

UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD

STANDARD PARKING, IMPERIAL PARKING, )  
AMPCO SYSTEM PARKING d/b/a ABM )  
PARKING SERVICES, LAZ PARKING, )  
INTERPARK, individually and on behalf of )  
CHICAGO PARKING ASSOCIATION, )  
Respondents, )  
and )  
TEAMSTERS LOCAL NO. 727, )  
Charging Party )

CASE NO.: 13-CA-071259

**RESPONDENTS' REPLY BRIEF IN SUPPORT OF THEIR CROSS-EXCEPTIONS  
TO THE DECISION OF THE ADMINISTRATIVE LAW JUDGE & IN RESPONSE TO  
THE COUNSEL FOR GENERAL COUNSEL'S AND TEAMSTERS LOCAL 727'S  
BRIEFS IN RESPONSE TO RESPONDENTS' CROSS-EXCEPTIONS**

**STANDARD PARKING, IMPERIAL PARKING,  
LAZ PARKING, AMPCO SYSTEMS PARKING D/B/A ABM  
PARKING SERVICES, INTERPARK**

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Pursuant to Section 102.46 of the Rules and Regulations of the National Labor Relations Board ( “the Board”), Respondents InterPark LLC, Imperial Parking, Standard Parking, LAZ Parking, and ABM Parking Services (collectively “Respondents”) respectfully submit the following reply brief.<sup>1</sup>

## **I. ARGUMENT**

### **A. The Union’s And The General Counsel’s Factual Statements Improperly Deviate From The ALJ’s Findings And Omit And Mischaracterize Key Facts**

Rather than addressing the findings in the ALJ’s opinion to which Respondents cross-  
except, both the General Counsel and Teamsters Local 727 (“the Union”) improperly use their  
answering briefs to reargue the facts in support of their own original exceptions. This is both an  
impermissible and entirely unfair maneuver. For example, the General Counsel persists in her  
argument that the parties reached a full, final, and binding agreement on October 28, 2011 at  
3:07 p.m. GC Br. at 2, 5, 18-23, 39.<sup>2</sup> This is not what the ALJ found in his decision; rather, he  
expressly concluded that the parties’ operative agreement arose on October 13-14, 2011. JD at  
24. While the General Counsel may disagree with this conclusion, Respondents did not dispute  
this finding in their cross-exceptions. Thus, it is improper and, indeed, is evidence of the  
General Counsel’s desperation that she argues this point in her answering brief.

Simply put, the answering brief does not provide the General Counsel and the Union a  
second opportunity to recite a false, but more favorable version of the facts, and to reargue their

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<sup>1</sup> Citations herein will be as follows: citations to the ALJ’s October 25, 2013 decision will be “JD”; citations to the hearing transcript will be “Tr.”; citations to the General Counsel’s trial exhibits will be “GCX”; citations to Respondents’ trial exhibits will be “RX”; citations to the Union’s Answering Brief will be “Un. Br.”; citations to the General Counsel’s Answering Brief will be “GC Br.”; citations to Respondents’ Cross-Exceptions Brief will be “RCX Br.”; and citations to Respondents’ Post-Hearing Brief will be “RPH Br.”

<sup>2</sup> Notably, the Union appears to concede, as Respondents have consistently argued and as the ALJ found, that the parties in fact concluded a tentative agreement on October 13-14, 2011. *See* Un. Br. at 20-21 (chronicling the series of offers and acceptances that occurred on October 13-14, 2011 and culminated in parties’ agreement).

objections to the ALJ's findings. They had every opportunity to do just that via their own exceptions to the ALJ's decision. The Union's and General Counsel's answering briefs are limited to addressing the merits of Respondents' cross-exceptions to the ALJ's findings. Thus, any facts asserted by the Union or the General Counsel that deviate from the ALJ's findings and do not pertain to Respondents' cross-exceptions should be disregarded.

