

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 20

NEILMED PRODUCTS, INC.

Case 20-CA-35363

and

TEAMSTERS LOCAL 624,
INTERNATIONAL BROTHERHOOD OF
TEAMSTERS, CHANGE TO WIN
COALITION

COUNSEL FOR THE ACTING GENERAL COUNSEL'S
ANSWERING BRIEF TO RESPONDENT'S EXCEPTIONS

Submitted by
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I. INTRODUCTION

As set forth below, Respondent's exceptions and arguments in support of its exceptions are completely without merit. Respondent's exceptions fail to affect any of the determinations made by the Administrative Law Judge¹ or in any respect the outcome of the ALJ's decision. In addition to excepting to the ALJ's findings on the issues litigated, based on the application of controlling Board law, Respondent sets forth arguments on issues completely irrelevant to whether Respondent violated the Act, and misstates Board law with respect to union representative qualifications. Lastly, many of Respondent's exceptions are based on the ALJ's credibility resolutions. The Board's standard as set forth in *Standard Dry Wall Products, Inc.*, for reversing the Judge's findings in this regard was clearly not met by Respondent. 91 NLRB 544, 545 (1950), enf'd. 188 F.2d 363 F.2d 363 (3rd Cir. 1951). For these reasons, furthered below, the Board should uphold the ALJ's decision.

II. ARGUMENT

- A. The ALJ Appropriately Applied the Test Set Forth by *KDEN Broadcasting* and its Progeny to Determine that Cisneros' Presence Did Not Create Such Ill Will as to Make Good Faith Bargaining Impossible, Thus Rendering Respondent's Refusal to Allow Cisneros Access to Its Facility a Violation of the Act. (Respondent's Exceptions 1, 2 & 3)

¹ Hereafter referred to as the ALJ or the Judge. All references to the ALJ's decision are noted by "ALJD" followed by the page and line number(s). All references to the transcript are noted by "Tr." followed by the page and line number(s). All references to the General Counsel's exhibits are noted as "GC Exh." followed by the exhibit number(s). All references to Respondent's exhibits are noted as "Resp. Exh." followed by the exhibit number(s).

Respondent argues that this case is a “Refusal of Access” case and not a “Refusal to Bargain” case. However, the ALJ correctly found that the appropriate Board analysis, which requires persuasive evidence that the presence of a particular individual in bargaining would create such ill will as to make good faith bargaining impossible, subsumes the issue of workplace safety and more importantly, encompasses the issue of refusal of access. (ALJD 9:28-30, 11:34-35)

It is well settled Board law that a union has an unfettered right to choose individuals to act as agents. See *People Care, Inc.*, 327 NLRB 814, 824 (1999); *Long Island Jewish Hillside Medical Center*, 296 NLRB 51, 71-72 (1989); *Fitzsimmons Mfg. Co.*, 251 NLRB 375, 379 (1980), *enfd.* 670 F.2d 663 (6th Cir. 1982); *KDEN Broadcasting Co.*, 225 NLRB 25, 35 (1976). A union and an employer have a duty to bargain in good faith with their respective bargaining representatives. *KSL Claremont Resort, Inc.*, 344 NLRB 832 (2005). An employer’s refusal to bargain with a union’s chosen representative is violative of Section 8(a)(5) of the Act.

Under *KDEN Broadcasting Co.*, 225 NLRB 25, 35 (1976), and its progeny, an employer is justified in refusing to bargain with a union’s chosen representative only if there is “persuasive evidence that the presence of the particular individual would create ill will and make good-faith bargaining impossible.” The Board has found that “where the presence of a particular representative in negotiations makes collective bargaining impossible or futile, a party’s right to choose its representative is limited, and the other party is relieved of its duty to deal with the particular representative.” *Fitzsimmons Mfg. Co.*, 251 NLRB 375, 379 (1980).

