

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 REPLY BRIEF TO RESPONDENT'S COMBINED
ANSWERING BRIEF TO ACTING GENERAL COUNSEL'S AND UNION'S EXCEPTIONS
TO THE ADMINISTRATIVE LAW JUDGE'S DECISION

Respectfully submitted,

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Comes now Counsel for the Acting General Counsel and respectfully submits to the Board this Reply Brief to the Combined Answering Brief To Acting General Counsel's and Union's Exceptions to the Administrative Law Judge's Decision filed by Republic Services, Inc., hereinafter referred to as the Respondent. In support of this position, Counsel for the Acting General Counsel offers the following:

I. STATEMENT OF THE CASE

On May 11, 2011 and consecutive days thereafter, an administrative hearing was held before Administrative Law Judge Arthur Amchan regarding the instant cases. On June 15, 2011, the parties filed post-hearing briefs. On June 21, 2011, the Judge issued his decision finding merit to most, but not all, of the allegations in the Consolidated Complaint in the instant cases including the allegation that the Respondent unlawfully withdrew recognition from the Union in violation of Section 8(a)(1) and (5) of the National Labor Relations Act, hereinafter referred to

as the Act. However, the Judge failed to recommend the issuance of a bargaining order. On July 19, 2011, Counsel for the Acting General Counsel filed exceptions to the Judge's decision. On September 7, 2011, the Respondent filed its Cross-Exceptions To the Judge's Decision With Supporting Brief and Combined Answering Brief To Acting General Counsel's and Charging Union's Exceptions to the Judge's Decision.

II. ARGUMENT

A. The Respondent's Argument That It Is Prohibited By Board Law To Negotiate A New Collective-Bargaining Agreement With The Union Is Without Merit.

In its Answering Brief, the Respondent argues that it is prohibited from negotiating a new contract pursuant to the Board's holding in Dura Art Stone, 346 NLRB 149 (2005). The Respondent asserts that, in Dura Art Stone, the employer was presented with a petition from a majority of unit employees stating that they no longer wished to be represented by the union shortly before the expiration of the collective-bargaining agreement. The employer did not withdraw recognition, but instead negotiated with the union for a new contract. The Board held that the employer violated the Act by continuing negotiations and executing a collective-bargaining agreement when they had knowledge of the employee disaffection petition establishing the Union loss of majority status.

Despite the Respondent's assertions, the facts in the Dura Art Stone are distinguishable from the facts in the instant cases. In Dura Art Stone, the employer was presented with a petition from a majority of unit employees stating that they no longer wished to be represented by the union shortly before the expiration of the collective-bargaining agreement. The employer did not withdraw recognition, but instead negotiated with the union for a new contract.

In the instant cases, three of the Respondent's four remaining employees notified the Respondent on November 10 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 Holly 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). See Auciello Iron Works, 517 U.S. 781, 785 (1996) (an employer may not lawfully withdraw recognition while a collective-bargaining agreement is in effect). Following its unlawful withdrawal of recognition, the Respondent immediately repudiated the parties' collective-bargaining agreement by making changes to employees' health insurance, 401(k) plan, Union's access to employees at Respondent's facility, the deduction of Union dues from employees' paychecks, and the use of the Union's hiring hall (TR 117-119, 199-210, 216-221, 222-234, 306-307, 332; GC Ex 14; GC Ex 15; GC Ex 26; GC Ex 30; GC Ex 31; GC Ex 32; GC Ex 33; GC Ex 36(a)-36(f); Resp. Ex 3(a)-3(d)). Respondent then later made changes to its method of calculating employees' accrued vacation time and to employees' wage rates (TR 61, 125-130, 257-258, 307-309, 310-311; GC Ex 20; GC Ex 21). All of these changes were made without notice to the Union and without affording the Union an opportunity to bargain over the changes. Thus, unlike the employer in the Dura Art Stone, the Respondent unlawfully withdrew recognition from the Union prior to the expiration of the parties' collective-bargaining agreement and subsequently engaged in several unlawful unilateral changes to employees' terms and conditions of employment.

