the landfill on December 16, by engaging in surveillance of union and employee activity during that visit, and by interrogating employees during that visit. (ALJD p. 9, lines 17-25; p. 12). Exception is also taken to the ALJ's conclusion that Respondent denied the Union access to the workplace on December 13, 2010. (ALJD p. 12 – Conclusion of Law No. 2).

6. Exception is taken to the ALJ's finding that one of the discharge arbitrations took place in May 2010 and the others were scheduled for June 2010. ALJD p. 3. This is inaccurate. Two of the arbitrations took place in May 2011 and one in June 2011. TR 12.

7. Exception is taken to the ALJ's finding that "there is simply no alternative explanation for Respondent providing its benefits to Condon during the life of the contract in the absence of any evidence that the Union threatened to cut off benefits during this period." ALJD p. 4, n. 3. As set forth in this Brief, Condon's uncontradicted testimony was that she was fearful of losing coverage under the union plan after signing the disaffection petition. TR 118, 100.

8. Exception is taken to the ALJ's finding that on November 12 Respondent did not realize that it was obligated to recognize the Union until the collective bargaining agreement expired. ALJD p. 5, n. 6.

9. Exception is taken to the ALJ's characterization of Rodney Atkinson's testimony as further evidence that as of November 12th, the management representatives present at the meeting with the employees were not aware of their continuing obligations under the collective bargaining agreement. ALJD p. 5.

10. Exception is taken to the ALJ's characterization of the record evidence when he states that Respondent sent Union employees plan enrollment documents indicating that they were eligible to participate in the plans as of November 12, 2010. ALJD pp. 4-5, n. 3.

BRIEF IN SUPPORT OF EXCEPTIONS

I. STATEMENT OF THE CASE

In this case, Respondent was provided objective evidence of an actual loss of majority status shortly before the expiration of Respondent's collective bargaining agreement with the Charging Union. Respondent withdrew recognition under the anticipatory withdrawal of recognition doctrine, and continued to abide by the CBA until its expiration. After withdrawal, Respondent advised its employees, who would be non-union in a matter of weeks, of the company benefits that would be available after expiration of the CBA to ensure that they had sufficient time to enroll in the various benefits plans. The ALJ found that Respondent's withdrawal of recognition was unlawful and did not fit within the anticipatory withdrawal doctrine. The ALJ also found that Respondent violated the Act by: a) "direct dealing" with employees by discussing the benefits they were entitled to after the CBA expired; b) "temporarily" failing to deduct Union dues; c) and requiring union agents to be escorted by management during a worksite visit after the anticipatory withdrawal of recognition, and engaging in surveillance and interrogation of employees during that visit.

Despite finding the withdrawal of recognition during the term of a CBA as unlawful, the

ALJ followed controlling Board precedent and denied the AGC's request for a bargaining order. The ALJ correctly held that, because the Union undisputedly did not have majority support after the CBA expired, Respondent could not be ordered to recognize and bargain with the Union and that the implementation of changes to terms and conditions of employment after the contract expired were not unlawful.

II. STATEMENT OF FACTS

A. The Nature of Republic's Business and Its Prior Relationship With Charging Party Local 150.

Republic Services, Inc. is in the business of waste collection, disposal and recycling. TR 17-18[2]. In early January 2009, Republic and Allied Waste merged, and as a result of the merger Republic acquired and began operating County Line landfill in Argos, Indiana ("County Line"). TR 18. Republic has approximately 35,000 employees nationwide, and approximately 10,000 in the Midwest region. In the Midwest region alone, Republic has 51 collective bargaining agreements with various labor organizations. TR 62.

At the time of the Republic/Allied merger, there were approximately seven hourly employees at County Line. The operators employed at the time were Shannon Pugh, Travis Pugh, Mike Fairchild, Carleen Condon, Bob Styles, and Dennis Jaeger. One mechanic employed at the time was Jason Wiegand. These hourly employees were represented by Charging Party, Local 150. TR 19. The general duties of operators were to handle the waste as it comes into the landfill, deal with compacting duties, and operate the equipment. The mechanic's duties included maintenance of heavy equipment, such as the compactor and bulldozer. TR 19.