In December 2010,² following 22-25 bargaining sessions, a six-month strike, and the ratification of the collective-bargaining agreement, the Union appointed former employee Elmer Cisneros (Cisneros) to be its business agent. (ALJD 3:5, 7, 13-14; 8:19-20; Tr. 39:20) The Union had an unfettered right to select Cisneros. The Union chose Cisneros to be its representative even before appointing him business agent. As an employee, Cisneros has been involved with the Union since the inception of its organizing campaign. (Tr. 22:11-12) Cisneros was elected to the Union's bargaining team. (Tr. 23:7) He served as observer for the Union during the Board-conducted election and then as job steward. (Tr. 22:4-6) After his termination, Cisneros continued to serve on the Union's bargaining committee and as a Union picket captain. (Tr. 38:9; 130:15-16) Cisneros was an obvious choice for the Union to appoint as its business agent because he knew the bargaining unit employees and the contract.³

On December 15, when the Union notified Respondent's attorney by email that Cisneros would visit Respondent's facility later that day and again on the next, Respondent raised no objection to his anticipated visit. (Tr. 134:3) Nonetheless, Respondent denied Cisneros access to its facility that afternoon. (Tr. 134:16-17) In a telephone conversation that afternoon (December 15), Respondent's Counsel told Union Vice President/Treasurer Ralph Miranda (Miranda) that Cisneros could not be on the facility because of the "TRO thing" and because employees were

² All dates hereafter refer to calendar year 2010 unless otherwise indicated.

³ Of course, his qualifications to be a Union representative are not an issue herein. Although Respondent's Counsel cites Counsel for the Acting General Counsel's mention of Cisneros' background with the bargaining unit, this evidence is offered merely as one of the reasons the Union may have chosen him. This in no way makes a union representative's qualifications a necessary consideration in determining whether a union representative's presence in bargaining creates such ill-will as to make good faith bargaining impossible.

fearful of him. (Tr. 134:17-20) However, there was no TRO in effect that barred Cisneros from entering Respondent's facility. (Tr. 135:21-22) The only ongoing action related to a TRO was Respondent's appeal of the Union's anti-SLAPP suit.⁴ (Tr. 137:11-16)

Additionally, it was in the telephone conversation between Respondent's Counsel and Miranda the afternoon of December 15, that Respondent told the Union for the first time that employees were fearful of Cisneros notwithstanding its assertion on the record that it had received such complaints during the picketing which took place between May 20, and November 19. (Tr. 142:17-19) Further, the evidence revealed that that no such complaints were raised by Respondent in the numerous bargaining sessions that Cisneros attended as the Union's representative prior to December 15. (Tr. 37:4; 39:12; 129:12; 138:19; 142:17-19) Respondent did not respond to the Union's request that it advise the Union of the persons who were fearful of Cisneros so that he could stay away from them. (GC Exh. 10-12) Further, Respondent voiced no objection to Cisneros participating in the bargaining session held at Respondent's Counsel's law office on December 23. (Tr. 138:19)

However, on December 27, Respondent again refused to allow Cisneros access to its facility. (139:13-17) On this occasion, Respondent's Human Resources Director Carolyn Ryzanych (Ryzanych) told Mirada that it did not matter that Cisneros would not be meeting with employees because "the Doctor," Respondent's founder and owner, did not want him there.⁵ (Tr.

⁴ Following the June 16, incident which resulted in Cisneros' termination, Respondent filed a TRO against Cisneros on behalf of two of its employees. (Tr. 34:14-15; 51:24-25) The TRO was allowed to expire, and thereafter the Union filed a Motion to Strike, also known as an anti-SLAPP (Strategic Lawsuit Against Public Participation). (Tr. 35:9, 12-13) The Union was successful in its Motion and Respondent appealed. (Tr. 35:12-13; 137:15)

⁵ Interestingly, while at the facility on December 15, Cisneros was allowed to continue to converse with employees and did so uneventfully. (tr. 40:16) But on December 27, when

