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August 1, 2013

SENT BY FEDERAL EXPRESS PRIORITY OVERNIGHT MAIL:

National Labor Relations Board
1099 14th Street NW
Washington, DC 20570-0001

RE: Pressroom Cleaners v. Service Employees International Union, Local 32BJ
National Labor Relations Board Case No. 34-CA-071823
Our File No. 20922.001

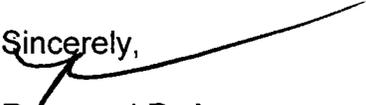
Good Morning:

Enclosed please find the following documents:

1. Respondent, Pressroom Cleaners' Exceptions to the Record and Proceedings, (original and 10 copies). Please file the original and file-stamp 2 copies to be returned to me in the enclosed stamped envelope; and
2. Affidavit of Service regarding Exceptions to the Record and Proceedings (original and 10 copies) to be filed in the above-entitled mater. Please file the original Affidavit of Service and file-stamp 2 copies to be returned to me in the enclosed stamped envelope.

Thank you for your courtesies in this matter.

Sincerely,


Raymond R. Aranza
raranza@mclawyers.com

RRA:epa
Enclosures
cc/encs.:

Andrew Strom, Associate General Counsel, Local 32BJ, SEIU, CLC
Judith A. Scott, General Counsel, SEIU
Thomas W. Meiklejohn, Esq.
Terri A. Craig, Deputy Regional Attorney
Roy Lilledahl, Pressroom Cleaners

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NLRB
ORDER SECTION

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 34**

PRESSROOM CLEANERS,)	
Charged Party,)	
)	
and)	CASE NO. 34-CA-071823
)	
SERVICE EMPLOYEES)	
INTERNATIONAL UNION,)	
LOCAL 32BJ)	
Charging Party.)	

EXCEPTIONS TO THE RECORD AND PROCEEDINGS

COMES NOW, Pressroom Cleaners (“Respondent”), and hereby submits its Exceptions to the Record in the above-entitled matter. Respondent’s Exceptions are as follows:

1. RESPONDENT OBJECTS TO THE FINDINGS OF THE ADMINISTRATIVE LAW JUDGE (“ALJ”), FINDING THAT COMMENTS MADE BY STEVE LILLEDAHL (“LILLEDAHL”) ON OR ABOUT NOVEMBER 8, 2011, WERE COERCIVE AND IN VIOLATION OF SECTION VIII (A)(1) OF THE NATIONAL LABOR RELATIONS ACT (HEREINAFTER “THE ACT”) (DECISION, PG. 26, LINES 7-12).

The ALJ relied primarily on the “non-union” statement made by Mr. Lilledahl during the November 8th meeting with the five (5) former employees of Capitol. That evidence “must be *substantial*, not speculative, nor derived from inferences upon inferences.” *Brown & Root, Inc. v. NLRB*, 333 F.3d 628, 629 (2003) (citing *Mini-Togs*, 980 F.2d 1027, 1032 (5th Cir. 1993). There was a dispute amongst the discriminatees as to what Mr. Lilledahl stated to the applicants regarding Pressroom’s non-union status.

Respondent conceded that Mr. Lilledahl stated, “we are non-union.” (Tr. 258:10-23). However, the applicants are not cohesive in whether a “union” statement was even made. Ms. DeJesus was the only person to testify with any certainty that Mr. Lilledahl said anything more than “we are non-union.” (Tr. 540:1-5). Mr. Hovhannisyian did not recall Mr. Lilledahl making a comment about a union. (103:10-21). Ms. Zhamkochyan did not recall Mr. Lilledahl saying anything about a union. (130:10-17). Mr. Figueroa only remembered Mr. Lilledahl stating “no union here, nobody union here.” (Tr. 82:10-18). As concerns Ms. Lubowska’s testimony, it is not credible as she clearly contradicts her previous statements, which is presumed to be the result of a language barrier and inadequate translation. (Tr. 75:1-20).

If the union applicants cannot even clearly recall Mr. Lilledahl mentioning the word “union,” they were obviously not affected by the alleged statement or felt discriminated based on their union affiliation. Mr. Lilledahl’s statement “we are non-union” is not unlawful and certainty does not satisfy the burden of proving anti-union animus. To the contrary, the statement viewed in the totality of the circumstances unequivocally indicates that Respondent did not ponder the applicant’s union affiliation in its hiring decision as it considered the applicants for the available job positions.