Republic and Local 150 were parties to a collective bargaining agreement with a term of

[2] References to the official transcript are designated as "TR" followed by appropriate page numbers. References to the hearing exhibits are "JT" for Joint Exhibits; "AGC" for Acting General Counsel Exhibits; "CP" for Charging Party (Local 150); and "ER" for Employer (Respondent) Exhibits

January 1, 2008 to December 31, 2010. JT 1. The bargaining relationship covering this bargaining unit existed for more than 10 years. TR 16. Moreover, Republic and Local 150 have had and continue to have longstanding bargaining relationships covering eight other bargaining units in the Midwest region. TR 64.

Holly Georgell is Republic's Midwest Region Labor Relations Director. The Midwest region covers the County Line landfill. Her duties include providing advice in all labor relations matters to any supervisor or member of management for the Midwest region, training employees, handling grievance arbitrations, addressing any particular union-based activity such as organizing campaigns, and handling day-to-day labor relations matters for the company. She is also the chief negotiator of over 51 Republic labor agreements. TR 17.

Rodney Adkinson is the company's area human resources manager for Northern Indiana, an area covering County Line landfill. TR 22. He has held the position since August 9, 2010. TR 91. His duties are those of an HR generalist and include handling employee relations throughout the Northern Indiana area, which would be from Crown Point in northwestern Indiana to northeastern Indiana. *Id*. Adkinson has not worked in a union environment before, and unlike Georgell, he is not responsible for union-management relations, such as bargaining. TR 94, 106.

Mike Beckley is the company's operations manager at County Line, starting in August 2010. TR 21. Bob Walls is the company's general manager overseeing County Line landfill. TR 21.

B. Republic Attempted To Initiate Bargaining For A Successor Contract With Local 150 From August to October 2010.

On about August 23, 2010, Georgell met with Local 150 agent James Gardner concerning a grievance. At that meeting, she advised Gardner that she was the company's chief labor negotiator and that she was interested in bargaining as soon as possible for a successor to the

CBA set to expire on December 31. Georgell told Gardner that healthcare contributions, because of the increasing costs, were going to be a big concern. She and Gardner traded business cards, and she asked Gardner to please let her know as soon as possible when he wanted to bargain. TR 25-26.

Georgell did not hear back from Gardner personally. On about October 5, however, the executive director of Local 150 sent a letter to Republic requesting bargaining dates. Georgell responded in writing, advising Local 150 that the company would like to begin bargaining, is ready to start negotiations, and asking for bargaining dates in November. TR 26-27. Local 150 did not respond to her letter. *Id*.

C. Local 150 Undisputedly Lost Its Majority Support On November 10, 2010.

Effective November 9, unit members Michael Fairchild, Travis Pugh, and Jason Wiegand were terminated for time card fraud. TR 27, 95. Local 150 grieved the terminations, and those grievances are pending in the arbitration process. TR 28. The Acting General Counsel did not allege that the terminations violate the Act or in any way taint employee disaffection with Local 150, which the ALJ acknowledged. ALJD p. 9.

On November 9, Local 150 member Dennis Jaeger was recalled from a voluntary layoff. TR 344. There is no dispute that Jaeger was next in line for recall. Thus, on November 9, the bargaining unit consisted of the following employees: Shannon Pugh, Carleen Condon, Robert Styles, Jr., and Dennis Jaeger. TR 19, 344.

On about November 9, Condon informed Operations Manager Mike Beckley that she and some other employees did not want to be represented by Local 150. TR 170. By a handwritten letter dated November 10, Condon, Jaeger and Styles (75 percent of the unit) notified Republic that they "did not wish to be represented by Local 150 Operating Engineers." CP 4.

Importantly, the Acting General Counsel did not allege or produce evidence that the employees' disaffection petition was coerced or tainted in any way. TR 57; ALJD p. 9. The Acting General Counsel confirmed several times in the trial the critical fact that it has not alleged that Republic violated § 8(a)(3), or that the voluntary and uncoerced expression of the employees to not be represented by Local 150 was in any way tainted by actions of the company. TR 185-6 ("Judge Amchan: So [taint is] not part of the case at all? Mr. Williams: . . . as far as the taint – there is no taint"; "Mr Williams: . . . there's no evidence of taint –").

The ALJ correctly noted at the trial: "three of the four remaining employees had – as a matter of free choice – expressed the desire not to be represented by Local 150 anymore." TR 186.