45:2-5; 139:13-17) This is a clear admission that Respondent's refusal to allow Cisneros access to its facility went beyond any purported fear Respondent's employees had of him and any purported fear that his presence would create ill will and make good faith bargaining impossible. Counsel for the Acting General Counsel submits that Respondent's refusal to allow Cisneros access to its facility was based on a grudge that Respondent held against Cisneros that began with its refusal to grant him amnesty as a picketer if he chose to return to work during the strike, and which continued after Cisneros was appointed as the Union's business agent. (Tr. 39:20; Resp. Exh. 6)

Significantly, Cisneros was one of the employee leaders who initiated the Union campaign. After a long and arduous strike, from which some employees did not return, the employees needed the reassurance that they were still represented by the Union. (Tr. 22:1) By refusing Cisneros access to its facility, Respondent breached its duty to bargain with the Union's chosen representative. It is only in very limited circumstances that an employer is justified in refusing to bargain with a union's designated representative, and the ALJ correctly found that those circumstances are not present in the instant case.

As the ALJ correctly pointed out, those instances in which the general rule has been excepted to have been instances of unprovoked violent behavior. (ALJD 11:17-18) In *Fitzsimmons Mfg. Co.*, the Board found that an employer did not violate the Act by refusing to meet and bargain with the union's chosen representative who had engaged in a "sudden, unprovoked attack," on an employer's representative by reaching across the desk, grabbing the employer's representative by his tie and pulling upward, and challenging the employer

Cisneros was present specifically for the purpose of meeting with management, he was immediately asked to leave. (Tr. 42:2)

representative to meet him (the union representative) outside to continue the altercation. *Id.* at 379. The union and employer representative were each part of a bargaining meeting, and were discussing a fifth step grievance. *Id.* Their confrontation was initiated by the employer representative wanting to discuss a subject the union representative thought was confidential. *Id.* Upon the employer representative's denial that the subject was confidential, the union representative told the employer representative that, "he would punch [the employer representative] in the mouth and knock him on his ass if the subject was brought up again" and the physical confrontation followed. *Id.* The Board reasoned that as the attack was sudden and unprovoked, and occurred in the presence of both management and union officials, it was sufficient to find that the union representative's presence in future bargaining sessions "would create such an atmosphere as to render good-faith bargaining impossible." *Id.* at 380.

Similarly, in *King Soopers, Inc.*, 338 NLRB 269 (2002), the Board affirmed the finding of an administrative law judge that an employee's misconduct that led to his termination, was sufficient to warrant the employer's refusal to bargain with him four years later as a union representative. *Id.* In that case, as an employee, the union representative had been involved in a confrontation with his supervisor when his supervisor assigned him to work on a Saturday. *Id.* During the confrontation, the representative angrily threw his meat hook over his shoulder, narrowly missing another employee. *Id.* He also threw a 40 pound piece of meat into a saw breaking its blade; threw his knife into a box; threatened his supervisor; and refused to follow the store manager's order to leave the store. *Id.*

In upholding the administrative law judge in *King Soopers*, the Board noted that as an employee, the representative had engaged in volatile and disruptive workplace misconduct that led to his termination; that the misconduct had been triggered by a minor scheduling dispute; and

that the misconduct had jeopardized the safety of a supervisor and a fellow employee. *Id.* The Board further reasoned that in light of this egregious misconduct, individuals required to deal with the representative in a potentially adversarial setting might reasonably be preoccupied with the legitimate concern that he would react violently if his position did not prevail. *Id.* The Board reasoned that “such a preoccupation undermines good-faith collective bargaining because it impedes the vigorous exchange of positions unencumbered by the threat of an adversary’s violent reaction.” *Id.*⁶

On June 16, Cisneros was involved in an incident which resulted in the windshield on Supervisor Jonathan Herdita’s (Herdita) vehicle being broken. (ALJD 9-11) However, as the Judge correctly pointed out, the incident was provoked by Herdita continuing to move his vehicle forward when a line of picketers was blocking the entrance and exit. (ALJD 6:14-16) Cisneros fell across the hood and held on while the vehicle continued to move. (ALJD 6:18-19) Cisneros then hit the windshield, which may have caused it to break. (ALJD 6:4) This incident resulted in Cisneros’ suspension on June 16, and his termination on August 2. (Tr. 25:5, GC Exh. 2, 5) However, any action on Cisneros’ part was a provoked reaction to Herdita. As such, the instant case is, as the Judge pointed out, clearly distinguishable from *Fitzsimmons* and *King Soopers*.

