UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

COUNCIL 30, UNITED CATERING,
CAFETERIA AND VENDING WORKERS,
RWDSU/UFCW

Respondent

and

Case No. 7-CB-083076
ALJ Arthur J. Amchan

LORAINE WHITFIELD-SCUSSEL, an individual

Charging Party

and

AWREY BAKERIES, LLC,

Party in Interest.

RESPONDENT UNION'S REPLY IN SUPPORT OF EXCEPTIONS

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I. INTRODUCTION

The Board has made clear that a union violates §8(b)(1)(B) of the Act when its course of conduct goes beyond the mere insistence that an employer accept its bargaining demands, but forces an employer, through restraint or coercion, to give up its right to freely select its bargaining representative or grievance adjustor. The ALJ's Decision, and the General Counsel's argument in support of this Decision, attempt to expand the clear meaning of "restraint" and "coercion" under the Act. Here, the record evidence reflects that the Union merely attempted to persuade the Employer, through free and open bargaining, to terminate its top executives - including the Charging Party. The Board has never held that such conduct sufficiently establishes a violation of §8(b)(1)(B). Affirming the ALJ's Decision here effectively creates new law that is inconsistent with both the plain meaning and intent of the Act. Therefore, the ALJ's Decision must be rejected.

A. The Board's Decision in *Local 259, Automobile Workers* Does Not Support a Finding That the Union Here Unlawfully Restrained or Coerced the Employer in Violation of §8(b)(1)(B).

In *Local 259, Automobile Workers,* 225 NLRB 421 (1976), the Board based its finding that the union restrained and coerced the Employer in violation of §8(b)(1)(B) from record evidence of union threats, work stoppages, strikes and economic reprisals, not merely because the union insisted during bargaining that it remove its §8(b)(1)(B) representative. The General Counsel argues that this case is analogous to the facts presented here because both cases were presented with circumstantial evidence of the union's coercive and restraining activity toward the employer. (GC's Brief in Response, pp. 6-7) However, unlike *Local 259, Automobile Workers,* the circumstantial evidence here did not take the form of union threats, strikes and other forms of economic pressure to support a finding of unlawful coercion and restraint. Moreover, unlike *Local 259, Automobile Workers,* there is no evidence here from the Employer that its decision to terminate its §8(b)(1)(B)

representative was influenced in any way by union conduct. To the contrary, the only person with the authority to fire the Charging Party unequivocally denied that the Union influenced his decision to terminate the Charging Party, let alone restrained or coerced him into doing so. (Tr. 209-210)

Finally, the General Counsel argues that like *Local 259, Automobile Workers*, negotiations over concessions were stymied until the unit employees ratified the agreement containing promises to terminate the Charging Party. However, the General Counsel misrepresents the facts on the record. Negotiations between the Employer and the Union were never stymied by any Union demands or bargaining tactics, like in *Local 259, Automobile Workers*. Here, the Union agreed to concessions, and presented this agreement to its membership for ratification, prior to any promise by the Employer to terminate the Charging Party. The General Counsel argues that the subjective motives of 150 unit employees in ratifying the agreement is evidence of conduct attributable to the Union. Clearly, the individual motives of Union members in approving or rejecting the terms of a collective bargaining agreement is not evidence of motive attributable to Union agents, or the Union itself. Even if such individual motives were evidence of union conduct, why the union membership voted as it did is something that can never be known, especially on this record.

Local 259, Automobile Workers stands for the proposition that a union engages in unlawful restraint or coercion when it conditions approval of an agreement upon an employer's discharge of its §8(b)(1)(B) representative and does so through the use of threats, strikes, work stoppages and other forms of economic pressure. The ALJ's Decision expands this holding to create new law on the meaning of unlawful "restraint" and "coercion" under §8(b)(1)(B). Affirming the ALJ's Decision effectively makes it an unfair labor practice for a union to engage in lawful bargaining with an employer over a contract term that, if accepted, would deprive the employer of its right to select (or not select) its §8(b)(1)(B) representative. It is clear, however, that the Act does not prohibit a

union from appealing to an employer's discretion to select (or not select) its §8(b)(1)(B) representative - it prohibits a union from forcing an employer, against its will, to relinquish its right to freely choose its §8(b)(1)(B) representative. Accepting all of the ALJ's factual findings, the Union's course of conduct here simply does not constitute unlawful restraint or coercion within the holding of *Local 259, Automobile Workers* or within the plain meaning of the Act.

B. The Board's Decision in *Turner-Brooks* Provides Guidance as to the Meaning of "Restraint" and "Coercion" Under the Act.

The General Counsel argues that the Board's decision in *Local 80, Sheet Metal Workers (Turner-Brooks, Inc.)*, 161 NLRB 229 (1966) is not applicable to the facts present here because the Board in that case never made a finding that the union's conduct amounted to unlawful restraint or coercion under §8(b)(1)(B). (See GC's Brief, pp. 9-10) However, the Board in *Turner-Brooks* held that a union's mere insistence that an employer accept contract proposals (even if the employer's acceptance would result in a wavier of its §8(b)(1)(B) rights) is not enough to establish "restraint" or "coercion" within the meaning of §8(b)(1)(B). Here, the record evidence shows only that the union wanted the Charging Party terminated and requested, during lawful bargaining, that the employer fulfill its wishes. The fact that the Board in *Turner-Brooks* did not ultimately make a finding that the union's conduct - beyond its insistence to bargaining demands - amounted to unlawful coercion or restraint, does not distinguish this case from the facts present here. To the contrary, the proposition stated in *Turner-Brooks* provides clear guidance to the Board that a union's "mere insistence [to its bargaining demands] is not to be equated with the restraint and coercion required by the statute to establish a §8(b)(1)(B) violation." *Id.* at 235.

II. CONCLUSION

For the foregoing reasons, and the reasons cited in Respondent Union's Brief in Support of Exceptions, the Union requests that the National Labor Relations Board grant the Exceptions, reverse the ALJ's decision and dismiss the Complaint in its entirety.

Respectfully submitted,

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By: /s/ *Patrick J. Rorai*

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PROOF OF SERVICE

I hereby certify that on June 21, 2013 I e-filed the Respondent Union's Reply Brief in Support of Exceptions and served same upon:

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