Based on this objective evidence of Local 150's loss of majority support, and pursuant to established NLRB law allowing an employer in these circumstances to withdraw recognition anticipatorily prior to the end of an expiring CBA, Republic notified the union on November 11 that it was withdrawing recognition. TR 33; AGC 8. Republic advised employees that the withdrawal would take effect after the existing collective bargaining agreement expired. TR 239. In this regard, Carleen Condon testified that management representatives Georgell and Adkinson advised her that "they would [withdraw recognition] after the Contract was up." *Id*.

D. Republic Continued To Administer And Abide by The Parties' CBA Until Its Expiration.

Notwithstanding the actual loss of Local 150's majority status and Republic's subsequent anticipatory withdrawal, Republic continued to administer the expiring Local 150 CBA through its termination on December 31. TR 65. On November 12, Georgell and Adkinson met with the four unit employees and, contrary to the ALJ's erroneous factual finding, informed them unequivocally that the withdrawal of recognition would not affect Republic's continued

performance under the existing CBA. Georgell testified that the employees were informed that Republic "would continue to operate the business, and we still had to honor the labor contract. We talked about some benefits that would be available to the employees, the healthcare. We talked about the 401(k). We talked about the fact that we would continue to pay the benefits related to healthcare and pension, the dues all of the way to the end of the contract. We talked about honoring the grievance procedure." TR 46.

The AGC does not dispute that Republic maintained the same contractual wages, benefits and terms of employment required by the CBA. The AGC factually cannot dispute that Republic continued abiding by the grievance procedure in the CBA. The AGC also can not dispute that Republic collected all dues and paid them to Local 150, and paid all fund contributions, until the expiration of the CBA. While Respondent mistakenly failed to deduct union dues from employee paychecks for one week, the AGC did not contradict abundant evidence which ALJ Amchan failed to acknowledge. TR 46, 110, 239. In fact, since the company payment of dues occurred on a monthly basis by agreement of the company and the Union in the month following collection of the dues, the Union received the full dues payments for November and December 2010, demonstrating that this was a clerical error that was promptly corrected. TR 43; ER 3.

Administrative Law Judge Arthur Amchan presided over a three-day trial in Rochester, Indiana, on May 9-11, 2011. The ALJ issued his Decision on June 21, 2011.

III. ARGUMENT

A. The ALJ Incorrectly Ruled That Respondent Unlawfully Withdrew Recognition (Exception 1).

The ALJ held that Respondent's November 11, 2010 letter withdrawing recognition during the term of the parties' CBA violated the Act because it went "beyond" what he viewed as legally permissible. The ALJ ruled that the only notice Respondent was allowed to give at that

time was one informing the Union it would not negotiate a successor agreement and announcing it would not recognize the Union after the CBA expired. ALJD p. 9. The case law permitting anticipatory withdrawal, however, does not require any particular language to be used by an employer. Respondent's notice was lawful in and of itself, and its continued compliance with the CBA until its expiration is further evidence of Respondent's lawful anticipatory withdrawal of recognition.

When an employer is presented with objective evidence of an actual loss of majority status shortly before the expiration of an existing CBA, well-established Board law authorizes the employer to withdraw recognition anticipatorily and inform the union that it will not negotiate a successor agreement. *See Abbey Medical*, 264 NLRB 969 (1982), *enfd*. 709 F.2d 1514 (9th Cir. 1983); *Burger Pits*, 273 NLRB 1001 (1984), *enfd. sub nom. HERE v. NLRB*, 785 F.2d 796 (9th Cir. 1986).

Here, there is no dispute that on November 9 and thereafter Republic was presented with an untainted and freely expressed rejection of Local 150 by a majority of the unit employees actually employed by County Line.[3] The ALJ correctly held that there is no allegation or evidence that employee disaffection with the Union was tainted at any time – before or after November 10. ALJD p. 9.

Based on Local 150's loss of majority support, Republic was allowed to anticipatorily withdraw recognition from the union prior to the expiration of the existing CBA. As the Board noted in *Abbey Medical*, in some instances prior to expiration of an existing CBA, "the employer will – without challenging the right of the union to administer the present contract until its

[3] Exception is also taken to the ALJ's unwarranted conclusion that "should the arbitrator reinstate the 3 terminated employees, the General Counsel may wish to petition the Board to reopen the record in this matter." ALJD p. 12.

expiration – question the right of the union to negotiate a successor contract and will withdraw recognition of the union as to items other than the present contract." *Id*. at 969 (emphasis added).