The *KDEN Broadcasting Co.*, standard has been applied to cases in which a union representative’s access to an employer’s facility is at issue. In *Long Island Jewish Hillside Medical Center*, 296 NLRB 51, 72 (1989), the Board affirmed an administrative law judge’s

⁶ Member Liebman dissented in this case reasoning that this single incident on a personal matter, involving no physical contact, away from the bargaining table, having occurred four years earlier, was insufficient for the employer to refuse to deal with the union representative. *Id.* at 271. Member Liebman noted that what is more significant are the union representative’s years of service as a shop steward without ever having engaged in misconduct. *Id.* at 270.

finding that the employer violated the Act by barring a union representative from its premises. In *Long Island Jewish Hillside Medical Center*, the union representative was an employee on a leave of absence to serve as a union organizer. *Id.* at 52. During an investigatory grievance meeting for a bargaining unit employee, the union representative repeatedly called the employer's representative an "asshole" and then slightly pushed her as they simultaneously reached for a telephone. *Id.* at 53. Subsequently, the union representative presented himself on the employer's premises a number of times without permission; pounded on a supervisor's door and yelled threats; insulted supervisors; acted obnoxious, loud, and rude; and refused to leave on some of those occasions. *Id.* at 55-58. Thereafter, the employer decided to bar the union representative from its premises which later resulted in the arrest of the representative. *Id.* at 60-61. The administrative law judge with Board approval found that although the union representative's conduct was not to be condoned, it did not rise to the level of activity described in *Fitzsimmons*, and was not persuasive evidence from which to conclude that his presence would create ill will and make good faith bargaining impossible. *Id.* at 71-72.⁷ As such, by barring the union representative from its premises, the administrative law judge found that the employer violated Section 8(a)(5) of the Act.

Nor did Cisneros' presence in bargaining have any impact on the parties' ability to bargain or reach a collective-bargaining agreement. In *Caribe Staple Co.*, 313 NLRB 877 (1994), the Board affirmed the finding of an administrative law judge that an employer violated the Act by conditioning bargaining on the removal of a union representative. In *Caribe Staple Co.*, the

⁷ *Cf. Pan American Grain Co.*, 343 NLRB 205 (2004), where union representative was banned from most of employer's facilities because of his misconduct including death threats to the employer's president.

union representative was discharged while he was a member of the union negotiating committee for assaulting a supervisor. *Id.* at 885.⁸ The administrative law judge reasoned that the union representative's conduct, i.e., assaulting the supervisor, was "unrelated to bargaining and involved no confrontation with any management representative that was a member of the negotiating team." *Id.* at 889. The administrative law judge went on to note that there was no "indication that bargaining suffered" when this particular union representative attended bargaining sessions after his termination, and thus his presence would not make good-faith bargaining impossible. *Id.* at 890. The administrative law judge also noted that the employer had raised no objection to the union representative's presence at two subsequent bargaining sessions. *Id.* at 889.

Here, the conduct pointed to by Respondent is Cisneros' alleged conduct on the picket line. This conduct occurred away from the bargaining table and is unrelated to bargaining. There was no confrontation with any member of management who was a part of Respondent's bargaining team. Such conduct had no bearing on collective bargaining, not just because Respondent's representatives were not present for the incident on June 16 that led to his termination, but because Cisneros continued as a member of the Union's bargaining team, to bargain with Respondent's representatives after the June 16 picket line incident, and after his termination. (ALJD 10:16-18; Tr. 36:17; 38:9) Indeed, Cisneros continued to attend and participate in the bargaining sessions held on July 19, 28, August 3, November 12, and November 19, the day the parties reached agreement on a contract. (Tr. 36:12; 38:17) Thus, it is clear that Cisneros' alleged conduct on the picket line had no impact on bargaining.