Akin to this situation, in *Brown & Root, Inc. v. NLRB*, 333 F.3d 628 (5th Cir. 2003), the Board found that a manager's statement during its hiring process to the effect that the company was non-union and that it intended to stay that way, was protected free speech under Section 8(c) of the Act. As a result, the Fifth Circuit held that “[a] **lawful statement of a lawful position does not in itself allow inference that one is willing to enforce that position through illegal means.**” *Id.* at 639 n. 7 (emphasis added). The court noted that the remarks were in response to employee questions at meetings held to inform employees of job opportunities with the new

employer, and made in a context where the employer already employed non-union employees in another operation at the facility; thus, the employees could not reasonably conclude that the employer was threatening reprisals for their union support. The court explained that although the statements made by the employer allowed an inference that the company had a strong preference to remain non-union, that preference was lawful, even if it was a strong preference. *Id.* at 638-39. Similar cases wherein employers made non-union statements to union applicants have consistently held that such statements are insufficient to establish anti-union animus. See, e.g. *Ross Stores, Inc. v. NLRB*, 235 F.3d 669, 675-76 (D.C. Cir. 2001) (manager's statements that "they did not need a union" and that "he would do anything in his power to keep the union out of the building" were, as a matter of law, no evidence of unfair labor practices and the Board's use of them to show "animus" "was in direct violation of section 8(c) and beyond the Board's authority."); *Innes Construction Co.*, 351 NLRB No. 34 (2007) (employer did not have union animus when he stated the company "bid the contract on a non-union basis" and the company "could not go the union route."); *P.S. Elliott Services*, 300 NLRB 1161 (1990) (employer told applicants of former employer the company's contract was non-union was not unlawful as he was stating a fact.); see also *First Transit, Inc.*, 2010 WL 635580 (NLRB Div. of Judges Feb. 23, 2010) (employer's statement "Thank God you guys are not union," merely represented employer's opinion or preference for non-union shop and was lawful.) (citing *Park 'N Fly Inc.*, 349 NLRB 132 and 133-134 (2007); *Evergreen America*, supra, 348 NLRB at 200; *Children's Services International Inc.*, 347 NLRB 67, 68 (2006); *Rogers Electric Co.*, 346 NLRB 508, 509-510 (2006)).

Like Brown & Root's statements, Mr. Lilledahl's single remark did not threaten "not to hire" the union members, or imply that Respondent would engage in unlawful conduct to avoid

unionization. At worst, the purported comment stated the status quo and perhaps an inference of a desire to continue the status quo. As cited above, the Board has repeatedly found that neither a statement of the status quo nor an employer's statement of its desire to remain non-union constitute violations of the Act. "An employer may even express a desire to operate non-union so long as he does not translate that desire into action violative of the Act." *Gateway Freight Serv., Inc.*, 310 NLRB 1058, 1067 (1993) (citing *Great Plains Beef Co.*, 241 NLRB 948 (1979)). Moreover, "**a showing of animus requires greater proof than a single comment by a supervisor to the effect that the company preferred to hire non-union personnel**" and that "[t]he mere fact that the [employer] knew the applications were from Union applicants does not show animus." *Progressive Elec., Inc. v. N.L.R.B.*, 453 F.3d 538, 549 (D.C. Cir. 2006) (quoting *Tic-The Indus. Co. S.E., Inc. v. N.L.R.B.*, 126 F.3d 334, 338 (D.C. Cir. 1997)) (emphasis added); see also *BE & K Constr. Co. v. NLRB*, 133 F.3d 1372, 1376 (11th Cir.1997) ("[W]e will not allow the Board to punish an employer simply because that employer is anti-union.").

Here, the record is void of any proof of anti-union animus. Respondent's actions contradict such an assertion. There is no testimony that Respondent told the discriminatees that it would not hire union members or that the employees were discouraged to apply for the positions. Quite the opposite, all of the employees were invited to the November 8th interview and were considered for the position. The testimony clearly illustrates that Respondent considered the applicants for the position throughout its entire hiring process. Not only did Pressroom consider the applicants in the interview on November 8th, but Pressroom also observed the applicants working in December in which they were considered and ultimately determined, based on their performance, that the applicants were not going to "work-out" under the company's business model. It should also be noted that Pressroom still considered the

applicants despite their poor November 8th interview in which the applicants made disgruntled comments, illustrated negative body language, and openly confessed their dissatisfaction with the offered wages. (Tr. 354:20 to 357:20; 435:3 to 438:3) Respondent requested the applicants call Ms. McSharry within a couple of days regarding their interest in being considered for the positions, but the applicants did not adhere to this request (Tr. 354:20-357:20; 435:3to 438:3; 540:13-15); however, Respondent still considered them. Ultimately, Respondent was forced to hire employees based upon their business model to ensure its compliance with the bid projected for the Hartford facility; the decision was not motivated by any anti-union animus. (Tr. 482:22 to 483:13)