Furthermore, in recounting their version of the facts, both the General Counsel and the Union again intentionally omit key facts and resort to mischaracterizations of the record evidence. For instance, the General Counsel and the Union urge that the wage progressions within each of the parties' collective bargaining agreements (CBAs) from 1996 through 2011 were "identical" GC Br. at 8-9; Un. Br. at 3. This is flatly wrong. As Respondents detailed in their cross-exceptions brief, the format, structure, and rates of the wage scales evolved from contract to contract. RCX Br. at 3-6, 21-22. Most critically, in the 1996 and 2001 CBAs, the two-wage progressions converged upon five (5) years of service, meaning newly-hired employees reached wage parity with the more senior employees. JD at 4-5; GCX 5, 6. By contrast, in the 2006-2011 CBA, the parties (for the very first time) adopted a true, two-tier wage scale, meaning that newly-hired employees did not achieve wage parity ever and received a pay rate permanently fixed at \$2.00 below more senior employees. JD at 4-5; GCX 7. Thus, in the 2011 negotiations, the parties, for the first time ever, addressed the issue of separate wage scales for two tiers of employees. Despite these irrefutable and undeniably salient facts, neither the General Counsel nor the Union specifically mention the \$2.00 wage differential in their recitation of the facts. GC Br. at 6-28; Un. Br. at 1-12.

The General Counsel further argues that "it is undisputed that these two tiers for wages . . . in the Union's October 28, 12:05 [p.m.] contract submission *never changed* from the Union's

very first written proposal made on September 27.” GC Br. at 20 (emphasis in original); *see also* GC Br. at 39-40 (“the contract proposals proffered by the Union contain the actual wage rates which were proposed from the time of the very first bargaining session on September 27”). Contrary to the General Counsel’s argument, this claim is facially untrue. The Union’s initial, September 27, 2011 offer did not contain a \$2.00/hour wage increase nor did it contain identical wage rates to those that appear in the drafts exchanged between October 18, 2011 and October 28, 2011.<sup>3</sup> Indeed, after reviewing the Union’s September 27, 2011 offer, the ALJ found:

With previous contracts, the parties created the wage scales for “existing employees” by referring to the expiring contract and adding the agreed-upon annual wage increase to the wages shown in the final year (row) of the wage scales for new hires . . . . *The wage scales in the Union’s September 27 proposal, however, did not follow that formula, and it is not clear what alternative formula the Union used to create the wage scales in that proposal.*

JD at 7-8, n. 15 (emphasis added). The ALJ’s factual finding was for good reason: the Union’s September 27, 2011 offer provided for immediate wage increases, ranging from \$1.20/hour to \$2.00/hour (in addition to the proposed \$1.00/hour across-the-board annual wage increase), for newly-hired employees upon transitioning to the new contract. *Compare* GCX 7, Art. 8.2 to GCX 11, Art. 8.2; *see also* RPH Br. at 66-69.

In the end, both the Union’s and the General Counsel’s Answering Briefs are premised on fatally flawed facts and legal arguments. Therefore, absent affirmance of the ALJ’s decision, Respondents’ Cross-Exceptions should be granted.

**B. The General Counsel’s And The Union’s Apparent Authority Argument Constitutes An Impermissible Double Standard**

The Union and the General Counsel both contend that Fred Schwartz was authorized to negotiate on behalf of and bind Respondents to an agreement. Un Br. at 43-48; GC Br. at 29-32.

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<sup>3</sup> Notably, and as evidence of the Union’s sloppiness in document management, there were two different offers labeled and dated as the Union’s Initial Offer. *Compare* GCX 11, pg. 18 to RX 4, pg. 18.

In so arguing, the Union and General Counsel both rely on *A.W. Farrell & Sons*, 359 N.L.R.B. No. 154 (2013), in which the Board held that an agent assigned to negotiate a collective bargaining agreement has apparent authority to bind its principal *unless clear and timely notice is given to the other parties that any tentative agreement is contingent upon subsequent approval or ratification*. Un. Br. at 44; GC Br. at 29 (emphasis added).