⁸ The discharge was also alleged as an 8(a)(3) violation, however, the ALJ dismissed that allegation. *Id.* at 888.

Significantly, Respondent's representatives met and bargained with Cisneros without incident on December 23, after Respondent denied him access to its facility on December 15. (Tr. 138:19, 22) More importantly, other than on December 15, Respondent raised no objection to Cisneros' participation in bargaining either before or after his termination. (ALJD 9:40-41; Tr. 37:4, 38:6; 39:2, 12) Such a distinction was made by the Board in *King Soopers* in distinguishing the applicability of *Caribe Staple Co.*, and reaching a contrary conclusion. *King Soopers, Inc.*, 338 NLRB 269, 270 (2002).⁹ Clearly, Cisneros' conduct on the picket line had no impact on bargaining and is not dispositive to the analysis of whether his presence would create such ill will as to make good faith bargaining impossible.

Finally, Respondent's argument that this case should have been analyzed as a refusal of access case is completely misplaced. The complaint alleges refusal to bargain with the Union by refusing access to a certain Union representative. The complaint does not allege an unlawful unilateral change. The case cited by Respondent, *Turtle Bay Resort*, 353 NLRB 1242 (2009), is a unilateral change case and has no application to the instant case. The Judge correctly used the proper analysis in a refusal to bargain case, as set forth in *KDEN Broadcasting* and its progeny.

B. Irrespective of the Testimony Elicited on the Alleged Photographing of Witnesses, Such Testimony is Irrelevant to the Allegations Pled and Their Exclusion Has No Bearing on the Finding of a Violation. (Respondent's Exceptions 4, 5, & 6)

At the hearing, the ALJ found, contrary to Respondent's contention, that Cisneros did not breach the sequestration rule. (ALJD 7:25) In this regard the Judge noted on the record at the

⁹ *Cf. Pan American Grain Co.*, 343 NLRB 205 (2004), where the Board noted that the banned union representative and the employer continued to meet for bargaining, while the employer made the decision whether to continue to deal with the union representative. Here, Respondent continued to bargain in Cisneros' presence months after the purported misconduct.

hearing that, “[a] sequestration rule is to ensure reliability of testimony so that witnesses do not talk with each other.” (Tr. 62:13-14) As the Board has previously stated with regard to sequestration of witnesses “[t]he process of exclusion consists of preventing a prospective witness from being taught by hearing another's testimony . . . the purpose of exclusion is preventative; it is designed to minimize fabrication and combinations to perjure as well as mere inaccuracy.” *Unga Painting Corporation*, 237 NLRB 1306-1307 (1978).

Respondent offered no evidence that Cisneros breached the sequestration order, as its purpose is defined. Even if, as Respondent purports, Cisneros took photographs, such an act does not breach the sequestration order.¹⁰ At the hearing Respondent’s Counsel asked Witness Chavez if she had seen Cisneros that day and whether Cisneros had done anything to her. (Tr. 148: 14) Witness Chavez responded, “When we came in, he took pictures of us with his cell phone.” (Tr. 148:15-16) Counsel for the Acting General Counsel moved to strike based on relevance. (Tr. 148:18-19) The ALJ allowed the testimony but indicated that she would not give it much weight because it did not go to the action of prohibiting Cisneros of coming onto the facility. (Tr. 148:24-25) The ALJ also told Respondent’s Counsel she could argue what she wanted about it in her brief. (Tr. 149: 1, 3) Respondent’s Counsel made no other attempt to introduce any other evidence regarding this matter. This testimony is not evidence of a violation of the sequestration order. Moreover, the allegation is irrelevant to the issue at hand. As the ALJ correctly pointed out, the proffered evidence, i.e., that Cisneros took photographs of Respondent’s witnesses “doesn’t go to the action of prohibiting Mr. Cisneros from coming to the facility.” (Tr. 148:24-25) Witness Chavez’s statement that Cisneros took photographs of

¹⁰ In fact, it was Respondent’s witnesses who were in potential breach of the sequestration order. See transcript 104:15-25; 105:1-15.

