UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

WP COMPANY, LLC D/B/A THE WASHINGTON POST,	§	
	§	
and	§	Case Nos. 5-CA-36485
	§	5-CA-36574
WASHINGTON MAILERS UNION NO. 29 PRINTING, PUBLISHING AND MEDIA WORKERS SECTOR OF THE COMMUNICATIONS WORKERS OF AMERICA, AFL-CIO, CLC.	§	

THE WASHINGTON POST'S ANSWERING BRIEF IN RESPONSE TO COUNSEL FOR THE ACTING GENERAL COUNSEL'S EXCEPTIONS

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INTRODUCTION

In filing limited Exceptions to the Administrative Law Judge's Decision, the General Counsel effectively concedes that the ALJ properly evaluated the evidence and properly applied the law to dismiss most of the General Counsel's Complaint, including his challenges to two long-standing operational practices in The Washington Post's Mailroom. Having accepted that The Post did not unlawfully change these practices, the General Counsel is left with the strained argument that The Post engaged in unlawful direct dealing for the purpose of changing a practice that concededly was never changed. In the process, the General Counsel takes a fanciful approach to the record that he adduced over two days of hearing and to the ALJ's findings in dismissing the direct dealing allegations. That approach offers no sound or logical basis for overturning the ALJ's well-reasoned decision – a decision that the ALJ reached after evaluating all the evidence, assessing the demeanor of all the witnesses, and properly applying Board law.

The General Counsel premises his Exceptions on a fallacy: that the record supposedly established that The Post bargained "deals" individually with employees to "give up their right to a break" after voluntarily working through lunch at their foremen's request, and that the ALJ "found" (no citation provided) "that supervisors were offering 'deals' to employees in order to get them to give up these breaks." General Counsel's Brief in Support of Exceptions ("GC Br.") at 1. Neither assertion is accurate. In reality, the record shows that The Post's foremen, with the Union's knowledge and cooperation, simply asked employees whether they were willing to work through lunch in exchange for overtime pay and gave them time to get lunch later if they wanted it – fully consistent with the established and unchanged paid lunch practice. Under these circumstances, the ALJ properly concluded that "it cannot be found" that The Post engaged in direct dealing. Administrative Law Judge Decision ("ALJD") at 7.

That decision finds ample support in Board law and the record in this case. Indeed, the General Counsel filed no exceptions to, and thus concedes, the factual findings that require the Board to uphold the ALJ's decision, including that:

- The Post has an established practice of asking employees to work through lunch for operational reasons in exchange for overtime compensation. ALJD at 3 n.5.
- Under this practice, employees who work through lunch are permitted "time to get lunch" later if they request it, but the length of time to get lunch is not a fixed term of employment and varies from one foreman to another. *Id.*
- As a result, most employees receive some amount of time to get lunch later after working through their lunch break (*id.* at 5), but "some employees who worked through lunch did not seek or request time to get lunch." *Id.* at 3 n.5.
- Employees who volunteer to work through lunch receive, in addition to overtime pay, all of their other daily paid breaks – a 15-minute coffee break, three 15-minute rest breaks and two five-minute wash-up times, for a total of one hour and ten minutes out of a seven-hour shift. *Id.* at 3.
- Working through lunch is completely voluntary, and no employee suffers any adverse consequences for declining to work through lunch. *Id.* at 3 n.5.
- This paid lunch practice has not changed, and "no new lunch policy has been implemented." *Id.* at 5.

Based on this record, the ALJ properly rejected the General Counsel's allegations and concluded that The Post engaged in no direct dealing by continuing to ask employees to work through lunch for overtime pay, consistent with a paid lunch practice that has not changed. *Id.* at 7. Both the General Counsel's Complaint, and the unfair labor practice charge underlying it,

make clear that the direct dealing allegations arise out of The Post's alleged dealings with employees over implementing a supposedly new lunch policy. GC Exs. 1-A, 1-C. Where, as here, the General Counsel now concedes that The Post implemented no new lunch policy, there is simply no basis for overruling the ALJ's sound conclusion that The Post never "bypassed the Union and dealt directly with its employees . . . regarding working through lunch under the new policy," as alleged in the Complaint. GC Ex. 1-C. The Board should overrule the General Counsel's Exceptions.

STATEMENT OF FACTS

The essential facts are not in dispute. The General Counsel does not except to the following findings that the ALJ made:

1. The Union has long represented The Post's Mailroom employees, and the parties have negotiated and signed numerous contracts during this lengthy relationship. *See* ALJD at 2; R. Exs. 2-3; GC Ex. 2. Mailroom employees assemble the printed sections of the newspaper and advertising inserts into completed newspapers for distribution. ALJD at 3; Sept. 19-20 Hr'g Tr. ("Tr.") 32-36. The Union represents three classifications of employees: Mailers, who operate collating machines; Helpers, who operate rolling stock to move products; and Utility Mailers, who perform either Mailer or Helper work depending on production needs. ALJD at 3; Tr. 193-94.