Republic's withdrawal of recognition, and continued compliance with the existing CBA, fall squarely within the boundaries of the permissible conduct identified in *Abbey Medical*. The undisputed testimony of employee Carleen Condon establishes that Republic informed employees that the withdrawal of recognition would take effect after the existing collective bargaining agreement expired. TR 239.

The ALJ held that "all Respondent was entitled to do" with respect to its withdrawal of recognition "was to inform the Union that it would not negotiate a successor agreement and announce that it would not recognize the Union after its contract with the Union expired on December 31, 2010." ALJD p. 9. However, there is no Board case known to Republic that requires any particular "magic words" to accompany an anticipatory withdrawal of recognition. In fact, in *Abbey Medical*, the employer did not use the word "anticipatory" or limit its withdrawal of recognition notice to an announcement that it would not recognize the union after expiration of the CBA. Rather, in *Abbey Medical*, the employer simply informed the union that it was withdrawing recognition, just as Respondent did in this case. 264 NLRB at 972-973. *Two weeks later*, the employer in *Abbey Medical* informed the union that it intended to comply with the existing contract until its expiration. *Id*.

In this case, there is no basis to believe that the Charging Union did not understand the anticipatory nature of the withdrawal. Moreover, Respondent established at the hearing that, notwithstanding its November 11, 2010 notice to Local 150, it continued providing employees all wages and benefits under the existing CBA, continued deducting dues (except for one week where it erroneously did not do so, but then promptly remedied the error), paid all required

welfare and pension fund contributions, continued to process grievances under the existing grievance and arbitration procedure and continued paying into the union pension and welfare benefit funds until the contract expired on December 31, 2010.

Accordingly, the ALJ erred in concluding that Respondent's notice of withdrawal of recognition "goes beyond what it was legally entitled to do." ALJD, p. 9. While the case law in this area is scant, the anticipatory withdrawal doctrine should not be construed to find that Respondent used the wrong words, or failed to use the right words, in its withdrawal. Doing so elevates form over substance, and would create unfair traps contrary to the controlling Board precedent for employers who otherwise are legally entitled to notify the union of an anticipatory, pre-expiration withdrawal.

B. The ALJ Incorrectly Ruled That Respondent, After Its Anticipatory Withdrawal of Recognition, Engaged In Unlawful Direct Dealing And Unlawfully Allowed An Employee To Enroll Early For Medical Benefits (Exceptions 2 and 3).

The ALJ held that Respondent's November 12 meeting with employees constituted direct dealing, and that Respondent further violated the Act by allowing Carleen Condon to enroll early in the company health benefit program. ALJD p. 9.

First, it is undisputed that Respondent paid the union health and welfare funds the full amount owed on behalf of the employees working at the County Line landfill in November and December 2010. ER 2. Condon, an employee who no longer wished to be represented by the union, expressed concerns that the union would retaliate against her with respect to her health benefits and at her request, the company also allowed her to enroll in the company's health plan in November 2010. The remaining employees who had taken the no union position, Dennis Jaeger and Robert Styles, did not request to be put into the company health plan until well into the second quarter of 2011, after the collective bargaining agreement had expired.

Second, despite the ALJ's characterization of Respondent's conduct as direct dealing, Respondent's managers did nothing more than advise employees *after they signed the disaffection petition* what benefits might be available to them after the contract expired, or immediately if they lost coverage under the union health and welfare benefit plans. TR 32-33, 117-119. For example, Rodney Adkinson testified credibly about what Republic told employees, at the November 12 meeting:

> "that some of [their benefits] -- I think like personal days and things like that would be some things that would be available the first of the year.
> Q. What was it about personal days?
> A. Well, because of this -- the course of the way things were supposed to transpire is that on January 1, when we were no longer, you know, following the contract as it was, so at that point in time, they would become non-union employees, and they would be eligible for the benefits that all of the non-union facilities had."

TR 110.

Adkinson testified that, *after* receiving evidence of the Union's loss of majority support, the employees were provided information and eligibility packets, because the employees were "very concerned that they were going to lose their health benefit coverage with the Union." TR 117. He explained that Republic tried to address employee concerns about potential gaps in coverage between bargained and non-bargained benefits. He testified that "the one thing that we tried to assure them was that – you know, that we didn't want them to have a lapse of benefits in any way . . ." TR 100.