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.), 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.¹ 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 assess for themselves the union's effectiveness as a bargaining representative."²

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. Also, 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.

¹ See also Syscon, 322 NLRB at 544-45 (finding affirmative bargaining order required to remedy employer's unlawful withdrawal of recognition).

² Id.; Cf. Rock-Tenn Co., v. NLRB, 69 F.3d 803, 810 (7th 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").

Furthermore, as in Spectrum Health-Kent Community Campus, the Respondent's withdrawal of recognition and subsequent unfair labor practices in the instant cases, 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.³

Additionally, as stated in Counsel for the Acting General Counsel's exceptions, the Board has 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." Levitz Furniture Co., 333 NLRB 717 (2001). The Board has also held that 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. Furthermore, 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 cases, the Respondent employed six employees on November 8: Carleen Condon, Michael Fairchild, Shannon Pugh, Travis Pugh, Robert Styles, and Jason 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

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

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 cases, 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 employees had stated that they no longer wished to be represented by the Union. Thus, unlike the employer in Dura Art Stone, the Respondent cannot prove that, at the time of the actual withdrawal, there was an actual loss of majority status. Also, since the Respondent was not privileged to withdraw recognition from the Union while the grievances concerning the discharged employees are pending, the Respondent is obligated to continue to recognize and bargain with the Union. Therefore, the Respondent's assertions that it is prohibited under Board law from negotiating a new collective-bargaining agreement with the Union are without merit.

- B. The Respondent's Argument That The Allegations That The Respondent Unlawfully Told Employees That They Were No Longer Represented By The Union and Unlawfully Told Employees That Employees At The Respondent's Facility Were No Longer Represented By The Union Should Be Dismissed Since The Judge Failed To Find A Violation Is Without Merit.

The Respondent argues that the Judge failed to find and conclude that the Respondent violated the Act by informing employees that they were no longer represented by the Union and informing employees that employees at the Respondent's facility were no longer represented by the Union. The Respondent also asserts that the Counsel for the Acting General Counsel failed to present evidence to support the allegations. Additionally, the Respondent asserts that, on November 12, Senior Vice President of Operations Jack Perko sent a memo advising employees that they may be asked to engage in walkouts by the Union and reminded them that they had no-strike clauses in their collective-bargaining agreements.

Even though the Judge failed to find and conclude that the Respondent violated the Act by informing employees that they were no longer represented by the Union and informing employees that employees at the Respondent's facility were no longer represented by the Union,

record evidence demonstrates that, on November 12, Midwest Region Labor Relations Director Georgell and Area Human Resources Manager Rodney 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 Respondent's facility 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). As stated in Counsel for the Acting General Counsel's exceptions, since the Respondent's withdrawal of recognition 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, Respondent's assertions that the allegations that the Respondent violated the Act by informing employees that they were no longer represented by the Union and by informing employees that employees at the Respondent's facility were no longer represented by the Union should be dismissed are without merit.

III. CONCLUSION

For the reasons stated above and in the Acting General Counsel's Brief in Support of Exceptions, the Counsel for the Acting General Counsel respectfully requests that Respondent's exceptions be denied in their entirety and that the Administrative Law Judge's Decision be affirmed and his recommended order adopted except as modified by Counsel for the Acting General Counsel's exceptions.

Respectfully submitted this 21st day of September, 2011.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of ACTING GENERAL COUNSEL'S REPLY BRIEF TO RESPONDENT'S COMBINED ANSWERING BRIEF TO ACTING GENERAL COUNSEL'S AND UNION'S EXCEPTIONS TO THE ADMINISTRATIVE LAW JUDGE'S DECISION has been E-filed on NLRB internet site (www.nlr.gov) and served by Electronic Transmission on September 21, 2011 upon the following persons, addressed to them at the following addresses:

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