2. Most Mailroom employees work seven-hour shifts, and receive one hour and ten minutes of paid break time during that shift, consisting of four 15-minute breaks and two five-minute wash-up breaks. ALJD at 3; Tr. 79-80. In addition, employees are entitled to a 30-minute unpaid lunch break (ALJD at 3), which, as a matter of practice, is often combined with paid breaks to extend the lunch period to 50 minutes. Tr. 65-66, 79.

3. On infrequent occasions when the operation is behind on its goals or experiences equipment problems, the Mailroom Foremen ask employees whether they are willing to work through their 30- or 50-minute lunch break. ALJD at 3 n.5; Tr. 83, 174-75. Working through lunch is completely voluntary; employees who choose not to work through lunch do not suffer any adverse consequences. ALJD at 3 n.5; Tr. 81. Employees who work through lunch are paid at the overtime rate for doing so, usually receiving one hour of overtime pay (even though the lunch break is less than an hour); they still receive their other 15-minute relief breaks; and, if they request it, they receive a few minutes to get something to eat. ALJD at 3 n.5; Tr. 60, 176-77, 188.

4. The Union has known for years about The Post's practice of asking employees to work through lunch in exchange for overtime pay. *See* ALJD at 3-4; Tr. 60, 107, 148. Union officers have worked through lunch themselves for overtime pay (ALJD at 5; Tr. 49, 107, 148), and have on occasion even helped The Post find other volunteers to work through lunch. Tr. 122-23.

5. The parties' last collective bargaining agreement ("CBA") expired on May 18, 2003, with no new agreement in place. ALJD at 2. Negotiations in the fall of 2009 culminated in a Comprehensive Tentative Agreement ("CTA"), but the Union's membership twice voted not to ratify the CTA – first in January 2010 and then in April 2010. ALJD at 2-3; Tr. 279, 289. Since then, the parties have not met again for bargaining purposes and have not exchanged any bargaining proposals. ALJD at 11; Tr. 293, 297-98. [1]

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[1] The General Counsel claims in a footnote that The Post "must follow" the collective bargaining agreement that expired in 2003 "for those individuals who have a lifetime job guarantee." GC Br. at 3 n.2. The ALJ made no such determination, and the question is not before the Board in this case. Because the issue is entirely irrelevant to the General Counsel's Exceptions, The Post will not belabor the point, other than to state that The Post does not agree with the General Counsel's assertion as to the meaning of the lifetime job guarantee.

6. On October 28, 2009, shortly before the parties reached the 2009 CTA, the Union filed a grievance claiming that the foremen were "not giving the employees who have to work through lunch, an allotted amount of time to go get something to eat." ALJD at 4; R. Ex. 32. Even though The Post and the Union were at the bargaining table at this time, the Union never asked to bargain over the issue. ALJD at 5. The Union abandoned the grievance. Tr. 319-20.

7. A year later, on November 3, 2010, the Union filed a grievance complaining that The Post was improperly asking for volunteers to work through lunch. ALJD at 4. The grievance claimed that "[t]he paid lunch procedure for the insert operation has always been to give the workers in this area a 20-minute break when they get a chance so they can get something to eat." *Id.*; GC Ex. 6. The parties met on this grievance on December 16, 2010, but did not resolve it. Tr. 320-22. The Union did not attempt to arbitrate this grievance. *Id.*

8. On February 24, 2011, the Union filed a third grievance over paid lunches, claiming that "mailroom managers are soliciting paid lunches again." ALJD at 4; GC Ex. 7. At the grievance meeting in March 2011, The Post again expressed its position that The Post had the right to ask for volunteers to work paid lunches, without any guarantee of a fixed lunch break. Tr. 330. The Union did not attempt to arbitrate the grievance. *Id.* 327-28.

9. The Union has never requested The Post to bargain over its "paid lunch" practices. ALJD at 5; Tr. 70.

The Union's Unfair Labor Practice Charge And The ALJ's Findings

Dissatisfied with the outcome of its grievances, the Union filed an unfair labor practice charge, claiming, among other things, that The Post was "engaging in direct dealing with its employees when [it] unilateral[ly] implemented a new policy and procedure concerning lunches." GC Ex. 1-A. The Board issued a Complaint on June 22, 2011, alleging that The Post

"implemented a new lunch policy regarding working through lunch" and "bypassed the Union and dealt directly with its employees in the Unit regarding working through lunch under the new policy." GC Ex. 1-C, at 3. A hearing was held before Administrative Law Judge Bruce Rosenstein on September 19 and 20, 2011. In a carefully reasoned opinion, the ALJ dismissed all of the Complaint allegations, including the General Counsel's claims that The Post made unilateral changes in two Mailroom operational practices and engaged in direct dealing.