Applying this principle, the Union and the General Counsel contend that Mr. Schwartz had – at a minimum – apparent authority to enter into an agreement on behalf of Respondents because at no point during negotiations did he convey any limitation on his bargaining authority to the Union. Un. Br. at 43-48; GC Br. at 29-32. In stark contrast, Mr. Coli Jr. on multiple occasions clearly and expressly communicated to Mr. Schwartz that any agreement reached during negotiations would be subject to ratification. Thereby, he provided sufficient notice under the standard articulated in *A.W. Farrell Sons* that his negotiating authority was limited. *See* JD at 5-6 n.9; 8 nn. 16, 18; 12; *see also* GCX 8, 14, 15, 21. Indeed, the Union refused to discuss correcting the error in the wage progressions because contract ratification was already in progress. *See* JD at 14-15; GCX 30.

The ALJ concluded that Mr. Coli Jr.’s communications with Mr. Schwartz did not give rise to an *express agreement* between the parties that ratification would be a condition precedent to an enforceable agreement. JD at 5-6, n.9.<sup>4</sup> The ALJ, however, failed to address Respondents’ argument that no express agreement was necessary and that Mr. Coli Jr. could *unilaterally* limit his negotiating authority and did so by virtue of his representations that any agreement was subject to ratification. In fact, relying on the very arguments and the very cases advanced by the General Counsel and the Union, Respondents argued in both their Post-Hearing and Cross-

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<sup>4</sup> A finding to which Respondents have specifically excepted. *See* RCX Br. at 2-3, Exceptions 10, 11, 12.

Exceptions Briefs that fundamental principles of agency law – to which the Board subscribes – compelled the conclusion that Mr. Coli Jr.’s bargaining authority was limited by his representations regarding ratification. RPH Br. at 98-104; RCX Br. at 42-44.

The Union’s and the General Counsel’s apparent authority argument highlights the impermissible double standard applied in this case, which is based solely on the party whose agent was involved – Union vs. Employer. Under their theory, absent clear and express notice of any restrictions on his negotiating authority, Mr. Schwartz was able to fully and finally bind Respondents to any agreement reached during bargaining. By contrast, despite *giving* clear and express notice that his authority *was* limited, Mr. Coli Jr. still remained able to bind the Union to any agreement reached during bargaining. This disparate standard is impermissible under rudimentary agency law and under the long-standing rule that an employer’s duty to bargain under Section 8(a)(5) and a Union’s duty to bargain under Section 8(b)(3) should be applied and interpreted in the same manner. *See, e.g., Sage Dev. Co.*, 301 N.L.R.B. 1173, 1192 (1991) (“The duty to bargain imposed upon a labor organization by Section 8(b)(3) is the same as that imposed upon employers under Section 8(a)(5).”). Moreover, such a rule violates the due process clause. *See Yick Wo v. Hopkins*, 118 U.S. 356, 373-74 (1886) (“Though the law itself be fair on its face and impartial in appearance, yet, if it is applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the Constitution.”).

Thus, absent affirmation of the ALJ’s opinion, the Board should remand this case to the ALJ to make further findings on Respondents’ argument that, consistent with agency law

principles and an entire line of Board precedent, the Union may limit its agent's authority by unilaterally giving notice that any tentative agreement requires ratification.

**C. Section 10(b) Requires Actual Service Upon The Charged Party & The Board Lacks Authority To Rewrite The Statute**

Both the General Counsel and the Union argue that the statutory language of Section 10(b) (which uses a term of art and requires the Union to effect “service of a copy [of the charge] upon the person against whom such charge is made”) should be rewritten to permit the Union to provide only “*notice of* [the charge to the person] against whom such charge is made.” GC Br. at 32-38; Un. Br. at 25-33; 29 U.S.C. § 160(b). Relying on “policy” considerations, both the Union and the General Counsel contend that actual notice satisfies Section 10(b)'s service requirement so long as it allows the investigation process to commence without prejudice to the charged party. GC Br. at 38; Un. Br. at 32-33.