At the November 12 meeting, he and other managers advised employees that "the course of the way things were supposed to transpire is that on January 1, when we were no longer, you know, following the contract as it was, so at that point in time, they would become non-union employees, and they would be eligible for the benefits that all of the non-union facilities had." TR 110. Adkinson told the employees at that meeting that they would be eligible for 401(k) and

company health benefits "as of January the 1st." TR 114-115. Condon signed up for Republic's health plan prior to the expiration of the CBA because she was particularly fearful of losing coverage under the union plan. TR 118, 100. However, Republic paid all union benefit contributions for Condon until the contract expired. TR 118. Similarly, Dennis Jaeger told Adkinson that he was very worried about losing his union pension, and had relayed to Adkinson a story of a friend who had been "duped" out of his pension. TR 102-103. As a result of Jaeger's pension concerns, he, Condon and Styles sent letters to the Union stating that they no longer wanted union representation and that they wanted to freeze their pensions. AGC 9-11. Regardless of the employees' own communications with the Union about pension benefits, it is undisputed that Republic advised them on November 12 that their eligibility to participate in the Republic 401(k) plan would begin on January 1, 2011, after the CBA expired. TR 114-115.[4]

Some of Republic's documents may not be as clear as the company would have liked them to be and perhaps do not comprehensively convey what unit employees were explicitly and undisputedly told about January 1, 2011 being the effective date for welfare and retirement benefit commencement. This impreciseness is clearly not proof of unlawful unilateral changes. Adkinson had only been with the company for three months when the Union lost majority status, and he had never before worked in a unionized company. A telling email exchange between Adkinson and Ann Hodnefield, a Republic benefits administrator, demonstrates the confusion surrounding this unusual pre-expiration withdrawal circumstance.[5] CP 1. In the email exchange, Adkinson and Hodnefield discussed getting benefit packets issued to County Line unit

[4] Adkinson credibly explained that Republic uses an outside company to process benefit eligibility and provide employees with information; Adkinson passed on information to the corporate benefit department, and then that department passed along the information to the outside company. TR 115, 141-142. Adkinson, in November, began the process of setting up welfare and retirement benefits for unit employees to be effective January 1, 2011 because they asked for the information and to hedge against any unexpected, sudden loss of union benefits as the employees feared. TR 116-117.

[5] Adkinson testified that he had not dealt with anything remotely like this situation in his entire career. TR 158.

employees. Hodnefield asked what the effective date of the "decert" is, and Adkinson replied "this morning." *Id*. Adkinson testified that he does not know whether what occurred at County Line was a decertification, or what the technical term is, and that he relied upon Georgell for such issues. TR 159. It is no surprise, then, that some HR-generated documents such as AGC Exhibit 35 (Shannon Pugh's Welfare Plan Confirmation Of Enrollment) reflect an effective date prior to December 31, 2010. While this confusion is unfortunate, it can hardly be characterized, as an unlawful unilaterally implemented change in employees' terms and conditions of employment.

The ALJ erred in concluding that Respondent's informational meetings, held only after its anticipatory withdrawal, constituted direct dealing. There is no Board law that prohibits the provision of such information following an anticipatory withdrawal of recognition, and there is no basis to characterize such actions as direct dealing.

C. The ALJ Incorrectly Ruled that Respondent "Temporarily Violated the Act" By Failing To Deduct Union Dues For A Brief Period Following Its Anticipatory Withdrawal (Exception 4).

The ALJ held that Respondent "temporarily violated the Act in failing to deduct union dues for the pay periods November 14-27." ALJD p. 9, fn 9. He acknowledged that Respondent "quickly rectified" the failure to deduct dues, but that doing so did not cure the violation. *Id*.

Consistent with the requirements of the anticipatory withdrawal of recognition doctrine, Republic continued to administer the expiring collective bargaining agreement's contractual provisions through the end of the contract term. For example, Republic deducted and paid to Local 150 all required dues until the contract expired. Nonetheless, the ALJ found a "temporary" violation because of a trivial mistake by Respondent that resulted, for one week only, in dues inadvertently not being deducted from County Line employees' paychecks. However, as the ALJ

acknowledged, Respondent immediately rectified the error and deducted the missed week's dues from the employees' paychecks over the following two weeks. Republic entered into the record documents (ER 2) which clearly showed dues deductions through the end of the contract period and unequivocally demonstrate that the union received all the dues it was entitled to under the contract.

