UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

LATINO EXPRESS, INC.

13-CA-077678
13-CA-078126
And **13-CA-078127**
13-CA-079765
13-CA-082141

TEAMSTERS LOCAL UNION NO. 777, AFFILIATED WITH THE INTERNATIONAL BROTHERHOOD OF TEAMSTERS, AFL-CIO

COUNSEL FOR THE GENERAL COUNSEL'S ANSWERING BRIEF TO RESPONDENT'S EXCEPTIONS TO THE DECISION OF THE ADMINISTRATIVE LAW JUDGE

Administrative Law Judge David I. Goldman[1] correctly held that Respondent Latino Express, Inc., violated Section 8(a)(5) of the Act when it made a unilateral change to the employees working conditions, failed and refused to bargain with the Union, and unlawfully withdrew recognition from the Union. In finding that Respondent violated the Act, the ALJ properly held that Respondent's regressive bargaining, assertion of unlawful proposals in its final offer, insistence on not bargaining over health care, unlawful unilateral implementation of the driver accountability act, and its support for the decertification petition violated Section 8(a)(5) of the Act. (ALJD 18-19) Thus, Respondent clearly demonstrated a consistent disregard for the drivers' bargaining representative.

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[1] Throughout this Answering Brief, the Administrative Law Judge will be referred to as "ALJ," the National Labor Relations Board will be referred to as the "Board," and the National Labor Relations Act will be referred to as the "Act." The Administrative Law Judge's Decision will be referred to as "ALJD __." References to Respondent's Exceptions will be referenced as "Exceptions __." With respect to the parties in this case, Teamsters Local Union No. 777, Affiliated with the International Brotherhood of Teamsters, AFL-CIO will be referred to as "the Union" or "Local 777" and Latino Express, Inc., will be referred to as "Respondent" or "the Employer".

Based upon the coercive nature of these unfair labor practices, which traditional remedies cannot erase, under *Lee Lumber & Building Material Corp. v. NLRB,* 117 F.3d 1454, 1462 (D.C. Cir. 2000), the ALJ properly granted the extraordinary remedy of ordering Respondent to bargain in good faith with the Union for at least six months. (ALJD 28)

Respondent has filed copious exceptions to the factual findings and credibility determinations of the ALJ. Contrary to Respondent's contentions, the ALJ's decision explains in exacting detail the facts and reasoning supporting his decision that the Respondent violated the Act. Nothing contained within the Respondent's exceptions detracts from the ALJ's findings of fact, credibility resolutions and conclusions of law, which appropriately rely upon the evidence contained in the record and are amply supported by legal precedent and should be upheld.

At the outset, the General Counsel notes that numerous of Respondent's 23 Exceptions to the Administrative Law Judge's decision in the instant matter are repetitive and argue the same topics. Because of the nature and volume of exceptions, the General Counsel will address the exceptions in thematic groupings. Further, Respondent's exceptions are largely an effort to challenge the ALJ's credibility determinations. However, as *Standard Dry Wall Products*, 91 NLRB 544 (1950), states, the Board does "not overrule a Trial Examiner's resolutions as to credibility except where the clear preponderance of all the relevant evidence convinces [the Board] that the Trial Examiner's resolution was incorrect." *Id.* The Respondent has failed in its exceptions to show that any of the ALJ's findings are incorrect and necessitate overturning the ALJD. Accordingly, Counsel for the General Counsel requests that all exceptions filed by

Respondent be ignored for failing to comply with Section 102.46(c) of the Board's Rules and Regulations.[2]

I. The Record Clearly Supports the ALJ's Findings with Regard to the Credibility Determinations. (Exceptions 1-4, 6-8, 12 and 15)

Respondent makes unsubstantiated assertions in Exceptions 1-4, 6-8, 12, and 15 regarding the legal conclusions and factual findings made by the ALJ. The Exceptions do not specify the record relied upon in support of the exception, concisely state the grounds for the exception, or set forth the questions of procedure, fact, law or policy to which exception is taken. These blanket assertions, without the requisite supporting argument, hinders the General Counsel's ability to fully address and/or respond to Respondent's Exceptions. Respondent's deficient filing undoubtedly failed to show that any of the ALJ's findings are incorrect and necessitate overturning the ALJD.