ISSUE PRESENTED

Whether the ALJ correctly held that The Post did not engage in direct dealing.

ARGUMENT

I. The ALJ Correctly Held That The Post Did Not Engage In Unlawful Direct Dealing After Analyzing All The Testimony And Assessing The Demeanor Of All The Witnesses

After carefully considering *all* of the testimony and assessing the demeanor of *all* of the witnesses, the ALJ concluded that "[u]nder the[] circumstances" present in this case, "it cannot be found that the Respondent bypassed the Union and dealt directly with employees regarding working through lunch as alleged in paragraph 6 of the complaint." ALJD at 7. In so holding, the ALJ correctly articulated the legal standard: to prove unlawful direct dealing, the General Counsel had to show that: (1) the employer communicated directly with union-represented employees; (2) the discussion was for the purpose of establishing or changing wages, hours, and terms and conditions of employment, or undercutting the Union's role in bargaining; and (3) the communication was made to the exclusion of the Union. *See The Permanente Med. Group, Inc.*, 332 N.L.R.B. 1143, 1144 (2000). And the ALJ correctly concluded that the General Counsel failed to meet that burden here.

A. The Record Amply Supports The ALJ's Decision.

It is important to emphasize what is not in question based on the limited scope of the General Counsel's Exceptions. Significantly, the General Counsel does not except to the ALJ's rulings that "no new lunch policy has been implemented at the Respondent's facility" (ALJD at 5) and that "no material changes in conditions of employment were established or implemented with respect to the lunch policy" (*id.* at 7). *See* GC Br. at 2 n.1 ("There are no exceptions to the judge's dismissal of the allegations concerning . . . a unilateral change in the lunch policy"). Having conceded that he failed to prove that The Post implemented any "new policy" on paid lunches, the General Counsel has no credible basis for challenging the ALJ's holding that The Post engaged in no direct dealing when it interacted with its employees in a manner consistent with its long-standing and unchanged lunch policy.

The General Counsel filed no exceptions to, and thus concedes, the key facts that support the ALJ's finding of no direct dealing. The ALJ found that:

- The Mailroom Foremen have a practice of asking employees to work through lunch when operations warrant. *See* ALJD at 3 n.5 ("Due to operational needs and when equipment malfunctioned, a practice was established wherein employees were requested by their foreman to work through lunch . . . ."). The General Counsel filed no exceptions to this finding, and his own witnesses conceded the point. Tr. 49, 107, 127, 148.
- Employees who work through lunch are always compensated, usually with overtime pay, for doing so. ALJD at 3 n.5 ("employees . . . requested by their foreman to work through lunch . . . were compensated for doing so."). The General Counsel filed no exceptions to this finding, and his own witnesses

conceded the point. *See* Tr. 129 (Brian Leroux testifying that foremen asked him whether he wanted to work through lunch for overtime pay); *id.* 60 (Chairman Jim Forsythe testifying that "Everyone that works through lunch gets something, gets overtime, yes, I'm aware of that").[2]

- Employees who work through lunch sometimes receive time later in their shifts to get something to eat, and sometimes do not. ALJD at 3 n.5 ("If employees [who worked through lunch] wanted time to get lunch they were permitted to do so" but "some employees who worked through lunch did not seek or request time to get lunch either because they previously took lunch during one of their paid breaks or skipped lunch on days that they worked through lunch."). The General Counsel filed no exceptions to this finding, and his own witnesses conceded the point. Tr. 112-13 (Vice Chairman Grossman testifying that "some" employees get a later lunch but "not everybody is getting the lunch"); *id.* 150.
- Working through lunch is completely voluntary. Employees can and do decline to work through lunch, and those who choose not to work through lunch do not suffer any adverse consequences. ALJD at 3 n.5 ("The record further shows that no employee was disciplined if they declined the request of a foreman to work through lunch.") The General Counsel filed no exceptions to this finding, and his own witnesses, again, conceded the point. Tr. 81, 135.

Moreover, the record makes clear that, when The Post asked employees to work through lunch, it did so consistent with this established practice – and sought to change nothing in its

[2] Paying overtime for this work is fully consistent with the CBA. Since lunch periods are unpaid and outside the seven-hour shift, requiring employees to work through lunch triggers the CBA's overtime provisions, which require overtime pay for hours worked in excess of 35 hours each week. GC Ex. 2, Sec. 22(a), at 26.

communications with employees. As the ALJ correctly found (ALJD at 5, 7), and as the General Counsel now concedes (GC Br. at 2 n.1), there is no evidence that The Post changed its practice of asking employees to work through lunch, paying them overtime, and sometimes giving them time to get lunch later in their shift – neither in November 2010, as the General Counsel alleged, nor at any other time. Indeed, Mailroom Foreman Wanda Jackson testified, without contradiction, about the practice that she has consistently followed, before and after November 2010, when asking employees to work through lunch (Tr. 175):

> Normally, myself or the machine foreman will go around and ask the employees that's assigned to each machine if they would like to work through lunch. That's what we do.

