

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

PRESSROOM CLEANERS, INC.

and

**SERVICE EMPLOYEES INTERNATIONAL
UNION, LOCAL 32BJ**

Case 34-CA-071823

**COUNSEL FOR THE ACTING GENERAL COUNSEL'S
ANSWERING BRIEF TO RESPONDENT'S 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 (the Board), Series 8, as amended, Counsel for the Acting General Counsel submits this brief in answer to Respondent's Exceptions (Exceptions) to the decision of Administrative Law Judge Fish (ALJD). For the reasons set forth below, and based upon the record as a whole, Counsel for the Acting General Counsel urges the Board to affirm Judge Fish's rulings, finding and conclusions and adopt his recommended Order.

1. Respondent's Exceptions 1 through 3 are entirely without merit.

In its Exceptions 1 through 3, Respondent assails both Judge Fish's factual findings and legal conclusions that certain statements made by Respondent's representatives were unlawfully coercive and further indicative of Respondent's anti-union motive in refusing to hire the predecessor's employees (Exceptions p. 1-8). Unfortunately for Respondent, these three exceptions fail to set forth any new or previously unconsidered facts or arguments not fully explored and properly rejected by Judge Fish. Nor has Respondent presented any evidence that Judge Fish misstated or otherwise misapplied the facts and/or law.

Rather, in its first exception, Respondent merely rehashes its prior credibility arguments that it had set forth for Judge Fish's consideration, over which he carefully deliberated and in the end correctly rejected in finding that Respondent made an unlawful pronouncement of its intention to operate union free (ALJD p. 8, fn 8, lines 43-

51). It is the Board's established policy to leave an ALJ's credibility resolutions undisturbed absent a clear preponderance of all the relevant evidence indicating that an error had been made, as enunciated in *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3rd Cir. 1951). Because Judge Fish's resolution crediting the testimony of employee DeJesus, as substantially corroborated by other employee witnesses, is fully supported by the record evidence, there is no basis in fact or law for overturning this finding.

As for Respondent's second exception, it challenges Judge Fish's conclusion that the credited statement that "Respondent is non-union, does not work with unions, does not deal with unions and does not want a union at all", is unlawfully coercive (Exceptions p. 6-7). In this regard, Respondent solely excepts to Judge Fish's statement that he is "bound by Board law and not the Circuit's reversal of the Board decision in *Brown & Root*" in finding the credited statement unlawful (ALJD p. 23, lines 37-38). Contrary to Respondent's rather unusual contention, Judge Fish's statement correctly delineates the limits of his authority.

Respondent's third exception relates to Judge Fish's reliance on various post-discrimination statements made by Supervisor Teran, found to be violative of Section 8(a)(1), as support for finding an unlawful motive in the earlier unlawful refusal to hire six of the predecessor's employees (a/k/a Capitol employees) (Exceptions p. 7-8). Respondent's exception rests solely on the fact that Teran had not been hired as of the time the hiring decisions had been made. In directly disabusing Respondent of its previously advanced notion that this timing somehow inoculates it from a finding that its hiring decisions were made as the result of anti-union animus, Judge Fish, relying upon firmly established Board precedent, expressly found that "Teran's statements provide an explanation for those hiring decisions, and it is reasonable to infer that Teran, as a supervisor, did know why the decisions were made, even if he did not make them." (ALJD p. 30, lines 36-38). Again, Respondent presents nothing new and not previously considered, addressed and appropriately rejected by Judge Fish. Accordingly, there is no basis for overturning Judge Fish's findings and conclusions.

2. Respondent's Exceptions 4 through 6 are entirely without merit.

Each of the Exceptions enumerated above relate to Judge Fish's factual findings and legal conclusions concerning Respondent's unlawful refusal to hire the predecessor's employees and his application of the *Wright Line* burden shifting analysis.

In Exceptions 4 and 6, Respondent contends that Judge Fish erred by finding that it failed to meet its *Wright Line* burden that it would not have hired the predecessor's employees even in the absence of their union activities and support. Once again, Respondent recycles the exact same stale argument it previously presented, which was thoroughly considered and suitably rejected by Judge Fish. Namely, that the predecessor's employees were not hired because "the decision was made that the employees of Capitol would not be able to perform at the speed and efficiency that [Respondent] was requiring." (Exceptions p. 12). Judge Fish's exhaustive review of this claim is readily apparent. He specifically discarded it as false through the well-grounded resolution of various credibility disputes. Because any reasonable review of the record evidence and the ALJD reveals ample support for Judge Fish's conclusion that "Respondent's purported defenses are pretextual," there is no basis in fact or law for overturning those resolutions (ALJD p. 31, line 18). In light of the Board's deference to ALJ's credibility determinations, further comment on Exception 4 and 6 is unwarranted.

Respondent's fifth exception that Judge Fish erred in finding that the six Capitol employees were not hired because of their union affiliation is similarly unworthy of comment, as sustainment would require reversal of Judge Fish's persuasive and compelling credibility determinations.