As an initial matter, in opposing Respondents' service arguments, the General Counsel and the Union again disregard the ALJ's findings and concoct facts not supported by the evidence. The Union, for instance, incorrectly contends that Respondents “never once rais[ed] an issue of improper service” during the charge investigation process. Un. Br. at 32. The Union is wrong. As Respondents pointed out in their Cross-Exceptions Brief, the Regional Office initially dismissed the charge for lack of service, only to be reversed by the Office of Appeals.<sup>5</sup> Clearly then, from the outset of this dispute, service of the charge as deficient has been an issue.

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<sup>5</sup> In their Cross-Exceptions brief, Respondents urged that the Board take judicial notice of the fact that the Region initially refused to issue a Complaint in this matter, citing insufficient evidence to show the charge was filed and served within the statutory 10(b) period and attached the Region's September 12, 2012 dismissal letter as Exhibit A to their brief. RCX Br. at 34 n.11. The General Counsel argues that the dismissal letter should be stricken as irrelevant and unauthenticated. GC Br. at 38 n.30. Board law, however, clearly permits the Board to take judicial notice of form letters utilized by the Regional Offices of the NLRB. *See Washington Hosp. Ctr.*, 270 N.L.R.B. 396, 396 (1984) (taking judicial notice of dismissal letter).

Likewise, the General Counsel argues that service was sufficient because, like the charge at issue in *United Electrical Contractors Association*, 347 N.L.R.B. No. 1 (May 15, 2006), “the Union’s charge named the multiemployer bargaining agent.” GC Br. at 34. Here, the ALJ specifically concluded that Respondents engaged in “coordinated” bargaining with the Union, and neither the Union nor the General Counsel has excepted to this finding. JD at 3, 21, 21 n.36. There is a vast difference between multiemployer bargaining and coordinating bargaining. Thus, once again, the General Counsel completely ignores the ALJ’s undisputed findings in this matter and impermissibly fabricates facts to better suit her arguments.

Regardless of the Union and General Counsel’s flawed factual assertions, recent case law has clearly demonstrated that the Board is constrained to act within the dictates of the NLRA and the Constitution. *See, e.g., New Process Steel v. NLRB*, 130 S. Ct. 2635 (2010) (NLRB cannot issue decision in the absence of a quorum); *Chamber of Commerce v. NLRB*, 721 F.3d 152 (4th Cir. 2013) (Board lacks authority to require posting of notices or to create new unfair labor practices); *Noel Canning v. NLRB*, 705 F.3d 490 (D.C. Cir. 2012) (appointments made when Senate not in recess not valid).

The NLRA, by its own terms, requires “service” of the charge upon the charged party. 29 U.S.C. § 160(b). FRCP 4(h)(1)(B) defines “service” upon a corporation, in part, as receipt by an agent authorized “to receive service.” Nothing in Rule 4 suggests receipt by an attorney alone constitutes service. *See also* RCX Br. at 33 and cited cases. By rewriting the Act to provide for a “notice” or “prejudice” standard, the Board has exceeded its authority. Thus, to the extent the General Counsel and the Union assert that service, although technically deficient, was sufficient because Respondents received actual notice and/or suffered no prejudice, those arguments should be rejected. *See Air Wis. Airlines Corp. v. Hoeper*, No. 12-315, \_\_\_\_ U.S. \_\_\_\_, slip. op. at 8

(Jan. 27, 2014) (“[I]t is a cardinal rule of statutory construction that, when Congress employs a term of art, it presumably knows and adopts the cluster of ideas that were attached to each borrowed word in the body of learning from which it is taken.”)