On Tuesday, December 6, 2011, Mr. Lilledahl, Ms. McSharry, and Mr. Pena arrived in Hartford, Connecticut to prepare for the Monday, December 12th starting date. (Tr. 447:8-14). While traveling to Hartford on December 6th, Ms. McSharry posted the second Craig's List advertisement at approximately 7:21 p.m. (Tr. 433:15-23; Ex. R-6; GC-18). On Wednesday, December 7th, Pressroom shadowed the Capitol employees to familiarize themselves with the building and equipment, and in doing so, Respondent observed the applicants' work performance. (Tr. 364:18 to 7; 449:13 to 450:11). At the initial shadowing, Respondent observed the Capitol employees moving very slowly and methodical in performing their duties, which indicated to Pressroom that it needed to conduct interviews with other applicants to ensure that Respondent had a back-up plan if the Capitol employees were not able to adequately perform under Pressroom's different business model of fewer FTEs. (Tr. 467:16 to 468:14; 471:12-22; 473:4 to 474:21). The Craig's List advertisement produced 30 – 40 responses seeking to apply for the janitorial cleaning position. Respondent conducted its first interview on Thursday, December 8th, which was elicited through the December 6th advertisement. The small

group interview consisted of two unrelated applicants, Elias Rosario and Joel Bhanji, whom Respondent believed possessed the requisite background, flexibility, tenacity and enthusiasm to work at Respondent. However, the decision to hire these applicants was not determined until Friday, December 9th. (Tr. 477:8 to 478:23; Ex. R-7). Following this initial interview, Respondent shadowed the Capitol employees on Thursday evening, where it was again observed that the Capitol employees were not working fast enough to ensure Pressroom would be able to function under 6.25 FTEs that the contract was bid. (Tr. 481:9 to 483:13; 487:22 to 488:11). Therefore, the decision not to hire the six Capitol employees was determined late Thursday night after shadowing the employees a second time. The inability of the discriminatees, who had already shown their displeasure at working for the Respondent, to work at a faster pace was the final straw (Tr. 482:22 to 483:13).

2. RESPONDENT TAKES OBJECTION TO THE COURT’S DECISION AT PG. 23, LINES 35-40, CONCERNING HIS STATEMENT THAT HE IS NOT BOUND BY FEDERAL CIRCUIT COURT LAW.

There has been much controversy as relates to the position that administrative law judges do not necessarily have to follow precedent from the Federal Circuit Court, See, for example, “Nonacquiescence: Outlaw Agencies, Imperial Courts, and the Perils of Pluralism”, 39 Vand.L. Rev. 471 (April 1986). More troublesome though is the fact that the ALJ ignored other NLRB precedent which is consistent with the decision in *Brown v. Root*. There are a number of cases wherein an employer has made non-union statements to union applicants where such statements are insufficient to establish anti-union animus. See, e.g., *Ross Stores, Inc., v. NLRB*, 235 F3d 669, 675-76 (D.C. Cir. 2001) (The Manager’s statements that “they did not need a union” and that “he would do anything in his power to keep the union out of the building” were, as a matter

of law, no evidence of unfair labor practices and the Board's use of them to show "animus" was in direct violation of §8(c) and beyond the Board's authority"(emphasis added); In *Innes Construction Co.* 351 NLRB No. 34 (2007)(Employer did not have union animus when he stated the company "bid the contract on a non-union basis" and the company "could not go the union route."); P.S. Elliott Services, 300 NLRB 1161 (1990) "Employer told applicants of former employer that company's contract was non-union, was not unlawful as he was stating a fact"; See, also, *First Transit Inc.*, 2010 WL 635580 (NLRB DIV. of Judges February 23, 2010) (Employer's statement "thank God you guys are not union," merely represented employer's opinion or preference for non-union shop and was lawful. (Citing *Park'N Fly, Inc.* 349 NLRB 132 and 133-134 (2007); *Evergreen America*, supra., 348 NLRB at 200; *Children's Services International Inc.*, 347 NLRB 67, 68 (2006); *Rogers Electric Company*, 346 NLRB 508, 509-510 (2006)) These cases all support the proposition that a lawful statement of a legal position does not allow an inference that one is willing to enforce that position through illegal means. *Brown & Root, Inc.*, 833 F3d at 639. The ALJ relied on the testimony of one lone witness (DeJesus) to make a finding that Steve Lilledahl told the discriminates that "Respondent is non-union, does not work with unions, does not deal with unions and does not want a union at all"(Decision, p. 22: Lines 8-11). DeJesus testimony is found at Tr. p. 520:24 through 521:4. This testimony taken out of context, simply conveys the thought that Respondent does not have any experience with union and would not want union membership. Such a statement, pursuant to *Brown v. Root* and the other cases cited above, would not be illegal.