3. Respondent's Exceptions 7 and 11 are entirely without merit.

In its Exceptions 7 and 11, Respondent essentially argues that Capitol employees Korzeniecki and Lubowicka were improperly classified as discriminatees in Judge Fish's conclusions of law because: 1) Koreniecki did not express his interest in employment by failing to attend a November 8, 2011 meeting that Respondent persists in terming an

“interview;”¹ and 2) Lubowicka was unavailable for employment at the time the hiring decisions were made as she was on vacation in Poland (Exceptions p. 14 and 18 -19). Quite simply, in order to carry the day, Respondent’s arguments require the utter suspension of critical thinking. It is undisputed that both Koreniecki and Lubowicka’s applications for employment were submitted on both September 26 and November 2, 2011, together with those of the remaining discriminatees (ALJD p 6, line 18; p. 6, lines 44-45). Those applications reflected their ample qualifications (ALJD p. 31, fn 36). As Judge Fish properly found, there is absolutely no evidence that Respondent ever relied upon Koreniecki’s absence from the November 8 meeting as a basis for determining his ineligibility for hire. To the contrary, Respondent remained silent when employee Lubowicka relayed that Korzeniecki was absent because he was not on-duty as his shift started later than the scheduled meeting (ALJD p. 7, lines 27-28). With regard to Lubowicka, her last contact with any Respondent official was during the November 8, 2011 meeting, which ended by Respondent requesting that the Capitol employees make contact if they desired to continue their employment with Respondent - contact which Respondent concedes was made (Tr. 68; 70; 85; 103; 131-32; 224; 357; 526-28). Having had absolutely no discussions or other communications with the Capitol employees as to any expectations concerning hiring eligibility, it stands reason on its head for Respondent to suggest that employees should somehow intuit precisely what those might be. The more likely explanation is that neither Koreniecki nor Labowicka were removed from consideration for the reasons advanced in Respondent’s appeal. Instead, Respondent seized upon these as post hoc justifications, which were clearly not articulated to be objectionable at the time hiring decisions were being made, and, in Lubowicka’s case, were only raised for the first time in the instant appeal.

¹ Although Respondent repeatedly refers to this meeting as an “interview,” if indeed it were, it took on an exceptionally peculiar form as Respondent posed no questions to any of the amassed workers – who, not surprisingly, mostly remained silent (Tr. 246). It is further undisputed that Respondent did not make any direct arrangements with the Capitol employees for their attendance. Rather, it relied upon the predecessor’s supervisor to gather the employees for this meeting. Moreover, it took no action to confirm what steps had been taken to ensure employee attendance, or to discover why Korzeniecki was not in attendance (Tr. 425-26).

4. Respondent's Exception 8 is entirely without merit.

Respondent cites *Noel Canning v. National Labor Relations Board*, 705 F.3d 490 (D.C. Cir 2013) for the proposition that because the Board lacks a legally sufficient quorum, it therefore lacks authority to take any official action including issuing Orders or seeking enforcement with existing Orders (Exceptions p. 15-16). Irrespective of the merits of the Circuit Court's holding in *Noel Canning*, on July 30, 2013, the United States Senate confirmed a full five-member complement of Presidential nominees to the Board. Those members were sworn into office on August 12, 2013. These subsequent developments render moot Respondent's *Noel Canning* argument.

5. Respondent's Exceptions 9 and 10 are entirely without merit.

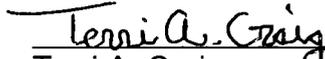
Respondent takes exception to Judge Fish's findings: 1) that it is a successor employer due to the existence of a substantial continuity in the business enterprise; and 2) that it failed to fulfill its bargaining obligations under circumstances in which the Union did not request bargaining.

As to its ninth exception, Respondent has once again failed to bring anything new to the table that would warrant overturning Judge Fish's analysis, findings or conclusions on this point (ALJD p. 35, line 52, through p. 38, line 37). Respondent provides essentially identical cleaning services to the same customer at the same location as the predecessor. The very minor distinctions between the predecessor's operations and Respondent's was fully presented to Judge Fish and correctly rejected as anywhere near sufficient to find a lack of continuity. Likewise, with regard to Exception 10, Judge Fish expressly rejected Respondent's argument, rehashed here, that it cannot be deemed a successor under circumstances in which the Union did not make a demand to bargain (ALJD p. 39, line 31). In doing so he noted, "[i]t is well settled that no bargaining demand was necessary, here, because Respondent's unlawful refusal to hire the predecessor's employees rendered any request to bargain futile [case cites omitted] (ALJD p. 39, lines 31 – 33).

CONCLUSION

As is apparent from the above, Judge Fish conducted an exceptionally detailed and thorough analysis of the record evidence to which he applied appropriate legal precedent. Respondent has failed to supply even so much as a scintilla of support for any of its objections. Accordingly, the Board is urged to reject each of Respondent's Exceptions and to affirm Judge Fish's rulings, finding and conclusions and adopt his recommended Order.

Respectfully submitted this 16th day of August, 2013.



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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the aforesaid Counsel for the Acting General Counsel's Answering Brief to Respondent's Exceptions to the Decision of the Administrative Law Judge was served on August 16, 2013 in the manner set forth below:

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