The ALJ properly credited Jackson's undisputed testimony that employees who work through lunch receive overtime pay for doing so, and that she would give them time to get something to eat later if they asked. ALJD at 3 n.5 ("If employees [who worked through lunch] wanted time to get lunch they were permitted to do so"); Tr. 175 (employees are paid up to an hour for working through lunch); *id.* 177 (when Jackson worked through lunch as a unit employee, she usually received "[a]t least an hour's pay" in return).

There is likewise no dispute that the Union was well aware of The Post's requests to employees to work "paid lunches." As the ALJ found (ALJD at 4) and the General Counsel now concedes, the Union's officers clearly knew that The Post was asking employees to work through lunch for overtime pay – and usually but not always gave them time later to get lunch – no later than October 28, 2009, when the Union grieved the issue for the first time. R. Ex. 32 (grievance claimed that foremen were "not giving the employees who have to work through lunch, an allotted amount of time to go get something to eat"); *see* Tr. 60. Not only did the Union actually know about the practice, but several Union officers even participated in the practice. For example, Union President Pullium himself has voluntarily worked through lunch, on occasion,

throughout his career at The Post, and was compensated for doing so – with or without receiving time to get lunch later. *See id.* 148. And Vice Chairman Grossman has even assisted the Mailroom Foremen in finding volunteers to work through lunch. *See, e.g.*, *id.* 122-23 (Grossman asks employees whether they are willing to work through lunch whenever any foremen ask her to do so). [3]

Suffice it to say, The Post has not operated to the "exclusion" of the Union in seeking volunteers to work through lunch. The Union is well aware that The Post has continued to ask employees to work through lunch consistent with a long-standing and unchanged "paid lunch" practice. That is not direct dealing, and the ALJ was plainly correct when he held (ALJD at 7 (emphasis added)):

> *Under these circumstances, and particularly noting that no material changes in conditions of employment were established or implemented with respect to the lunch policy, it cannot be found that the Respondent bypassed the Union and dealt directly with employees regarding working through lunch as alleged in paragraph 6 of the complaint. E.I. DuPont de Nemours & Company*, 301 NLRB 155 (1991) (Board held that employees understood that their participation in the video was voluntary and that the alleged direct dealing did not erode the union's representational status.

[3] Of course, since the Union has been aware of The Post's "paid lunch" practice since at least October 2009, it had every opportunity to request The Post to bargain over any supposed changes to the practice. The Union admittedly never did so, as the ALJ found and the General Counsel concedes. *See* ALJD at 5. While the General Counsel suggests that the Union's officers may not have been acting in any official capacity when they participated in the paid lunch practice, the Union's officers simply cannot disavow knowledge of the practice in their representational role when it is convenient to do so.

For the same reason, the direct dealing allegations in this case suffer from the same Section 10(b) problem that led the ALJ to dismiss the rest of the Complaint. ALJD at 4. The Union has known for years about The Post's paid lunch policy and The Post's failure to provide employees with a fixed lunch break after working through lunch, as the October 2009 grievance on the issue makes clear. *Id.* And the record establishes that the foremen have been asking employees to work through lunch for overtime pay – sometimes with, and sometimes without, a later lunch break – for many years. The direct dealing allegation, therefore, is time-barred – just like the claim that The Post made unilateral changes in the lunch policy is time-barred. *See id.*; *see also El Paso Elec. Co.*, 355 N.L.R.B. No. 95, 2010 WL 3279406, at 1 n.2 (Aug. 18, 2010).

That sound ruling – based on the ALJ's assessment of all the testimony and the demeanor of all the witnesses – should be sustained.

B. The ALJ Properly Applied The Law In Holding That The Post Did Not Engage In Direct Dealing.

The ALJ's conclusion that The Post did not engage in direct dealing rests on a proper application of Board law. As the ALJ noted, direct dealing involves more than simply communicating with members of the bargaining unit outside the union's presence. *See KEZI, Inc.*, 300 N.L.R.B. 594, 600 (1990) ("[T]o conclude that direct dealing has occurred, there must be factors present other than a simple communication from employer to employee."). Rather, such communications must be "for the purpose of establishing or changing wages, hours, and terms and conditions of employment or undercutting the Union's role in bargaining" and "made to the exclusion of the Union." *See The Permanente Med. Group, Inc.*, 332 N.L.R.B. 1143, 1144 (2000) (citing *S. Cal. Gas Co.*, 316 N.L.R.B. 979 (1995)). The ALJ correctly held that the General Counsel failed to meet that test.