3. THE ALJ ERRED IN FINDING THAT THE ACTIONS OF FRANCISCO TERAN, AN INDIVIDUAL WHO WAS NOT PART OF RESPONDENT'S WORKFORCE AS AN EMPLOYEE AT THE TIME DECISIONS WERE MADE TO

HIRE THE INITIAL CREW AT THE FACILITY IN DECEMBER OF 2011, IS EVIDENCE OF ANTI-UNION MOTIVATION OR ANIMUS (DECISION, PG. 30, LINES 7-22).

Mr. Teran's alleged conduct occurred in January and February of 2012 in which he made threats to Pressroom employees that if they associated with the Union, he would terminate said employees. (GC Ex.1) Teran was not a supervisor until February 9, 2012 (Tr.6:17-19). Mr. Teran's alleged unlawful conduct was unbeknownst to Pressroom and if Pressroom had known about such anti-union threats, it would have terminated him upon discovery of said threats. (Tr. 231:3-24) It is evident that if Pressroom had known about Mr. Teran's conduct, it would have acted in a similar manner as concerns the allegations of Mr. Teran's sexual harassment of an employee in May of 2012 for which he was terminated. (Tr. 388:16 to 390:14). Further, despite Mr. Teran's threats, Pressroom employees obtained and signed Union cards and continued their employment with Pressroom. (Tr. 287:13-15; 288:21-22). As unfortunate as this situation may be, it does not indicate anti-union animus by Pressroom in its decision not to hire the union applicants on December 8, 2011, as Mr. Teran had not even been hired at that point. There is absolutely no evidence that Mr. Teran was involved in any way in the hiring decisions in question. Therefore, this blanket assertion is without merit and should not be considered as relates to the refusal to hire allegations.

4. THE ALJ ERRED IN FINDING THAT RESPONDENT HAD FALLEN SHORT OF MEETING ITS BURDEN OF ESTABLISHING THAT IT WOULD NOT HAVE HIRED THE DISCRIMINATEES ABSENT THEIR UNION MEMBERSHIP AND SUPPORT AND, THEREFORE, VIOLATED SECTION VIII (A)(1)(3) OF THE ACT (DECISION, PG. 35, LINES 33-36).

The record and evidence consistently provides that Respondent based its decision to not hire the former employees due to their belief that it would not be able to perform its contract in accordance with the proposed 6.25 full time employees if the Capitol employees were hired. In other words, these employees were not a good fit.

Respondent's bid of the Hartford Broad Street facility was based on 6.25 full-time employees ("FTE") at \$9.00 per hour, which was less than the current contractor at the time. (Tr. 347:3-160). In the calculation of 6.25 FTEs, it included three full-time positions, the supervisor, the day porter, and the night porter, with the rest of the positions being part-time employees. (Tr. 462:3 to 464:12). Respondent's business model of 6.25 FTEs at a lower wage is very different when compared with the predecessor Capitol's use of approximately 8 – 9 FTEs at a much higher rate of pay. (Tr. 481:22 to 482:14). Capitol's model is approximately 30% higher than what Respondent bid the contract. Additionally, as confirmed by Mr. Gullotta, Respondent was expected to do more work within a shorter period of time and with fewer employees than Capitol had previously performed the contract. (Tr. 164:3-5; 178:2-12; 188:10 to 190:3; 487:22 to 488:11). As such, Respondent's contract required it to hire applicants that would perform the rigorous tasks in an extremely efficient manner to adhere to the economic realities of the 6.25 FTEs business model.

After the second shadowing of the Capitol employees on Thursday, Respondent determined that the applicants were not suitable for the positions due to their sub-par performance. Based on these observations, it was believed that the applicants could not move fast enough to perform the job within the 6.25 FTEs required. (Tr. 471:6-19; 481:13-21; 482:22 to 483:12). Even Ms. DeJesus conceded that she would not be able to perform the job duties within Pressroom's business model. (Tr. 538:23 to 539:10). At this point, Respondent decided

to proceed with conducting interviews of the applicants obtained through the Craig's List job posting on Friday and Saturday. The applicants in the various group interviews were all willing and enthusiastic to work for the \$9.00 per hour, no benefits, part-time position Pressroom offered. Respondent perceived the applicants, which were ultimately hired, as being good candidates that would work extremely fast and efficiently to complete the tasks within the provided time frame. (Tr. 372:17-25). Each applicant hired had related work experience, were flexible in scheduling, self-motivated, possessed tenacity, and were willing to accept the terms and conditions of employment. (See, Tr. 372 to 383; 448 to 461; Ex. R-7; c.f. Ex. GC-9).

