UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 15

BIG MOOSE LLC	:	
	:	
and	:	
	:	Case No. 15-CA-19735
HUMBERTO RECIO, AN INDIVIDUAL	:	
	:	
and	:	
	:	
INTERNATIONAL ALLIANCE OF THEATRICAL STAGE EMPLOYEES LOCAL 478 (THE GREEN LANTERN)	:	
	:	
-and-	:	Case No. 15-CB-5998
	:	
HUMBERTO RECIO, AN INDIVIDUAL	:	
	:	

RESPONDENT BIG MOOSE LLC'S ANSWERING BRIEF TO THE ACTING GENERAL COUNSEL'S CROSS-EXCEPTIONS TO THE DECISION OF THE ADMINISTRATIVE LAW JUDGE

Pursuant to Section 102.46 of the Rules and Regulations of the National Labor Relations Board ("NLRB" or the "Board"), Respondent Big Moose LLC ("Big Moose") respectfully submits this brief in answer to the Acting General Counsel's Cross-Exceptions to the February 2, 2012, Decision of Administrative Law Judge Michael A. Marcionese. As demonstrated below, the Acting General Counsel's cross-exceptions are without merit and should be denied in their entirety.

Introduction

The Acting General Counsel has excepted to that portion of the ALJ's Decision concluding there was insufficient evidence to establish that the International Alliance of Theatrical Stage Employees Local 478 (IATSE Local 478") and Big Moose discriminated against Charging Party Humberto Recio ("Recio") in connection with his separation of

employment on April 28, 2010. The Acting General Counsel's primary argument is that the ALJ's credibility determinations on this issue ***must*** be erroneous because he reached a different credibility conclusion with regard to Recio's first alleged discharge in March 2010. Although the ALJ's "split-the-baby" approach is admittedly perplexing given the numerous instances in which Recio was caught in a lie, the mere fact that the ALJ credited a small portion of Recio's testimony does not justify disturbing the factual determinations rejecting his claim that he was terminated a second time in April 2010. Indeed, the ALJ specifically noted that Recio's ***own testimony*** established that he voluntarily relinquished his employment and moved back to Florida for financial reasons in April 2010.

To the extent that the ALJ's factual findings and credibility determinations are irreconcilable, the evidence presented in this case leads to only one inescapable conclusion: the ALJ's only error was crediting ***any*** of Recio's self-serving and uncorroborated testimony. In this regard, the exceptions filed by IATSE Local 478 demonstrate that Recio's testimony was inconsistent and replete with numerous examples of untruthfulness. In contrast to the conflicting accounts offered by Recio, the testimony of Local Best Boy Earl Woods and IATSE Local 478 business agent Mike McHugh was corroborated and consistent – with both parties unequivocally denying that they ever discussed Recio's status with IATSE Local 478 or otherwise engaged in any actions that caused the termination of Recio's employment.

In sum, the Board should deny the Acting General Counsel's credibility-based exceptions because substantial evidence supports the ALJ's factual determinations rejecting the allegations that Recio was unlawfully terminated in April 2010.

Statement of the Case

On May 25, 2010, Recio filed an unfair labor practice charge against IATSE Local 478 alleging violations of Sections 8(b)(1)(A) and (2) of the Act. (ALJD, 1:1-6). More than three (3) months after the filing of Recio's initial charge against IATSE Local 478, he filed a charge against Big Moose claiming that it had terminated his employment due to his "membership status with IATSE Local 478." (*Id.*). Approximately two months later, in November 2010, Recio revised his allegations yet again and claimed for the first time that Big Moose violated the Act when Local Best Boy Earl Woods (acting at the direction of IATSE Local 478's business agent Mike McHugh) told him that he was not allowed to work. (GC Ex. 1(h)).

On December, 30, 2010, the Regional Director issued a Consolidated Complaint alleging that IATSE Local 478 and Big Moose had engaged in unfair labor practices in violation of the Act. (ALJD, 1:5-16). The Consolidated Complaint alleged that IATSE Local 478, through McHugh, violated Section 8(b)(2) of the Act by attempting to cause and causing Big Moose to terminate Recio's employment once in March 2010 and again in April 2010. (*Id.*). The Consolidated Complaint further claimed that Big Moose violated Sections 8(a)(1) and (3) of the Act by succumbing to McHugh's alleged demands to terminate Recio's employment. (*Id.*).