1. First of all, there is no evidence that any discussions between the Mailroom Foremen and unit employees were "for the purpose of establishing or changing wages, hours, and terms and conditions of employment." *The Permanente Med. Group, Inc.*, 332 N.L.R.B. at 1144. As discussed above, the General Counsel does not except to the ALJ's findings that The Post has a policy of asking employees to work through lunch in exchange for overtime pay, when operations so warrant, and of permitting employees time to get lunch later if they so request. *See* ALJD at 3 n.5. Nor does the General Counsel except to the ALJ's finding that The Post made no unilateral changes to that policy. *See id.* at 5, 7; GC Br. at 2 n.1. Thus, simply continuing to ask employees whether they were willing to work through lunch in exchange for overtime pay – consistent with the unchanged "paid lunch" practice – does not amount to

communicating with employees for the "purpose of establishing or changing" terms of employment.[4]

Likewise, there is no evidence whatsoever that any discussions between the Mailroom Foremen and employees were for the purpose of "undercutting the Union's role in bargaining." *The Permanente Med. Group, Inc.*, 332 N.L.R.B. at 1144. The General Counsel claims that The Post "undercut the Union" when it "set up new terms and conditions of employment" (GC Br. at 9) by supposedly "*eliminating*" an alleged right to a lunch break after working though lunch. *Id.* at 7. But that claim fails because the General Counsel did not except to the ALJ's findings, and thus conceded, that The Post implemented "no new lunch policy" (ALJD at 5) and made no unilateral changes to its lunch policy (*id.* at 7), which involved asking employees to volunteer to work through lunch for overtime pay and "*permitting*" employees time to get lunch later if they asked. *Id.* at 5. Nor did the General Counsel except to the ALJ's finding that a fixed lunch break for employees who worked through lunch never "ripened into a term and condition of employment." *Id.* at 3 n.5 ("[T]he record confirms that . . . no firm practice was established that ripened into a term and condition of employment concerning the length of time permitted to get lunch"). In the absence of any unilateral changes to any term and condition of employment, therefore, there is no basis for concluding that The Post "undercut the Union's role in bargaining" in any way. *See E.I. DuPont de Nemours & Co.*, 301 N.L.R.B. 155, 156 (1991) (employer did not engage in direct dealing by asking employees to participate in production of

[4] As discussed *infra*, there is no evidence to support the General Counsel's claim that foremen offered overtime to employees in exchange for giving up their "right to a break" to get something to eat. Even assuming *arguendo* that they did, such discussions would not have been for the purpose of changing any terms and conditions of employment since, as the ALJ found with no exception from the General Counsel, a fixed lunch break for employees who worked through lunch was never a term and condition of employment in the first place. *See* ALJD at 3 n.5.

videotape where participation was voluntary, did not amount to a unilateral change in working conditions, and thus did not erode the union's representational status).[5]

Those fatal flaws aside, the Union had every opportunity to request bargaining if it believed that The Post was undercutting its bargaining role or acting "to the exclusion" of the Union. After all, there is no dispute that the Union knew about The Post's practice of asking employees to volunteer to work through lunch for overtime pay. As Union Chairman Forsythe admitted, "[e]veryone who works through lunch gets something, gets overtime, yes, I'm aware of that." Tr. 60. The Post even asked Union officers to volunteer to work through lunch themselves (*id.* 49, 148) – "always" for overtime pay but not always with a later lunch break (*id.* 52, 150) – and the Union's officers helped find volunteers to work through lunch from time to time. *See id.* 122-23. In addition, the Union filed three grievances between 2009 and 2011, and met with The Post at least twice, over The Post's failure to give some employees who worked through lunch a break later in their shift to get something to eat. ALJD 4; GC Exs. 6-7; R. Ex. 32. Yet the Union never once asked to bargain. *See* ALJD at 5 ("[T]he Union admitted that at no time between October 2009 and the present date, did they ever request the Respondent to negotiate over any new lunch policy"). The Union cannot observe and participate in a practice for years, then file and abandon grievances over the practice while never requesting to bargain, and then cry foul that The Post somehow "undercut" its role by interacting with employees consistent with the practice.

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[5] The General Counsel's claim that The Post sought to"eliminate" employees' right to lunch break, moreover, finds no support in the record. As the ALJ found, "most" foremen give employees time to get lunch after working through lunch. ALJD at 5-6. Even the General Counsel's own witnesses conceded the point. *See, e.g.,* Tr. 113 (Grossman testifying that some employees who work through lunch are still being given the opportunity to get lunch later in their shift).