Finally, as the Supreme Court recently made clear, an individual “may be an agent for some business purposes and not others so that the fact that one may be an agent for one purpose does not make him or her an agent for every purpose.” *Daimler AG v. Bauman*, No. 11-965, 571 U.S. \_\_\_\_, slip. op. at 16 (Jan. 14, 2014); *cf.* FED. R CIV. P. 4(h)(1)(B) (service may be effected upon “agent authorized by appointment . . . to receive service of process”). Thus, the fact that an attorney is acting as a representative in one capacity does not automatically mean he or she is acting as an agent in all other capacities. Thus, service upon Mr. Darch, who, as the ALJ found, had not been designated by any of the Respondents as an authorized agent for purposes of service of process, was insufficient under both Board and federal law. *See* JD at 19; RPH Br. at 39-47; RCX Br. at 25-34.

**D. The ALJ’s Findings Regarding Respondents’ Scrivener’s Error Argument Should Be Revisited And Reversed**

As detailed in Respondents’ Cross-Exceptions Brief, the ALJ erred in concluding that the Union did not commit a scrivener’s error in reducing the parties’ October 13-14, 2011 tentative agreement to writing and in refusing to reform the contract to reflect the CBA signed by Respondents and proffered to the Union on December 13, 2011. *See* RCX Br. at 34-42.

In response, the General Counsel insists, contrary to the ALJ’s findings, that no scrivener’s error occurred because the parties reached a full and final agreement at 3:07 p.m. on October 28, 2011 and that agreement contained “the actual wage rates which were proposed from the very first bargaining session on September 27.” GC Br. at 39-40. It is unfathomable as to how the General Counsel can continue to assert that the wage rates remained constant, when

the ALJ irrefutably concluded otherwise and the actual documentary evidence undeniably supports that conclusion. JD at 7-8, n. 15; 10-11 n. 21; *compare* GCX 11, Art. 8.2 to GCX 16(b), Art. 8.2. The General Counsel's persistence in proffering completely unsubstantiated facts only betrays the weakness of her case. The difference between the wage rates in the Union's September 27, 2011 proposal and those included in the various drafts proffered by the Union on and after October 18, 2011 serves as compelling evidence that the Union did not in fact understand how the wage scales should be structured and mistakenly drafted them.

As explained in Respondents' Cross-Exceptions Brief, upon distributing its initial, September 27, 2011 proposal, the Union orally stated (albeit incorrectly) that it sought a \$1.00 per hour wage increase and that the wage scales in its proposal reflected that increase. Tr. 116, 484, 533, 604, 642-43, 797-98; GC Ex. 11. This representation is confirmed by Mr. Schwartz's notes from that bargaining session, which indicate that the Union's proposal included a \$1 increase in the wage scales. RX 32 at 6. The wage rates within the Union's proposal did not, however, reflect a \$1.00/hour increase as represented. Rather, the Union's proposal granted newly-hired employees under the expiring contract a total, immediate raise of anywhere between \$2.20 to \$3.00 per hour. *Compare* GCX 7 to GCX 11. The ALJ acknowledged this disparity:

With previous contracts, the parties created the wage scales for "existing employees" by referring to the expiring contract and adding the agreed-upon annual wage increase to the wages shown in the final year (row) of the wage scales for new hires . . . . *The wage scales in the Union's September 27 proposal, however, did not follow that formula, and it is not clear what alternative formula the Union used to create the wage scales in that proposal.*

JD at 7-8, n. 15 (emphasis added).

The Union's faulty math was not the only evidence of mistake. The Union committed a number of other errors in reducing the parties' October 13-14, 2011 tentative agreement to writing, many of which resulted from the Union's decision to use its September 27, 2011



**CERTIFICATE OF SERVICE**

The undersigned attorney hereby certifies that on February 14, 2014, he caused the foregoing document to be filed electronically via the National Labor Relations Board's electronic filing system. All parties below will be served via e-mail and U.S. Mail.

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