It is not enough that the General Counsel disagrees with an employer's policies or methods. In order to establish discriminatory animus, the Board must show that the employer's stated reasons were false or clearly pretextual. See, e.g., *Poly-Am., Inc. v. N.L.R.B.*, 260 F.3d 465, 490-91 (5th Cir. 2001). Further, the courts have recognized that intangibles such as laziness, dislike for the job and disrespect for company policies may serve as valid motivators for an employer's decision. *Id.* It follows, there was nothing inherently unlawful or discriminatory in placing qualities demonstrating a superior work ethic or "tenacity" ahead of work experience in Respondent's hiring practices for low-skill entry-level positions. Respondent's non-discriminatory, legitimate business decision based upon the economics of the 6.25 FTE contract bid cannot be refuted and does not prove animus.

Again, an employer can refuse to hire for any reason other than union membership or activity. In this situation, Respondent decided not to hire the union applicants based on its legitimate business purpose of performing its contract. This cannot be refuted. It should also be noted that Respondent could have refused to hire the applicants based on other reasons which would have also been justified under the *Wright Line* test, such as the Capitol employees' poor

interview, derogatory comments, apprehension to accept the lower wages and no benefits, lack of communication, or its failure to inform Pressroom of their union membership. See, e.g., *Innes Construction Co.*, 351 NLRB No. 34 (2007) (an employer demonstrated that it would have refused to consider union applicants even in the absence of their union affiliation when it demonstrated that its vice president acted on his reasonable belief that the union applicants were only willing to accept employment as part of a union package deal that included union wages, and the employer's contract for the project in question had been bid on a nonunion basis.); *State College et al.*, 2006 WL 3493824 (NLRB 2006) (an employer was justified in deciding not to hire an applicant because he had a poor work record from his previous job—not because he was a union officer with a reputation of being a troublemaker.); *In re American Steel Erectors, Inc.*, 2003 WL 22027492 (NLRB 2003) (An employer did not violate the NLRA for its refusal to hire a union member who made deliberate and outrageous statements about the employer's safety record.); *Exterior Systems, Inc.*, 2002 WL 3153333 (NLRB 2002) (an employer did not unlawfully refuse to hire union members where the Board found that the members acted in a disruptive, intimidating, and disrespectful manner when making inquiries about available jobs.); *Jim Walter Resources*, 177 F.3d 961 (11th Cir. 1999) (an employer unlawfully refused to hire a union member where it made its decision on the basis of his former supervisor's reporting that the applicant had a "bad attitude."); *Piedmont Shirt Co.*, 49 NLRB 313 (1943); *Sioux City Brewing*, 108 NLRB 1061 (1954) (an employer was justified in deciding not to hire an applicant because he had a poor work record from his previous job—not because he was a union officer with a reputation of being a troublemaker. It is not an unfair practice to refuse to hire when an employer did not know of an applicant's union membership or when an applicant refused permanent employment.).

Based on the testimony and evidence elicited at hearing, it is obvious that the Capitol employees' union affiliation was not a factor in refusing to hire them. After careful consideration of the applicants, the decision was made that the employees of Capitol would not be able to perform at the speed and efficiency that Pressroom was requiring. As a result of Respondent's decision not to hire the former employees, it conducted interviews and ultimately hired its workforce based upon the same hiring criteria.

5. THE ALJ ERRED IN FINDING THAT THE FOLLOWING INDIVIDUALS WERE NOT HIRED BECAUSE THEY WERE NOT MEMBERS OF THE UNION: EPIFANIA DE JESUS, RAZMIK HOVHANNISYAN, MARIANA LUBOWICKA, ANAHIT ZHAMKOCHYAN, EMILIO FIGUEROA AND DANIEL KORZENIECKI (DECISION, PG. 35, LINES 33-36).

Respondent refers the Board to its arguments contained in exceptions 1, 2, 3, 4, and 6.

6. THE ALJ ERRED IN FINDING THAT RESPONDENT VACILLATED IN OFFERING A CONSISTENT EXPLANATION FOR ITS ACTIONS, THUS WARRANTING AN INFERENCE THAT THE REAL REASON FOR ITS ACTION IS NOT AMONG THOSE ASSERTED (DECISION, PG. 35, LINES 24-28).