The ALJ's Decision

This matter proceeded to hearing before the ALJ on April 4 and 5, 2011. On February 12, 2012, the ALJ issued a Decision rejecting the overwhelming majority of evidence and testimony offered in support of the Acting General Counsel's allegations. In that regard, the ALJ explicitly rejected the Acting General Counsel's contention that Big Moose hired Recio for "the run of the show" of *The Green Lantern*, concluding that the record evidence did not remotely support Recio's uncorroborated and self-serving claims that he had been promised guaranteed

employment. (ALJD, 3:35-4:1). In reaching this conclusion, the ALJ found it particularly significant that Recio's "Deal Memo" – a written contract executed by Recio – unequivocally disclaimed any promise of "guaranteed employment." (*Id.*).

Despite concluding that Recio's claims of guaranteed employment were contradicted by the record evidence and thereby rejecting the linchpin of his allegations, the ALJ nonetheless determined that Big Moose violated the Act by terminating Recio in March 2010 at the request of IATSE Local 478. (ALJD, 10:3-16). While recognizing that Recio's recollection of events was uncorroborated and lacking in detail, the ALJ nonetheless credited his assertion that Woods told him he could not continue working for Big Moose until his union paperwork was straightened out. (*Id.*). Notably, the ALJ's determination that Recio's March 2010 separation of employment violated the Act relied primarily on Woods' alleged reference to Recio's union paperwork. (ALJD, 10:3-24).

Unlike Recio's alleged discharge in March 2010, the ALJ observed that the events surrounding Recio's separation from employment in April 2010 were substantially "murkier." (ALJD, 11:1-2). Indeed, the ALJ highlighted a number of evidentiary deficiencies associated with Recio's alleged April 2010 discharge when explaining the rationale for his determination that the Acting General Counsel's proof was lacking. In particular, the ALJ emphasized that:

- "Unlike the first termination, Recio d[id] not recall Woods giving him any reason or making any reference to McHugh, Recio's membership status, or any other inference that the Respondent Union caused this second termination;"

- There was no evidence in the record establishing that McHugh ever contacted Woods or any of Big Moose's supervisory personnel prior to Recio's last date of employment on April 28; and

- There was no evidence to contradict McHugh's undisputed testimony that any communications with Big Moose regarding Recio were limited to determining whether he "was having any problems on the job."

(ALJD, 11:8-19). Thus, the ALJ's conclusions regarding Recio's April 2010 separation from employment explicitly recognized the absence of ***any*** admissible evidence establishing that (i) Woods made any reference to union paperwork on Recio's last day of work, or (ii) Woods and McHugh engaged in any communications before Recio's last day of employment.

Although the ALJ could have stopped there, he went on to conclude that Recio's own testimony established that "he voluntarily relinquished [his] employment and moved back to Florida for financial reasons" in April 2010. (ALJD, 11:23-25). In reaching this determination, the ALJ emphasized that Recio himself admitted to returning to Florida at that time because "it was becoming too expensive to maintain two residences, one in New Orleans to qualify for a membership transfer, and the other for his family in Florida." (ALJD, 11:27-29). The ALJ also stressed that Recio's own recollection of events established he withdrew his union transfer application and requested a refund of his initiation fee ***before*** returning to work on *The Green Lantern*. (ALJD, 11:30-31). Therefore, Recio's testimony made it "undisputed that [he] was re-hired by Woods ***after*** requesting a refund [for his union transfer application] because he needed the money." (*Id.*). In light of these undisputed facts – all of which were established through Recio's own testimony – the ALJ concluded that "any loss of work was not caused by the Union [or Big Moose], but instead by Recio's voluntary decision to return to Florida for financial reasons." (ALJD, 11:37-39).

Standard of Review

"The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces [the Board] that they are incorrect." *Flexsteel Industries, Inc.* 316 N.L.R.B. 745, n.1 (1995) (citing *Standard Dry Wall Products*, 91 NLRB 544 (1950*), enfd.* 188 F.2d 362 (3d Cir. 1951)). Put

another way, the Board may displace an ALJ's credibility findings "only in the most unusual of circumstances." *Poly-America, Inc. v. NLRB*, 260 F.3d 465, 480 (5th Cir. 2001) (quoting *Centre Property Management v. NLRB*, 807 F.2d 1264, 1269 (5th Cir. 1987)). Applying these well-established principles to the present case, the Board should not disturb the ALJ's well-reasoned factual findings regarding Recio's alleged termination in April 2010.

Argument

Throughout the two-day hearing, the ALJ had the opportunity to observe the demeanor and assess the credibility of witnesses, review the documentary evidence admitted at trial, and consider the arguments set forth in the parties' post-trial briefs. After taking the matter under advisement for approximately ten (10) months, the ALJ ultimately determined that the Acting General Counsel failed to discharge its burden of proof and demonstrate that Recio's separation from employment in April 2010 violated the Act. Indeed, the ALJ specifically concluded that "[a]ll that the General Counsel has in this case to link Recio's April 28 termination of employment to the Respondent[s] is speculation and conjecture. (ALJD, 11:47-49). Because the ALJ's conclusion on this particular issue is firmly rooted in the record, it should be adopted by the Board.