Assuming, *arguendo*, that the Board does not strike these exceptions, the lack of citation to record evidence in these exceptions can only mean one of two things, either of which is fatal to Respondent's exceptions: either Respondent is asserting facts that are not in the record, or Respondent is basing its arguments on facts that were not credited by the ALJ. If Respondent is asserting facts that are not in the record, it has not made any motion to reopen the record to introduce any evidence to support such assertions. In any event, it has not made any showing required under Section 102.48(d)(1) of the Board's Rules and Regulations that there are any extraordinary circumstances that would justify reopening the record to introduce such evidence.

On the other hand, if Respondent's assertions are meant to attack the ALJ's credibility determinations, it has provided no argument demonstrating why such determinations should be

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[2] Counsel for the General Counsel has no opposition to Respondent's Exception 13.

overturned. As such, they have failed to provide any basis for disturbing the findings of fact the ALJ relied on. In either case, whether Respondent is asserting new facts or silently challenging the ALJ's credibility findings, its exceptions do not support any alternative findings of fact.

II. Respondent's Misguided Attempt to Recreate the Facts is Without Merit (Exception 5)

Respondent's Exception 5 states that the ALJ correctly found that the decertification petition contained 54 signatures. However, Respondent posits that the decertification petition represented 62.7% of the bargaining unit, which is over the required 30%. Respondent's claim that the 54 signatures, of which only 23 were authenticated, represented 62.7% of the Unit is false and assumes facts not in evidence. The ALJ correctly held that Respondent failed to present any evidence regarding the total number of employees in the bargaining unit at the time that Respondent unlawfully withdrew recognition. In fact, the Intervenors' brief admits that there was no evidence regarding the unit total contained in the record.[3] As was the case with the previous group of exceptions, Respondent has made no attempt to show why the record should be reopened to introduce evidence of the total number of employees employed at the time it withdrew recognition, and thus its argument that the 54 signatures represent more than a majority of the bargaining unit is unsupported by any evidence.[4] Respondent's improper attempt at introducing facts that were not contained in the record should be ignored by the Board.

Finally, Respondent's Exception makes the erroneous claim that the decertification Petition required signatures from 30% of the bargaining unit to be valid. Respondent's confuses the 30% requirement necessary to administratively process a decertification petition with the

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[3] See page 10 of the Intervenors' Exceptions and Brief in Support of Exceptions.

[4] In any event, as will be shown below, Respondent did not prove that all 54 signatures were authentic. The ALJ found that there were 84 employees in the bargaining unit at the time the petition was presented (ALJD 24); thus, the 23 authenticated signatures would represent only 27.3% of the employees.

standards for lawfully withdrawing recognition. Established Board law requires the employer to prove by a preponderance of the evidence that the union had, in fact, lost ***majority*** support at the time the employer withdrew recognition. If it fails to do so, it will not have rebutted the presumption of majority status, and the withdrawal of recognition will violate Section 8(a)(5). *Levitz Furniture Co. of the Pacific*, 333 NLRB 717, 725 (2001)

While 30% is a sufficient showing of interest to support a decertification petition, and thus obtain an election, it is not sufficient to establish that a majority of employees do not support the Union. With respect to the alleged unlawful withdrawal of recognition, the ALJD properly found that Respondent did not prove by a preponderance of the evidence that Teamsters Local 777 had, in fact, lost majority support on April 24, 2012, when the company withdrew recognition. *Id*. (ALJD 20)

III. Respondent's Objection to the Recitation of the Transcript Should be Ignored (Exception 9)

Exception 9 claims to object to "the ALJ's conclusions," which Respondent claims are "in contravention of the testimony and evidence that was submitted." However, the portion of the ALJD cited contains a verbatim quotation from the transcript. Respondent puts forth no argument or supporting basis for its objection. In fact, Respondent fails to even claim that the ALJD did not accurately transcribe the record testimony into the ALJD. Put in the light most favorable to Respondent, this exception appears to challenge the ALJ's choice to credit the testimony of Raymond Del Toro, Sr., contained therein. However, Respondent provides no argument for why the Board should reverse the ALJ's credibility finding, if that is what this exception represents. In any event, there is no basis for reversing this finding. Therefore, the Board should disregard Respondent's specious exception.