The ALJ commented specifically that the response to charges made on behalf of Respondent is inconsistent with the testimony of Lilledahl and McSharry. (Decision, p.34:33-53; p.35:1-17). The Judge states that there was no reference to "shadowing" in the initial response to the Complaint made on behalf of Respondents. However, the testimony of Lilledahl and McSharry established that both considered the discriminatees until shortly before they took over the contract and after shadowing the employees (Tr. 482:22 to 483:3). This is consistent

with the position taken by Respondent in its response to the allegations. (General Counsel Ex. 25, pg. 6 states as follows:

“ The reasons the individuals identified in attachment 9 were hired was that they had a willingness to be flexible with the demands that that Pressroom places on its employees and would work as a team. Except for those who accepted lead positions, all were willing to work part-time. The candidates chosen had experience in the janitorial field and exhibited an eagerness to work at this position at a rate of \$9.00 per hour. Since these jobs did not require much skill, experience working as a janitor was not a high priority; flexibility and willingness to work with Pressroom’s guidelines with little supervision. The former Capitol employees who said they were willing to work were considered to the very end. However, the other candidates chosen were a better fit for the work and for Pressroom’s demands. The Capitol employees were not happy with the compensation. Pressroom was concerned that these individuals would not be willing to work a part-time position for any length of time as they had previously worked full-time at Capitol. Most of those individuals who accepted part-time employment had full time jobs during the day.

Pressroom’s intention was to provide services on a more streamlined basis, reducing the crew by one to two full time positions. More flexibility is demanded of the crew, many times being required to come back to work at the request of the Hartford Courant.”

The above identifies the fact that the employees must be willing and able to work on a streamline basis. In other words, they must work quickly. As stated previously, under its contract, Respondent was required to do more work with fewer FTEs (Full Time Employees). This required employees that would be willing to work at \$9.00 per hour at a quicker pace and with more flexibility. The discriminatees never conveyed an attitude that they were willing to do the job faster and more enthusiastically as Respondent expected from its employees. The testimony of McSharry and Lilledahl indicate that they were willing to consider the Capitol employees until the very end. However, watching these employees work, their attitude, demeanor and pace, convinced McSharry and Lilledahl that they were not a good fit for the crew

that McSharry and Lilledahl felt they needed to have to comply with the current contract. It was necessary to work in a shorter time frame (Tr. p. 164:3-5; p. 178:2-12).

7. THE ALJ ERRED IN FINDING THAT DANIEL KORZENIECKI WAS A DISCRIMINATEE AS MR. KORZENIECKI DID NOT ATTEND THE NOVEMBER 8 INTERVIEW NOR DID HE GIVE ANY INDICATION THEREAFTER THAT HE WAS INTERESTED IN WORKING FOR RESPONDENT. FURTHER, MR. KORZENIECKI DID NOT APPEAR AT TRIAL TO INDICATE WHETHER HE WISHES TO CONTINUE WORKING FOR RESPONDENT (DECISION, PG. 40, LINES 50-51).

A review of all testimony in this matter indicates that there was absolutely no reference to Daniel Korzeniecki until the end of the hearing at which time Epifania De Jesus testified that the Union found a job for all the discriminatees, including Mr. Korzeniecki (546:5-9). There is no question that Mr. Korzeniecki did not appear at the November 8 meeting (Tr. 354:12-25). In her testimony, Epifania De Jesus stated that the only individuals from Capitol Cleaners who was present at the November 8 interview were Marianna Lubouska, Emelio Figueroa, Anahit Zham Kochyan, and Rosnick Hovhannisyan (515:21-25; 516:1). Ms. De Jesus served as the spokesperson for the group and Ms. De Jesus admitted that she did not ask on behalf of Korzeniecki whether he would be hired (520:2-9). There is no testimony in the record that Korzeniecki followed up with any discussions or inquiries with representatives of Pressroom. In fact, the record is devoid of any testimony by Mr. Korzeniecki verifying that the application that was sent in his name in September 2011 was in fact Korzeniecki's application. Without any evidence that Mr. Korzeniecki was even interested in a position with the Respondent, the finding of the ALJ is in error.

8. THE NATIONAL LABOR RELATIONS BOARD HAS NO AUTHORITY TO BRING A COMPLAINT AGAINST RESPONDENT OR PURSUE PROSECUTION OF THIS COMPLAINT AGAINST RESPONDENT. FURTHER, THE NATIONAL LABOR RELATIONS BOARD DOES NOT HAVE AUTHORITY TO DECIDE THE MERITS OF THIS MATTER NOR DOES IT HAVE THE AUTHORITY TO ENFORCE THE RULING HANDED DOWN BY THE ALJ IN THIS MATTER.