The ALJ cited *Passavant Memorial Area Hospital*, 237 NLRB 138 (1978), which held that a violation can be cured if the charged party's repudiation of the violation was timely, unambiguous, specific to the coercive conduct, and free from other prescribed illegal conduct. For reasons that were not explained by the ALJ, he found that Respondent did not cure the temporary violation under the *Passavant* test. However, the undisputed evidence clearly establishes that Respondent met every part of the *Passavant* test. As soon as it realized its mistake, Respondent completely rectified the problem and made the Union whole. Its actions were timely, unambiguous, specific to the violation, and were lawfully taken to properly deduct the dues from employees' paychecks. The ALJ's failure to explain why he concluded that this "temporary violation" was not cured speaks for itself, and this trivial mistake should not be considered a violation of Section 8(a)(5) of the Act.

D. The ALJ Incorrectly Ruled That Respondent Violated The Act By Protecting The Interests Of Employees Who Did Not Want To Meet With The Union (Exception 5).

The ALJ held that Respondent violated the Act by having management representatives present during a union site visit on December 16, by allegedly engaging in surveillance of union and employee activity during that visit, and by interrogating employees during that visit. ALJD p. 9.

The ALJ stated that Respondent's actions during the December 16 site visit "prevent[ed] these employees from contact with union business representative Gardner out of view of management" and thus constituted interference with the employees' free choice regarding their Section 7 rights. ALJD p. 10. This remark misstates what actually occurred on December 16, and ignores the fact that the Union could have spoken to employees at any time outside of business hours. There was no evidence offered by the Union that it had limited access to employees or that its only avenue for trying to change employees' minds about their disaffection petition was a visit to the workplace.

Of course, it's not surprising that the Union decided to finally visit their members after a majority of them notified the union they no longer wanted the union's services[6]. Condon testified that in 16 years no Union agent visited her workplace to ask her about any concerns or problems she might be having at work. TR 251. When Condon did tell Local 150 of problems in the past, "they just brushed me off." **Most importantly, the County Line employees did not want Union agents visiting them, and so informed Republic**. TR 251-252. Dennis Jaeger attempted to testify with respect to the harm which would be caused to him if an affirmative bargaining order were granted, but both the AGC and the Union vigorously objected. Thus, counsel for Republic made an offer of proof. TR. 344-347. Jaeger had good reason to fear reprisal from the union since union Business Agent, James Gardner, tried to block his return to employment even though he was a union member and at the top of the seniority list when Republic wanted to recall him from layoff on November 9, 2010. TR 160-161.

[6] Section 6:02 of the CBA addresses Union access. In response to questions posed to him during cross-examination, Business Agent Gardner admitted that he was aware of the access requirements set forth in the CBA and that he did not follow those procedures when he came to the County Line landfill in November and December 2010. TR 265-268.

Therefore, Respondent took extra steps to ensure that the employees were not harassed during working time and on company property. Republic told Gardner that the employees did want to speak to him. TR 267. The ALJ simply fails to acknowledge that Respondent was acting upon the request of its employees, who had rejected the union unequivocally.

The ALJ held that Respondent denied the Union access on December 13. However, Holly Georgell testified that access was *delayed*, not denied, only for that day because of a severe storm that hit northwest Indiana and shut down most of Republic's sites. TR 58. She advised the union in a letter on December 12 that "for safety reasons and due to weather, because we weren't sure how the situation was going to get better, that we were denying access, but then I remember in the e-mail that I wrote to Gardner, that said that we would like to give him access at any other date that week, but that day, due to the weather, it was kind of a developing situation." TR 58. This was a legitimate basis to postpone the union's visit to the site.

IV. CONCLUSION

For the reasons set forth above, including controlling Board precedent and the record evidence taken as a whole, the Board should grant Respondent's Cross-Exceptions and issue an appropriate order.

Respectfully submitted,

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Dated: September 7, 2011

Statement of Service

I certify that on September 7, 2011, I caused the Respondent's Cross-Exceptions To Administrative Law Judge's Decision With Supporting Brief to be served on the following persons via electronic filing:

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Additionally, I certify that on September 7, 2011, I caused the Respondent's Cross-Exceptions To Administrative Law Judge's Decision With Supporting Brief to be served on the following persons via email:

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