Respondent's witnesses is not relevant to the issue of whether Respondent violated the Act by refusing to deal with the Union's chosen representative. Nor is the statement relevant to whether Cisneros' presence would create such ill will as to make good faith bargaining impossible, particularly as the proffered evidence occurred after Cisneros' exclusion from Respondent's facility. Moreover, Respondent offered no other record evidence on this issue. Respondent only called on one witness to testify as to this issue. Therefore, the issue of whether Cisneros took photographs on the day of the hearing outside of the presence of the ALJ is irrelevant.

C. The ALJ's Appropriately Made Credibility Resolutions Should be Left Intact.
(Respondent's Exceptions 7, 8 & 9)

In *Standard Dry Wall*, the Board set forth the standard for determining credibility resolutions as found by the administrative law judge. *Standard Dry Wall*, 91 NLRB 544, *enf'd*. 188 F.2d 363 (3rd Cir. 1951). The Board does not overrule an administrative law judge's credibility findings "except where the clear preponderance of *all* the relevant evidence convinces [the Board] that all that the Trial Examiner's resolution was incorrect." *Id.* at 545. This standard was reached as the Board recognized that it is the administrative law judge who observes witness demeanor. *Id.*

As noted in the ALJ's decision, the Judge based her credibility resolutions on a review of the entire record and exhibits, including the demeanor of the witnesses and the inherent probability of the testimony. (ALJD FN.3) Respondent contends that the ALJ failed to credit its witnesses regarding their fear for their safety, and Respondent Witness Chavez's testimony that Cisneros threatened her by stating "If I wasn't with them, something bad would happen to me."¹¹

¹¹ Exceptions 7 and 9 appear to be identical in proposition.

Again, the ALJ observed the demeanor of the witnesses in giving their testimony and made her findings accordingly.

Further, any findings regarding the Respondent's employee witnesses' fears of Cisneros are unnecessary as they are inapplicable to the analysis of whether Cisneros' presence in bargaining would create such ill will as to make good faith bargaining impossible. As the ALJ pointed out, none of these employees were involved in negotiations (ALJD 10:15-16). Both *Fitzsimons* and *King Soopers* were decided on how an employer's representative at the bargaining table would be hindered by having an individual with a history of past violent behavior engage in bargaining. Neither case addresses employee sentiment about the representative. Rather, the Board's analysis is based on how the presence of the individual at issue will impact bargaining. In the instant case, the testimony of Respondent's witnesses did not establish that the presence of Cisneros will have a negative impact on bargaining.

However, even considering the evidence of purported employee fear proffered by Respondent, such a consideration is insufficient to justify its refusal to bargain with the Union's chosen representative. Respondent's claims of employee fear of Cisneros are exaggerated and insubstantial. Respondent presented the testimony of six individuals, one of whom is its human resources assistant and another is one of its supervisors. (Tr. 170:23; 185:17) The four employee witnesses are part of a bargaining unit of approximately 75 employees. (Tr. 43:14) More significant is the fact that after his exclusion from the facility in December, Cisneros met with approximately 45 to 50 bargaining unit employees when he distributed copies of the collective bargaining agreement, which Cisneros had translated into Spanish. (Tr. 43:12) The employees met with Cisneros outside of Respondent's facility. (Tr. 43:4) Surely, the fact that these

bargaining unit employees voluntarily approached Cisneros demonstrates that he is a very approachable business agent.