A. The Acting General Counsel's Cross-Exceptions Are Without Merit.

The Acting General Counsel's cross-exceptions should be rejected out of hand because they are nothing more than an expression of disagreement with the ALJ's demeanor-based credibility determinations.[1] Indeed, the Acting General Counsel's assignments of error are not only unsupported by the record, but also flatly contradicted by the testimony and evidence presented at trial.

[1] The ALJ specifically noted that his determinations were based "[o]n the entire record, including [his] observation of the demeanor of the witnesses…." (ALJD, 2:11-14).

The Acting General Counsel claims that the "only rational explanation" for Recio's April 2010 employment separation is that "McHugh had Recio discharged because he was not following McHugh's perceived orders." (AGC Brief, p. 9). Notwithstanding the absence of ***any*** record evidence suggesting there were any communications between McHugh and Big Moose before Recio's last day of employment in April 2010, the Acting General Counsel nonetheless contends that "it can be reasonably inferred that [McHugh's] call was made before Recio was hired." (AGC Brief, p. 10). The Acting General Counsel's claim in this regard demonstrates a fundamental misunderstanding of the Board's scope of review and disregards the evidence presented at trial.

As a threshold matter, the Acting General Counsel's argument fails because "the issue is ***not*** whether th[e] [Board], confronted by the same evidence, would have come to different factual conclusions, but whether substantial evidence supports the factual conclusions of the [ALJ]." *NLRB v. E-Systems, Inc.*, 642 F.2d 118, 120 (5th Cir. 1981) (emphasis added). Thus, the Acting General Counsel's claim that the ALJ's findings should be reversed just because he ***could have*** "reasonably inferred" that McHugh contacted Woods before Recio was hired again in April 2010 is without merit. Because the ALJ's factual findings are supported by substantial evidence, they should be affirmed.

Furthermore, the Acting General Counsel's professed disagreement with the ALJ's factual determinations fails to take into account the numerous evidentiary deficiencies associated with its allegations claiming that Recio was discharged in April 2010. In contrast to the evidence regarding Recio's alleged termination in March 2010, the Acting General Counsel presented absolutely no testimony or evidence that (i) Woods made any reference to union paperwork on Recio's last day of work, or (ii) Woods and McHugh engaged in any communications prior to

Recio's last day of employment in April 2010. (ALJD, 11:9-21). According to the ALJ, the conspicuous absence of any evidence on these two issues rendered the Acting General Counsel's evidence insufficient to meet its burden of proof in connection with Recio's alleged discharge in April 2010. Regardless of whether the ALJ's determination on Recio's purported discharge in March 2010 was correct, it is undisputed that there was even less evidence to support the Acting General Counsel's claim that there was a second illegal termination in April 2010 – evidence that the ALJ apparently deemed significant. Thus, the ALJ's articulated rationale for rejecting the Acting General Counsel's April 2010 allegations is firmly rooted in the record.

Finally, and perhaps most important, the Acting General Counsel's challenge to the ALJ's decision completely ignores the fatal admissions in Recio's own testimony. As the ALJ specifically recognized, Recio himself conceded that he left his job with Big Moose and returned home to Florida because of the financial troubles associated with maintaining two residences and his professed unhappiness that he was only getting 2-3 days of work per week. (ALJD, 11:22-39). Recio further admitted that he was re-hired by Big Moose in April 2010 well ***after*** withdrawing his union transfer application and requesting a refund of his initiation fee. (ALJD, 11:25-31). The fact that Recio was re-hired after abandoning his attempts to transfer his membership to IATSE Local 478 belies any claim that he was discriminated against because of his union status.

Conclusion

In the final analysis, there is no evidence establishing that Woods or any other Big Moose supervisor terminated Recio's employment in April 2010 because of his union status or otherwise. Indeed, Recio's own testimony supports the ALJ's well-supported factual determinations rejecting the Acting General Counsel's claims to the contrary. Accordingly, the

Board should affirm the ALJ's Decision insofar as it concluded that Recio's April 2010 separation of employment did not violate the Act.

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Respectfully submitted:

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CERTIFICATE OF SERVICE

I hereby certify that I served the foregoing Respondent Big Moose LLC's Answering Brief to the Acting General Counsel's Cross-Exceptions to the Decision of the Administrative Law Judge on the parties listed below by electronic mail on this 24th day of April, 2012.

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