IV. The ALJ Made the Appropriate Finding of Fact and Law and Respondent's (Exceptions 10 and 14)

Yet again, Respondent's Exceptions 10 and 14 make unsupported claims attacking the ALJ's findings of fact and conclusions of law. Respondent fails to cite to record testimony or case law that would necessitate a finding that there is any justification for overturning the ALJ. More specifically, with regard to exception 10, although Respondent claims that the ALJ did not "fully describe or provide the basis" for correspondence regarding Respondent's changes to the breakroom, but does not describe what is lacking from the ALJ's description of these changes. Exception 14 challenges the ALJ's conclusion that these breakroom changes would have violated the Act but for Section 10(b), because the changes were not terms and conditions of employment. Yet Respondent cites no case authority for that proposition, and Counsel for the General Counsel has found none that supports Respondent's bald assertion. The break room changes here all fall into the category of miscellaneous benefits for which Respondent was required to bargain. Coffee, smoking, and food services are benefits designed for the comfort of employees. The Board has consistently held that the Board the elimination of a variety of miscellaneous benefits to constitute unlawful unilateral changes. See, e.g., *AT&T Corp.*, 325 NLRB 150 (1997) (paycheck-cashing services); *Beverly Cal. Corp.*, 310 NLRB 222 (1993) (free coffee); *Mercy Hosp. of Buffalo*, 311 NLRB 869 (1993) (late-night cafeteria services); *Chemtronics, Inc.*, 236 NLRB 178, 190 (1978) (coffee, rolls, and smoking privileges); *Yellow Cab Co.*, 229 NLRB 1329 (1978) (drivers taking their cabs home at night); *Master Slack Corp.*, 230 NLRB 1054 (1977) (allowing employees to purchase employer's goods on layaway basis). Likewise here, the pool table and television benefits previously provided to drivers provided comfort and their removal was a clear violation of the Act.

V. Respondent's Flawed Assertion that the ALJ Made Incorrect References to Evidence is Unfounded (Exception 11)

The ALJD's reference to the "welcome back" letter was properly cited to and fully supported by the evidence presented at trial. Unlike the Respondent, the ALJ fully explains his position with regard to the letter and cites to record evidence in support of his position. Counsel for the General Counsel request that Respondent's groundless exception be ignored.

VI. Respondent's Misguided Attack on the ALJ's Conclusions of Fact and Law are Unsupported and Should be Disregarded (Exceptions 16 and 17)

Respondent's Exceptions 16 and 17 fail to show that any of the ALJ's findings are incorrect and necessitate overturning them. Respondent insists on raising objections that do not include any cites to record testimony or case law. Nothing is clear from the Exceptions beyond Respondent's frustration that the ALJ failed to credit its witnesses. As for the objections to the ALJD's accurate and well reasoned recitation of controlling case authority, the ALJ explains in comprehensive detail the legal analysis used in reaching his conclusions. Respondent's failure to cite to even one case that would call into question the ALJ's legal argument makes it abundantly clear that such authority does not exist. Thus, the ALJ's factual findings and conclusions rely upon the evidence contained in the record, are amply supported by legal precedent and should be upheld.

VII. The Record Supports the ALJ's Finding that Respondent Failed to Meet its Burden of Proving that its Withdrawal of Recognition was Lawful. (Exception 18-20)

The ALJ's finding that Respondent's withdrawal of recognition was unlawful is fully supported by the record evidence and controlling case authority. As an initial matter, Respondent makes the superfluous claim that its withdrawal of recognition was based upon a properly authenticated decertification petition. The Board requires employers to properly

authenticate signatures on a decertification petition sufficient to demonstrate that a union has lost majority support. *Ambassador Services*, 358 NLRB 1, 3 fn. 1 (2012). The ALJD properly held that Latino Express failed to carry this burden at the hearing, authenticating, at most, only 23 of the possible 84 employee signatures. (ALJD 24) There is no evidence contained in the record that Respondent made any attempt to authenticate the signatures on the petition prior to illegally withdrawing recognition. Respondent failed to present any citation to the record to support its position and all such claims should be disregarded.

