UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 13

POLYCON INDUSTRIES, INC.

and

CASE: 13-CA-104249

TEAMSTERS LOCAL UNION NO. 142, AFFILIATED WITH THE INTERNATIONAL BROTHERHOOD OF TEAMSTERS

COUNSEL FOR THE GENERAL COUNSEL'S REPLY BRIEF TO RESPONDENT'S ANSWERING BRIEF

Pursuant to Section 102.46(h) of the Board's Rules and Regulations, Cristina Ortega, Counsel for the General Counsel (General Counsel), respectfully files this Reply Brief to the Answering Brief filed by Polycon Industries, Inc. (Respondent).[1] For the reasons described below, the matters asserted by Respondent in its Answering Brief are without merit, and the Board should grant the General Counsel's Cross-Exceptions.

In its Cross-Exceptions, the General Counsel submits that the ALJ erred by failing to find that the parties met on March 11, 2013[2], reached a meeting of the minds on the contract terms on this date, and that Respondent subsequently failed and refused to execute this collective-bargaining agreement that it reached with the Union. (Cross-Exceptions 1 through 3). Respondent, in its Answering Brief, argues that the only reason it refused to accept the March

[1] In this brief, the Administrative Law Judge will be referred to as "the ALJ"; the National Labor Relations Act will be referred to as "the Act"; the National Labor Relations Board will be referred to as "the Board"; Polycon Industries, Inc. will be referred to as "Respondent"; and Teamsters Local Union No. 142, Affiliated with the International Brotherhood of Teamsters will be referred to as "the Union" or "Local 142". Citations to the ALJ's Decision will be referred to as "ALJD" followed by the specific page(s) and line(s) referenced. With respect to the record developed in this case, citations to pages in the transcript will be designated as "Tr." followed by the page number. The General Counsel's exhibits will be designated as "GC"; Joint exhibits as "JT"; and Respondent's exhibits as "R" followed by the exhibit number.

[2] All dates hereinafter are in 2013 unless otherwise indicated.

2013 contract was because of an invalid union security clause. However, the facts of this case clearly demonstrate that Respondent rejected the March 11 contract as a deliberate delay tactic to evade its legal obligation to sign the contract. Specifically, Respondent raised the issue concerning the contract's union security clause at the conclusion of bargaining the contract and after the Indiana right-to-work statute had already been in effect for the past year. Moreover, Local 142 made many attempts to cure the contractual language, pursuant to the agreement's saving clause, which enables the parties to remedy an invalid contractual provision. However, Respondent caused further delay by ignoring Local 142's repeated communications and Board law does not allow Respondent to delay executing the agreement under the facts of this case. As such, there was a complete and enforceable contract as of March 11.

In its Cross-Exceptions, the General Counsel also submits that the ALJ's finding that there were 106 unit employees as of May 22 was not based on competent evidence. (Cross-Exception 4). In its Answering Brief, Respondent argues, wrongly, based on hearsay evidence, that the ALJ correctly concluded the total number of employees. Respondent also argues, wrongly, that the burden to demonstrate the total number of unit employees at the time it purportedly received actual knowledge of the Union's lack of majority support is on the General Counsel. Respondent failed to present a scintilla of evidence (e.g. payroll records) to corroborate the number of employees listed on the Petition filed with the Board. Without corroborating evidence, the number of employees listed on the Petition should not be used as a basis for a finding of fact. Here, the Respondent failed to present evidence of a numerical loss of majority support because, inter alia, it failed to establish the total number of unit employees at Respondent.