Moreover, simply asking employees to perform overtime work that is consistent with established practice and completely voluntary does not "undercut[] the Union's role in bargaining." This case is similar to *E.I. DuPont de Nemours & Co.*, 301 N.L.R.B. 155 (1991), a case that the ALJ cited, where the General Counsel alleged that the employer engaged in direct dealing by asking employees to participate voluntarily in the production of a promotional videotape without first giving the union notice and an opportunity to bargain. *Id.* at 155. The Board dismissed this claim, noting that soliciting employee-volunteers to participate in the video was not a change in working conditions requiring bargaining and did not erode the union's representational status (*id.* at 156 (footnotes omitted)):

> [T]here is no complaint allegation of unlawful direct dealing with employees that has as its purpose or effect the erosion of the Union's status as exclusive bargaining representative. We are also not faced with an employer's effort to solicit grievances with an express or implied promise to improve benefits or conditions of employment, in derogation of a union's effort to organize employees or to negotiate an agreement.

In short, like *DuPont*, this is not a case involving an employer "going behind the back of the exclusive bargaining representative to seek the input of employees on a proposed change in working conditions." *Allied-Signal, Inc.*, 307 N.L.R.B. 752, 754 (1992); *Hercules Drawn Steel Corp.*, 352 N.L.R.B. 53, 54 (2008) (employer did not engage in direct dealing where employer simply asked employee to return to work as part of partial recall and where there was no evidence that communications "w[ere] likely to have any material effect on the [Union]'s status as the employees' exclusive representative"). Because the General Counsel thus failed to prove the essential elements of direct dealing, the ALJ correctly applied Board law in dismissing the General Counsel's Complaint.

2. None of the cases that the General Counsel cites requires a contrary outcome. Most of the General Counsel's cases stand for the unremarkable – and completely inapposite –

proposition that an employer cannot, in connection with open contract negotiations, bypass a union and go directly to its employees to solicit their views on bargaining proposals or working conditions. *See* GC Br. 6-7, *citing Armored Transp., Inc.*, 339 N.L.R.B. 374 (2003); *U.S. Ecology Corp.*, 331 N.L.R.B. 223 (2000), *enforced*, 26 F. App'x 435 (6th Cir. 2001); *Putnam Buick*, 280 N.L.R.B. 868 (1986), *aff'd*, 827 F.2d 557 (9th Cir. 1987). The General Counsel's other two cases, *Pepsi America Inc.*, 339 N.L.R.B. 986 (2003), and *Allied-Signal*, 307 N.L.R.B. 752 (1992), are easily distinguishable: those cases both involve direct dealing claims arising out of proven unilateral changes in terms and conditions of employment, and provide no basis for overturning the ALJ's well-reasoned decision in this case where the General Counsel concededly proved no such changes.

The General Counsel cites *Pepsi America* for the proposition that "[t]he Board has previously found that bypassing the union to bargain with employees over the elimination of their contractually-guaranteed lunch break constitutes direct dealing." GC Br. at 7. In *Pepsi America*, the CBA guaranteed employees at least a 30-minute lunch break during each shift, but the employer – without first giving the union notice and an opportunity to bargain – unilaterally eliminated all lunch breaks for all employees in response to its employees' request to the plant manager. Not surprisingly, the Board found not only that the employer engaged in direct dealing, but also that the employer committed an unlawful unilateral change.

That is not this case. Here, the ALJ found that The Post made no unilateral changes to its paid lunch policy, and the General Counsel does not except to that finding. *See id.* at 2 n.1. Nor did The Post solicit the views of its employees, without the Union's involvement, and eliminate any contract term based on those discussions. Rather, The Post has continued its established paid lunch practice, without change, and has continued to give employees who work through

lunch "time to get lunch" later in their shift if they want that time. *See* Tr. 113 (Grossman admitting that some employees who work through lunch are still being given the opportunity to get lunch later in their shift); *id.* 188 (Jackson testifying unequivocally that if employees who worked through lunch asked for time to get lunch later in their shift, she would give it to them). Unlike *Pepsi*, then, any discussions between The Post and its employees were not intended to – and did not – change any terms and conditions of employment, as the ALJ found. ALJD 5, 7. Thus, *Pepsi* provides no basis for overturning the ALJ's finding that The Post did not engage in direct dealing.

Nor does *Allied-Signal*. In that case, the Board held that the employer engaged in unlawful direct dealing when it commissioned an employee task force, without union involvement, to make recommendations on changes to the employer's no-smoking policy, and then unilaterally changed the policy. *Allied-Signal, Inc.*, 307 N.L.R.B. 752 (1992). The Board reached that conclusion even though it found that the unilateral change was not unlawful because the union had clearly waived, in its contract, the right to bargain over changes to smoking rules. In so holding, the Board explained that the union's waiver of its right to bargain did not constitute consent to allow the employer to deal directly with employees as if the unit had no union representative. *Id.* at 754. Thus, the Board's dismissal of the unilateral change allegation on waiver grounds did not affect the allegation that the employer engaged in direct dealing when it set up and dealt with the employee task force.