Noel Canning v. National Labor Relations Board, 705 F3d 490 (Decided January 25, 2013). In January of 2013, the United States Court of Appeals, D.C. Circuit, found that appointments of the last three members of the National Labor Relations Board were invalid under the Recess Appointments Clause of the Constitution, Article II, Section 2, Clause 3 and, therefore, the Board lacked a quorum. As a result, the Board had no authority to enforce any Orders, or to take any action as it did not have the authority to issue findings and order any action as relates to alleged unfair labor practices committed by Noel Canning. *Noel Canning v. National Labor Relations Board*, Id. at 507 (D.C. Cir. 2013). Recently, the 4th Circuit issued a similar finding in a Decision entered May 17, 2013, *National Labor Relations Board, Petitioner v. Enterprise Leasing Company Southeast, LLC* (12-1514); *Huntington Engles Incorporated v. National Labor Relations Board* (12-2000).

Without a quorum of three validly appointed members, the Board is unable to conduct official business, as required by the Supreme Court's Decision in *New Process Steel, LP v. NLRB*, 130 S.Ct. 2635 (2010). Under Section 10 of the NLRA, the Board is empowered to prevent and pursue unfair labor practices affecting commerce. In the absence of a quorum, the NLRB may not take any official action, including promulgating regulations, engaging in

enforcement proceedings, or issuing orders. At this time, and for any time in the near and distant future, the Board does not have authority to pursue unfair labor claims against Respondent.

9. THE ALJ ERRED IN FINDING THAT RESPONDENT WAS A SUCCESSOR EMPLOYER AND, THEREFORE, HAD AN OBLIGATION TO BARGAIN (DECISION, PG. 38, LINES 36-37).

In order to preserve industrial peace during the transition between employers, the presumption of majority support ordinarily enjoyed by a certified union may continue in successor situations, thereby obligating a successor employer to bargain with its predecessor's union. See *Fall River*, 482 U.S. at 41; *Burns*, *supra*. This presumption of majority status attaches if there is a “substantial continuity” between the predecessor's business and that of the new employer; if the incumbent union has made a bargaining demand; and if the new employer has hired a “substantial and representative complement” of its work force, a majority of which consists of the predecessor's employees. *Id.* The obligations to bargain under successorship are only triggered when all of the factors are satisfied.

Substantial continuity is the key factor in determining successorship. Substantial continuity may exist between new and old employers when the new company has acquired substantial assets of its predecessor and continued, without interruption or substantial change, the predecessor's business operations. *Pennsylvania Transformer Technology, Inc. v. NLRB*, 254 F.3d 217 (D.C. Cir. 2001). As applied to Respondent and Capitol, Respondent cannot be considered a successor employer since Pressroom did not acquire any assets, equipment, supplies, etc. from Capitol. (Tr. 164:17 to 165:5). There are no employees of Capitol that are also employed at Respondent. Other than shadowing the Capitol employees, there was no other contact during the transition of work. (Tr. 384:2-18). Moreover, there are distinct differences

between Capitol's business model and Respondent's model, particularly in the use of full time employees compared to Respondent's predominantly part-time workforce. (Tr. 462:3 to 464:12). Respondent was also expected to perform more duties within a shorter time frame as compared to Capitol's previous contract with the Hartford Courant. Respondent utilizes machinery, is more automated, and has a different schedule than Capitol. (Tr. 169:1-24; 189:1 to 190:17). Based upon these facts, Respondent cannot be deemed a successor, which would obligate it to bargain with Capitol's employees. Therefore, Respondent cannot be held liable for violating sections 8(a)(1), (3), or (5) of the NLRA as General Counsel contends.

10. THE ALJ ERRED IN FINDING THAT RESPONDENT FAILED TO FULFILL ITS DUTY TO BARGAIN WITH THE UNION (DECISION, PG. 39, LINES 36-39).

Assuming, *arguendo*, that General Counsel proved unlawful discrimination and refuted Respondent's legitimate business purpose for failing to hire the former employees, then Respondent would be presumed to be a *Burns* successor, thus obligating Respondent to bargain with the Union. "If the successor employer refuses to hire its predecessor's employees because of ant-union discrimination, then the Board presumes that but for the unlawful discrimination the new employer would have hired all or substantially all of the employees when it first started hiring." *Capital Cleaning Contractors, Inc.*, 147 F.3d at 1007-08.