I. RESPONDENT WAS OBLIGATED TO EXECUTE THE AGREEMENT AS REACHED ON MARCH 11, 2013. (Cross-Exceptions 1 through 3)

In its Answering Brief, Respondent admits that in March 2013, the parties agreed to correct the typographical error in the vacation provision of the contract. Respondent is implicitly admitting, therefore, that the parties had a meeting of the minds on a final contract and the vacation provision, as written, was a mere typographical error subject to correction. Respondent also admits that the only reason it refused to execute the March 11 agreed-upon contract was due to an invalid union security clause. In its final desperate attempt to excuse its refusal to execute the contract, Respondent raises a brand new claim in its Answering Brief, a fear of criminal prosecution for signing a contract with an invalid union security clause. Respondent's argument that it was following State law, and, therefore, there can be no violation of the Act, is incorrect and false. What Respondent conveniently fails to take into account, and completely fails to address in its Answering brief is that the March 11 agreed-upon contract contained a saving clause to cure an invalid provision. Therefore, Respondent cannot benefit from its own unlawful conduct, namely, failing to execute the document that accurately reflected the agreement that embodied the terms of the parties March 11 agreement by thereafter claiming that the Union no longer had majority support from the unit employees.

Under the March 11 agreement, the parties expressly agreed that if a clause was invalid by operation of law, the rest of the contract remained intact and the parties must negotiate a mutually satisfactory replacement to remedy the invalid provision. JT 6 and 7. After the Indiana right-to-work statute had already been in effect for a full year, Respondent raised on March 12, for the first time, that it could not sign the agreed-upon contract with an invalid union security clause. This refusal, however, was patently unjustified given the fact that the contract included the aforementioned saving clause that dealt with just such a scenario.

Accordingly, Respondent's claim that it could not execute the agreement because the contract's invalid union security clause could result in criminal penalties is patently wrong. Here, pursuant to the contract's saving clause, the union security provision was null and void when the Indiana right-to-work statute went into effect, in March 2012. Given this, neither the Union nor Respondent was at risk of violating the State law. Under these circumstances, the parties were obligated, based on the terms of the agreement they reached, to negotiate new language. Instead, Respondent repeatedly ignored the Union's attempts to remedy the invalid provision with proposed union security language for over a month. JT 8, 9 and 12.

Board cases, *Flying Dutchman* and *Stein Printing* are instructive to the instant case. *Flying Dutchman Park, Inc.*, 329 NLRB 414 (1999); *Stein Printing Co.*, 204 NLRB 17 (1973). In these cases, the Board did not permit an employer to avoid its obligation to execute an agreed-upon contract where the refusal to sign the contract was motivated by unlawful considerations other than the presence of an invalid union security clause. Specifically, in *Flying Dutchman*, the Board required the employer to execute its contract excluding the disputed provision. 329 NLRB at 418. In *Stein Printing*, the Board found the employer's refusal to execute the contract valid because, unlike the instant case, the employer stood willing to sign the contract without the offending provision. 204 NLRB at 23. Here, the contract included a specific mechanism to negotiate new union security language and yet, Respondent steadfastly refused to sign the agreement. Furthermore, Respondent did not offer to sign the contract without the offending provision. Given that Respondent's argument lacks merit, it should be rejected. The General Counsel respectfully requests that the Board find merit to Cross-Exceptions 1-3.

II. THE RECORD IS DEVOID OF COMPETENT EVIDENCE TO REACH A FINDING OF FACT AS TO THE TOTAL NUMBER OF UNIT EMPLOYEES AT RESPONDENT'S FACILITY. (Cross-Exception 4)

Respondent's primary defense in this case is its claim that it had actual knowledge that the Union lacked majority support by May 9. In response to the General Counsel's Cross-Exception taking issue with the ALJ's conclusion that Respondent proved the overall number of employees in the unit as of that date, and therefore even minimally established its defense, Respondent makes two arguments. First, Respondent claims the General Counsel should have timely asserted a hearsay objection to the admissibility of factual assertions on the face of the Petition filed with the Board regarding the total number of employees listed on this Petition. Respondent notes also that, *if corroborated by additional evidence*, this assertion could be accepted as conclusive by the trier of fact. Answering Brief at. p. 4. However, the record lacks any such corroborating evidence. Accordingly, Respondent doesn't even attempt to point to any such evidence in its Answering Brief. Here, the ALJ improperly relied on a document, admitted by Respondent to be hearsay evidence, without any corroborating evidence to make a competent conclusion as to the total number of unit employees.