Nothing in *Allied-Signal* supports reversal of the ALJ's decision in this case. In *Allied-Signal*, unlike here, the employer actually made a unilateral change in its policy – a change that was not unlawful because the union had waived its right to bargain on the subject – after engaging in direct dealing to solicit employee recommendations. Here, in contrast, the ALJ

concluded that The Post made *no* changes to its policy – a fact that the General Counsel now concedes – and thus that The Post engaged in *no* direct dealing with employees for the purpose of making policy changes. *See* ALJD at 5. Unlike the employer in *Allied-Signal,* who set up a task force to deal with an employment condition to the exclusion of the union, there is no evidence here that The Post "[went] behind the back of the [union] to seek the input of employees on a proposed change in working conditions" or otherwise "erode[d] the position of the [union]" through unilateral action. 307 N.L.R.B. at 754. There simply was no unilateral action here.

Thus, the General Counsel's cases offer no escape from the ALJ's well-reasoned decision and the General Counsel's own concessions. Having conceded that The Post did not unlawfully change its lunch policy or implement a new lunch policy, the General Counsel cannot sustain his Exceptions based on the illogical theory that The Post unlawfully dealt directly with employees for the "purpose of changing" a practice that never changed. Under the circumstances, the ALJ reached the only reasonable outcome in dismissing all of the General Counsel's Complaint. *See E.I. DuPont de Nemours & Co.*, 301 N.L.R.B. 155, 156 (1991) (employer did not engage in direct dealing where soliciting volunteers for videotape did not amount to a unilateral change in working conditions and thus did not erode the union's representational status).

II. The Board Should Reject The General Counsel's Effort To Overturn The ALJ's Well-Reasoned Decision By Distorting The Record.

Having failed to make a case that The Post "bypassed the Union and dealt directly with its employees in the Unit regarding working through lunch" under a supposedly "new policy," as alleged in the Complaint (*see* Compl. ¶ 7), the General Counsel resorts to distorting the record. Fundamentally, the General Counsel builds his Exceptions around the unsupported assertion that The Post "*bargained* with individual employees in an effort *to convince them to give up their*

right to a break after the employees had been asked to work through lunch." GC Br. at 1 (emphasis added). None of the General Counsel's witnesses so testified on the basis of any credible first-hand knowledge. And the General Counsel's fall-back reliance on a hearsay account and an "unstated" assumption cannot fill the void.

The General Counsel's False Premise. First of all, the General Counsel's theory rests on an erroneous and unsupported premise: that employees had an established "right to a break" after working through lunch, on top of the one-hour and ten minutes of paid break time that they already receive each shift. That is not what the record shows and not what the ALJ found.

Rather, the ALJ found that most Mailroom employees were entitled to four 15-minute paid breaks and two 5-minute paid wash up times, which they received whether or not they worked through lunch. ALJD at 3. And he found that Section 14 of the CBA continued "the present practice of providing for . . . time to get lunch when it is necessary to work through lunch" – a practice that, the ALJ found, amounted to foremen "permitting" employees to take some time to get lunch if they "wanted time to get lunch." *Id.* at 3 n.5. In making these findings, the ALJ rejected the General Counsel's claim that the contractual practice established, as a term and condition of employment, a guaranteed right to a fixed lunch break for employees who worked through lunch; to the contrary, he held that "no firm practice was established that ripened into a term and condition of employment concerning the length of time permitted to get lunch." *Id.* Having failed to except to any of the ALJ's findings in this regard, the General Counsel cannot build his Exceptions around the false premise that employees had an established "right to a break" after working through lunch.[6]

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[6] The Post, moreover, has consistently rejected the Union's notion that employees who volunteer to work through lunch are entitled to some fixed amount of time to get lunch later, as Kennedy's response to the Union's various grievances on this issue make clear. Tr. 322 (telling the Union that, if employees who volunteered to work

The Non-existent, "Unstated" Negotiations. In any event, none of the witnesses testified that The Post negotiated with them to "give up" this supposed right to a break after working through lunch, as the General Counsel represents with no record support whatsoever. The General Counsel's own witnesses conceded that they had no personal, first-hand knowledge of what any Mailroom Foremen said to any other employees when they asked them to work through lunch. Tr. 82-83 (Forsythe admitting that his knowledge of what foremen said to employees about working through lunch is based almost exclusively on "what was conveyed to [him] from other [union] members"); *id.* 122 (Grossman admitting that she has no personal knowledge of what any foreman told employees about working through lunch). And the witnesses who testified directly about being asked to work through lunch uniformly testified that The Post offered them compensation, i.e., overtime pay, in exchange for working through lunch. *See, e.g.*, *id.* 59 (Forsythe testifying, "I know if I worked through my lunch or worked into my lunch, I got overtime for lunch."); *id.* 123 (Grossman testifying that a foreman told her that "she would pay us through our lunch and . . . would get someone to give us a break later"); *id.* 129 (Leroux testifying that he was offered overtime for working through lunch).