In support of its contention that employees feared Cisneros, Respondent offered the testimony of Human Resources Assistant Viviana Ruano (Ruano), Supervisor Teresa Medrano, and four employees: Maria Chavez, Marilu Chavez, Maria G. Mendoza, and Maria H. Serrano. According to Ruano's testimony, some employees complained to her about Cisneros during the strike (Tr. 187:2) Ruano testified that Respondent did not want Cisneros on the facility because of employee safety. (Tr. 188:1-2) To further this contention, Ruano testified that during the strike, employees told her they feared for their safety. (Tr. 187:4) Ruano testified that employees told her that Cisneros would come to them while they were trying to cross the picket line, and throw himself in front of the car and stop so that they were unable to come onto the premises.¹² (Tr. 187:5-9) She further testified that she observed Cisneros being aggressive in the sense that he would obstruct the non-picketing employees from coming onto the property with his picket sign. (Tr. 187:17-19) However, this conduct hardly rises to a threat to employees or to the aggressiveness asserted by Ruano: a lone man standing with a picket sign while the employees crossing the picket line drive through in their vehicles. Further, Ruano's hearsay assertions are insubstantial and should be given no weight. She did not name the employees who allegedly told her or when they told her. Nor did she present any written record of these assertions of employee complaints. Presumably, if Respondent was concerned about employees' safety and the picketers

¹² During the hearing, Respondent presented a copy of a police report in which it is alleged that Cisneros pretended to be struck by a car. (Resp. Exh. 3) However, the report was admitted as a public record without supporting evidence.

posed any type of threat, such complaints would have been documented. However, no such evidence was presented on the record.

Respondent offered the testimony of employee Maria Chavez (Chavez) who testified that Cisneros made her afraid. (Tr. 148:11) According to Chavez's testimony, which was specifically discredited by the Judge, Cisneros hit her car with a picket sign. (ALJD 3:38-39; Tr. 146:21-22) She testified that this occurred every day and then stated that it was over the course of three days.¹³ (146:20-21; 147:1, 19) Chavez further testified that Cisneros used obscenities and would tell her ugly things: that something bad would happen to her; that she took things from the company; that he disrespected her; and that he threatened her. (147:10-11, 15, 24-25; 148:1) Respondent offered the testimony of employee Marilu Chavez who testified that Cisneros instructed the picketers to stand in a line and not let the cars go through them. (Tr. 160:15-16) Marilu Chavez also testified that Cisneros was aggressive, but did not answer how. (Tr. 160:18-19; 161:1) Respondent offered the testimony of Supervisor Teresa Medrano (Medrano) who said that she was afraid of Cisneros. (Tr. 174:9) However, when asked about what transpired on the picket line, Medrano answered that the picketers were very aggressive and yelled things at her and that they assaulted her. (Tr. 172:3-4, 9) When asked what Cisneros said to her, Medrano testified that Cisneros called her a sell-out, said that she sold out to the company, and said that she was a kiss-ass. (Tr. 173:4-5) Medrano also testified that Cisneros stuck his elbow out and moved her driver's side mirror. (Tr. 173:9-10) Respondent also offered the testimony of employee Maria G. Mendoza (Mendoza) who testified that Cisneros would stand in front of her car. (179:14) Mendoza testified that Cisneros yelled that she was a sell-out, and was afraid of

¹³ Both Cisneros and Miranda denied this accusation.

Cisneros because he would say to her husband, “[d]on’t take her in,” and “[t]hey are using her.” (Tr. 179:22-23) Mendoza further testified that other picketers yelled at her and put themselves in front of her car. (Tr. 179:25; 180:3-4) Finally, Respondent provided the testimony of employee Maria Serrano (Serrano) who testified that Cisneros would yell obscenities at her, and tried to jump in front of her car. (Tr. 182:5-7) Serrano also testified that she was afraid of Cisneros because he was rude and aggressive, but only gave these conclusory statements without specific details. (Tr. 182:22, 24)