Respondent also contends that the ALJ erred in finding that *Chelsea Industries*, 331 NLRB 1648 (2000), *enfd.* 285 F.3d 1073 (D.C. Cir. 2002), requires the signatures on a decertification petition be collected after the conclusion of the certification year. Respondent does not refer to any specific language within *Chelsea* for the basis of its claim. Instead, Respondent simply restates the general holding that a petition signed by a majority of employees provides the necessary evidence to lawfully withdraw recognition. In *Chelsea Industries*, 331 NLRB 1648 (2000), the Board held that an employer may not withdraw recognition from a union outside of the certification year based upon evidence received within the certification year. See also *United Supermarkets*, 287 NLRB 119 (1987) *enfd*. 862 F.2d 549 (5th Cir. 1989). It is improper for an employer to rely on an anti-union petition that was circulated to employees prior to the expiration of the certification year in order to justify an otherwise timely withdrawal of recognition. *Chelsea Industries*, 331 NLRB at 1648 (proof of loss of majority support justifying withdrawal of recognition may not be demonstrated "after expiration of the certification year . . . on the basis of an antiunion petition circulated and presented to the employer during the certification year."); *United Supermarkets*, 287 NLRB at 120 , (the Board held that just as a decertification petition filed with the Board during a certification year cannot provide a basis for

a decertification election, an employer cannot not rely on a decertification petition filed prior to the end of the certification year to justify its withdrawal of recognition). Accordingly, given that Respondent failed to authenticate the signatures on the decertification petition and had knowledge that the signatures were acquired prior to the end of the certification year; Respondent's withdrawal of recognition was unlawful pursuant to *Chelsea Industries*. (ALJD 23)

Finally, Respondent's Exceptions attempt to shift the burden of proof for a proper withdrawal of recognition. Respondent tries to place the burden upon the Petitioner and ALJ in proving that the signatures were not authenticated. Respondent once again fails to present any case authority for its argument. The Board has properly found that after the expiration of the certification year, an "employer may rebut the continuing presumption of an incumbent union's majority status, and unilaterally withdraw recognition," but "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, 725 (2001). As the Board in *Levitz*, supra at 725, explained, an employer's resort to "self-help" measures to reject its employees' unionization (i.e., a unilateral withdrawal of recognition) carries some risk for the employer: [A]n employer with objective evidence that the union has lost majority support—for example, a petition signed by a majority of the employees in the bargaining unit—withdraws recognition at its peril. If the union contests the withdrawal of recognition in an unfair labor practice proceeding, the employer will have to prove by a preponderance of the evidence that the union had, in fact, lost majority support at the time the employer withdrew recognition. If it fails to do so, it will not have rebutted the presumption of majority status, and the withdrawal of recognition will violate Section 8(a)(5). Respondent is essentially arguing that the Board should overturn its well reasoned and long standing holding in *Chelsea.* Counsel for the General Counsel posits that outside of its

dissatisfaction with controlling case authority, Respondent has presented no argument which would necessitate the overturning of *Chelsea* and its positions should be ignored.

VIII. Respondent has Proffered no Legitimate Rationale for Overturning the ALJD's Conclusions and Findings of Fact[5] (Exceptions 21-23)

As argued above by Counsel for the General Counsel, there is absolutely no support for any of the Exceptions filed by Respondent, including its general exceptions to the ALJ's conclusions of law and order. While certainly imaginative, Respondent's Exceptions to the ALJ's Decision do not alter the substantial record evidence demonstrating that Respondent violated Section 8(a)(5) of the Act. Moreover, certain exceptions are based on grossly mischaracterized testimony or evidence that was not contained in the record at all, and seek to challenge credibility resolutions which should not be disturbed. Accordingly, the Board should deny Respondent's exceptions in their entirety.

CONCLUSION

Based upon the foregoing, the entire record in this case, and the Decision of Administrative Law Judge Goldman, Counsel for the General Counsel submits that Respondent's Exceptions to the Administrative Law Judge's Decision fail to comply with Section 102.46 (c) and are wholly without merit. Counsel for the General Counsel respectfully requests therefore, that Respondent's Exceptions be dismissed in their entirety and Judge Goldman's recommended Decision, Order and Remedy by affirmed.

DATED at Chicago, Illinois, this 23rd day of December, 2013.

/s *Sylvia L. Taylor*
Sylvia L. Taylor

[5] Counsel for the General Counsel is in agreement with the entire of the ALJ's findings, outside of the limited matters contained in Counsel for General Counsel's cross exceptions.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that the foregoing **COUNSEL FOR THE ACTING GENERAL COUNSEL'S ANSWERING BRIEF** was electronically filed with the Executive Secretary of the National Labor Relations Board on December 23, 2013, and true and correct copies of the document have been served on the parties in the manner indicated below on that same date.

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