Respondent's second claim that it established a numerical loss of majority support is also blatantly unavailing. Respondent belabors an explanation on how to determine a mathematical percentage without the most crucial component to its equation, an exact numerical denominator representing the total number of unit employees. Here, absent the admitted hearsay evidence derived from the face of the representation petition filed with the Board there is not one iota of evidence establishing how many employees were employed by Respondent at any given time. Moreover, in making its patently wrong mathematical argument, Respondent not-so-subtly

attempts to shift the burden to the General Counsel to prove the overall number of employees in the unit. Respondent's claims utterly fail for the reasons discussed below.

Here, the ALJ found that the parties reached a meeting of the minds on May 3 and Respondent unlawfully refused to execute the agreement sent to it on May 7 that reflected the parties' May 3 agreement. ALJD p. 12, lns 4-7. It is undisputed that as of May 3, the date that Respondent and Local 142 reached a meeting of the minds, Respondent had not raised the issue of the Union's majority support or lack thereof. It wasn't until after the Respondent agreed to the contract terms that it questioned the Union's majority support. However, as of May 3, the Union was entitled to an irrebuttable presumption during the term of its contract (up to three years) that it enjoyed the support of a majority of bargaining unit employees. ALJD p. 13, Fn. 11; *Auciello Iron Works*, 517 U.S. 781, 785 (1996).

Despite the parties having reached a meeting of the minds on a final contract on May 3, the ALJ entertained one of Respondent's earlier defenses that it had knowledge of the Union's lack of majority support prior to its May 3 contract agreement. ALJD p. 13, lns 4-6. In so doing, the ALJ examined whether the employee-circulated decertification petition contained sufficient signatures to demonstrate that the Union lacked majority support. However, Respondent failed to present a scintilla of evidence (e.g. payroll records) to warrant a competent finding on the total number of employees at Respondent to make a determination on whether the Union, at any point in time, lacked majority support. Rather, the ALJ improperly relied on assertions made on the face of a Petition that was filed with the Board three weeks later, on May 22, to make a finding of fact that as of May 3, 106 unit employees were employed by Respondent. JT 18; ALJD p. 9, fn. 7 and p. 13, lns 13-15.

The Petition was entered into evidence as a joint exhibit on the basis that the document is what it purports to be, a document filed with the Board on May 22. JT 18. There was no representation made at the hearing that Respondent intended to use the document as proof of any factual matter contained therein. Therefore, the General Counsel's admission as to the authenticity of the employee-filed Petition does not serve as a source for Respondent, or the ALJ, to rely on assertions contained in the document to prove any particular matter asserted in the document including the listed number of employees in the unit. Thus, as Respondent impliedly concedes, this is plainly hearsay that should not be relied upon to establish the overall number of employees in the unit at any particular time. Moreover, as Respondent specifically admits in its Answering Brief, without corroborating evidence, hearsay evidence alone should not be used as a basis for a finding of fact. *RJR Communications, Inc.*, 248 NLRB 920, 921 (1980) ("Courts have long recognized that hearsay evidence is admissible before administrative agencies, if rationally probative in force *and if corroborated* by something more than the slightest amount of other evidence") (emphasis added). Here, the only evidence of the number of employees in the unit is this plainly hearsay evidence that is wholly uncorroborated. Respondent has therefore failed to present sufficient information to permit the ALJ to make a reliable conclusion that there were 106 unit employees at any point in time.