The testimony provided by Respondent’s witnesses, lacked foundation, corroboration, and in some instances, such as the allegations that Cisneros struck or jumped in front of any vehicle, were contradicted and refuted by the Acting General Counsel’s witnesses. (Tr. 208:10-12; 210: 4, 9-12; 214:5) The statements of assault are unsubstantiated. The statements alleged to have been made by Cisneros are not threats and do not pose any safety concerns to employees. As the ALJ correctly found, during the picketing, name calling, was exchanged on both sides. (ALJD 4:3-4) They are comments made in the course of picketing that were made by both the picketers and the employees crossing the picket line. The Judge specifically discredited testimony that Cisneros blocked specific individuals’ entrance, or that he threatened employee Chavez. (ALJD 4:5-7) Even taking the other alleged statements as true, the evidence is insufficient to establish that Respondent fell within the exception to the requirement that it bargain with the Union’s chosen representative.

D. The ALJ Appropriately Followed Board Law and Excluded Evidence on Cisneros’ qualifications as Union Representative. (Respondent’s Exception 10)

As the ALJ correctly pointed out on the record at the hearing, a union business agent’s qualifications have no bearing on whether that individual would create such ill-will as to make

good faith bargaining impossible. (ALJD 90:24-25; 91:1-23) Respondent cites *King Soopers Inc.*, for the proposition that a union representative's qualifications should be considered in determining whether that representative ought to represent the bargaining unit at issue.

Respondent also cites Counsel for the Acting General Counsel's opening statement. However, in addition to misstating the law, Respondent's counsel ignores controlling Board law. As the ALJ in this matter correctly pointed out on the record at hearing, in affirming the administrative law judge's decision in *King Soopers, Inc.*, the Board did not discuss the factor of necessity in choosing a particular union representative. (Tr. 91: 11-12) Although the administrative law judge in *King Soopers, Inc.* may have gone through some discussion regarding the lack of expertise the union representative had which would preclude him from being assigned to that particular workplace, the Board did not apply or even acknowledge such an analysis. *King Soopers, Inc.*, 338 NLRB 269 (2002). Rather, the Board based its decision on whether the union representative's presence would create ill will and make good faith bargaining impossible. *Id.* And reaching the conclusion that the union representative would impede good faith bargaining, the Board cited the individuals who would deal with him in bargaining's preoccupation with his propensity to react violently as preventing good faith bargaining. *Id.* The Board did not consider the union representative's qualifications. As such, they are not necessary to the analysis of this case.

- E. The ALJ Appropriately Considered the Allegations pled which did not Include an Allegation of Bad Faith Bargaining on the Part of the Union. (Respondent's Exception 11)

The complaint contains no allegation that the Union engaged in bad faith bargaining. The complaint only pled that Respondent refused to allow Cisneros access to its facility and thereby

refused to bargain with the Union. Respondent has no pending charge alleging bad faith on the part of the Union and as such, the matter was not before the ALJ.

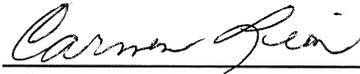
III. CONCLUSION

It is respectfully submitted that the ALJ's findings of fact and conclusions of law were fully supported by the record evidence. The ALJ's credibility rulings were correctly based upon witness demeanor and the inherent probability of the testimony, and should not be disturbed.

Accordingly, the Decision and Recommended Order should be adopted by the Board.

DATED AT San Francisco, California, this 12th day of September, 2011.

Respectfully submitted,



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OF TEAMSTERS, CHANGE TO WIN COALITION

Case 20-CA-35363

DATE OF MAILING September 12, 2011

AFFIDAVIT OF SERVICE OF

COUNSEL FOR THE ACTING GENERAL COUNSEL'S
ANSWERING BRIEF TO RESPONDENT'S EXCEPTIONS

I, the undersigned employee of the National Labor Relations Board, being duly sworn, depose and say that on the date indicated above I served the above-entitled document(s) by electronic mail upon the following persons, addressed to them at the following addresses:

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<p>Subscribed and sworn to before me on</p> <p>September 12, 2011</p>	<p>DESIGNATED AGENT</p> <p><i>Susie Louie</i></p> <p>NATIONAL LABOR RELATIONS BOARD</p>
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