Although it is true that a *Burns* successor must bargain with the union, **the union must request bargaining, in a manner that clearly defines the bargaining unit, to trigger an employer's duty to bargain.** See *Burns*, 406 U.S. at 278-79. A union need utter no particular words to convey its demand for bargaining with a successor employer. The demand may be in writing or it may be oral. However, in conveying its intentions to the successor, the union must

do more than simply suggest a meeting without specifying the subjects of the meeting or when or where the union would like to get together. *Prime Services, Inc. v. NLRB*, 266 F.3d 1233 (D.C. Cir. 2001). If the union does not clearly express its purpose, i.e., if it does not explicitly demand bargaining, then “some indicia of a demand, such as a suggested meeting place and time, proposed topics, and a method for reply” should be conveyed to the new employer. *Williams Enters. Inc. v. NLRB*, 956 F.2d 1226,1233 (D.C. Cir. 1992). The burden is on the union to make its desires known.

The testimony is consistent; the Union never requested bargaining. The Union Representative, Mr. Wojciech Pirog, failed to contact Respondent advising it that he was the bargaining representative or request bargaining on behalf of the Union. (Tr. 51:20 to 54:3; Ex. GC-5, 6, 7, 8, 10, 12). Mr. Pirog also failed to even attempt to contact Respondent concerning the status of the union members’ applications or to request negotiations. (Tr. 338:12-24; 559:12-24; Ex. R-1). The union applicants never communicated to Respondent that they were members of a union nor did the union steward, Ms. DeJesus, announce herself as such. (Tr. 432:6-14; 438:10-17; 540:18-20). Further, Ms. DeJesus did not indicate to Respondent that she was at the interview to negotiate on the Union’s behalf. (Tr. 541:9-11). To date, the Union has not made its demand to bargain with Respondent. Due to the Union’s failure to request bargaining, Respondent’s bargaining obligations have not been triggered, thus Respondent has not violated section 8(a)(5) of the Act.

11. THE ALJ ERRED IN FINDING THAT MARIANNA LUBOWICKA WAS NOT PRESENT TO ACCEPT THE POSITION AT THE TIME THE DECISION TO HIRE EMPLOYEES WAS MADE. (DECISION PAGE 40: LINES 31 THROUGH 32, 50 THROUGH 51).

Ms. Lubowicka was out of town in Poland during the time that the decision was made to hire the crew for the Hartford Current. Further, there is no testimony or other evidence that Ms. Lubowicka, in December of 2011, indicated that she had any interest in the position or that she would be returning. The testimony supporting this conclusion is as follows: Ms. Lubowicka testified that her last day working for the Hartford Courant was November 23, 2011 (Tr. 72:13-23).

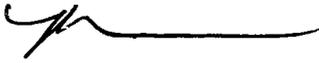
She did not return from Poland until December 18, 2011, almost one week after the new crew was hired. (Id). There is no testimony in the record that she attempted to contact Respondent when she returned or that she had any interest in the position. Further, there is no testimony that Respondent was informed that she would have been available to start on or about December 12, 2011.

CONCLUSION

For the above reasons Respondent requests that the Board reverse the Decision of the ALJ and that all charges against Respondent be dismissed.

DATED this 1st day of August, 2013.

PRESSROOM CLEANERS, Respondent

By: 

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ATTORNEY FOR RESPONDENT

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 34**

PRESSROOM CLEANERS,)	
Charged Party,)	
)	
and)	CASE NO. 34-CA-071823
)	
SERVICE EMPLOYEES)	
INTERNATIONAL UNION,)	
LOCAL 32BJ)	
Charging Party.)	

**AFFIDAVIT OF SERVICE OF PRESSROOM CLEANERS, INC.'S
EXCEPTIONS TO THE RECORD AND PROCEEDINGS**

State of Nebraska)
) ss
County of Douglas)

I, the undersigned counsel for the Respondent, Pressroom Cleaners, Inc., state under oath that on August 1, 2013, I served a true and correct copy of Respondent, Pressroom Cleaners, upon the following counsel of record by first-class U.S. mail, postage prepaid, to:

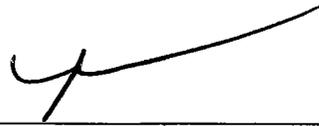
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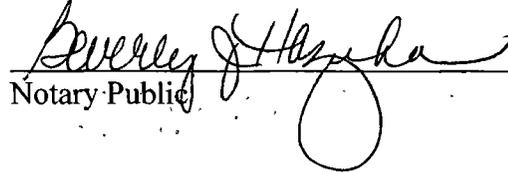
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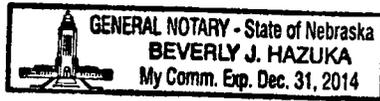


Raymond R. Aranza

Sworn before me this 1st day of August, 2013.



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