Respondent's second argument as to this Cross-Exception is equally unavailing. Despite the lack of evidence on this point, Respondent argues that it established a numerical loss of majority support. Respondent bears the burden to establish the necessary elements of its defense and it has failed to do so. The Board made clear in *Levitz Furniture Co. of the Pac., Inc.*, that it is, "entirely appropriate to place the burden of proof on employers to show actual loss of majority support." 333 NLRB 717, 725 (2001). The Board reasoned, "the general rule is that the

party raising an affirmative defense—e.g., that an incumbent union has lost its majority status, as a defense to an 8(a)(5) charge—has the burden of establishing that defense." *Id.*

Respondent painstakingly discusses in its Answering Brief that a majority status is dependent upon a ratio of employees who signed the petition divided by a total number of employees. Respondent, however, failed to establish the denominator in its question, the total number of unit employees at any relevant point in time. Putting aside the hearsay nature of the petition, it is not probative as to the number of employees at the time of the claimed loss of majority, since it was filed weeks after the purported loss. Thus, any reliance on a Petition filed with the Board weeks after Respondent raised the Union's majority support status is misplaced. Moreover, as discussed, the Petition is not competent evidence to establish the total number of employees at Respondent. At its core, Respondent failed to meet its burden of establishing its defense because it failed to provide evidence of the exact number of employees in the unit at the time it claimed the Union lost majority. By failing to establish the total number of employees through competent evidence, Respondent cannot effectively present a numerical loss of majority support, as required under *Levitz*.

Similarly, Respondent failed to establish the numerator in its equation. As the ALJ found, "as of May 3, forty-two (42) employees had signed and dated the decertification petition. That number rose to forty-nine (49) employees by May 6. An additional eleven (11) employees signed the petition, but there is no evidence (such as a date next to their signature) that established precisely when they did so." ALJD p. 9, fn. 7. Without more, Respondent's mathematical equation in its Answering Brief fails. Moreover, per *Levitz*, supra, Respondent's assertion in its Answering Brief that the General Counsel carries the burden to demonstrate the

total number of unit employees at the time Respondent purportedly received knowledge of the Union's lack of majority support is grossly misplaced.

Finally, it is worth noting that any argument by Respondent that it had actual knowledge that the Union lacked majority support after May 3 is irrelevant. The parties reached a final contract no later than May 3 and therefore Local 142 enjoys an irrebuttable presumption of majority support as of this date. Further, the record evidence does not support Respondent's claim that it received any petition as of May 9. Specifically, CFO/VP Bill Hansen admitted that he had only seen one or two pages of the employee-circulated petition prior to May 7 and he had not seen the document in its entirety until after he received notice from the Labor Board that a Petition, dated May 22, was filed. Tr. 65. Regardless of what point in time Respondent claims it had knowledge of the Union's lack of majority support (prior to May 3 or by May 9), the evidence falls well short of carrying Respondent's burden of establishing the necessary elements of its defense that a numerical majority no longer wanted Local 142 as its collective-bargaining representative. At issue here, is General Counsel's exception to the ALJ's reliance on an employee-filed Petition with the Board to conclude the total number of unit employees at Respondent. The General Counsel requests that the Board find merit to this exception.

III. CONCLUSION

General Counsel maintains that the ALJ erred in not finding that the parties had a "meeting of the minds" and reached an agreement on the terms of a collective-bargaining agreement on March 11. Having reached an agreement, Respondent violated Section 8(a)(5) of the Act by refusing, as of March 12, to execute the March 11 agreed-upon contract. General Counsel also maintains that the ALJ erred in relying on a Petition filed with the Board to make a finding of fact as to the total number of unit employees at Respondent. As such, the General

Counsel respectfully requests that the Board sustain the Cross-Exceptions, overrule the ALJ's findings on these issues, and hold that Respondent failed and refused to execute the March 11 agreement it reached with the Union.

Dated at Chicago, Illinois, this 4th day of February, 2014.

Respectfully submitted,

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CERTIFICATE OF SERVICE
13-CA-104249

I certify that on this 4th day of February 2014, a true and correct copy of Counsel for the General Counsel's Reply Brief to Respondent's Answering Brief was served by electronic mail upon the following parties of record:

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