Not one of those witnesses testified that The Post negotiated with them "to give up their right to a break." Union Chairman Forsythe described how one foreman asked him to work through lunch in 2011, but he never testified that the foreman asked him to "give up" any right to a lunch break in the process. *Id.* 81-83. Vice Chairman Grossman testified that, when her foreman asked for paid lunch volunteers, the foreman said that she "*would* . . . give [the

(continued...)

through lunch "needed time to get something to eat, we didn't have a problem with that, but there just wasn't going to be a fixed 20 minutes"). The Union did not attempt to arbitrate its grievances claiming such a right. *Id.*

employees] a break later." *Id.* 123 (emphasis added). Union President Pullium was even more to the point (*id.* 145 (emphasis added)):

> Q. Mr. Pullium, . . . have you ever been asked to work through lunch?
>
> A. Yes.
>
> Q. ***Have you in your employment, have you ever been asked to work through lunch without a break later on?***
>
> A. ***Not that I recall, no.***

With no testimony to support his theory of direct dealing, the General Counsel remarkably seeks to rely on "unstated" negotiations – claiming that, when The Post offered Leroux two hours of overtime in exchange for working through lunch, the "unstated trade-off" was that he "would give up his lunch break." GC Br. at 8. The General Counsel fails to articulate just how something "unstated" can amount to an unlawful "communication" for purposes of a direct dealing claim. That insurmountable problem aside, Leroux neither said nor suggested that his foreman offered him such a trade-off. What he said is consistent with the practice that the ALJ found and the General Counsel now concedes (Tr. 129):

> Q. And what do [the foremen] say to you?
>
> A. Well, they would ask you to work through lunch, 35-minute lunch, if it was a 35-minute lunch. Or they would ask you to work through a 15-minute lunch. Sometimes it would be time and a half. And then sometimes they would come around and say, well, would you like to work through lunch for two hours overtime.
>
> Q. If you do work through lunch, what are you supposed to get in the contract?
>
> A. In the contract, it states, it says overtime, it's time and a half.

Nor did Union President Pullium testify, as the General Counsel misrepresents, that "he was offered an hour of paid overtime to work through lunch *if he gave up his twenty minute break later on to get lunch.*" GC Br. at 5 (emphasis added). Pullium never testified that The Post conditioned overtime pay on his "giving up" a later lunch break. Rather, he testified that he, not his foreman, mentioned the Union's pending 20-minute lunch break grievance and that his foreman only told him that he would be compensated for working through lunch (Tr. 146):

> Q. What did [the foreman] say to you?
>
> A. He asked me if I would be going to work through lunch . . .
>
> Q. What did you say to him?
>
> A. I told him that I probably would, but there was an issue that we had pending on being able to get 20 minutes to take lunch if I worked through lunch. And he said that I would be well compensated.

Union President Pullium declined to draw the link that the General Counsel now draws – i.e., that he was offered overtime to "give up" his right to a later lunch – when he later evaded responding directly to the ALJ's question on that exact point (Tr. 150-51):

> ALJ: Did you have any discussions with anyone in management, a supervisor, superintendent, concerning being paid versus not being given the opportunity to get lunch?
>
> A. Honestly, I didn't have a problem because I had already eaten my lunch and they were paying me for it.

In short, not a single witness testified that The Post "negotiated" with them to "give up" any right to a break after working through lunch, and the General Counsel cannot overcome the ALJ's well-reasoned finding of no direct dealing by relying on record distortions and "unstated" assumptions.

The Supposed "Deals." There is likewise no direct, credible evidence that The Post worked out any "deals" with any identifiable employees to give up any supposed right to a break after working through lunch. For the most part, the General Counsel relies on hearsay testimony from Union Chairman Forsythe and Vice Chairman Grossman that is, at best, vague and self-serving – and that neither establishes any "deals" nor proves that the supposed deals involved negotiations with employees "to give up" a lunch break.

The only testimony about any supposed "deals" came from Grossman, who testified that, when she asked Superintendent Allen Martin and Assistant Superintendent Lawrence Johnson about giving breaks to employees who worked through lunch, they allegedly told her that they had "worked out deals" with these employees. Tr. 108-09. But the General Counsel did not elicit any testimony whatsoever from Grossman as to the specifics of those alleged "deals" (*see id.*), and the record thus contains no evidence to substantiate them – not the names of involved employees, not the negotiations that led to the deals, not terms of the deals, not the context of the deals, not whether employees were asked to "give up" anything. Nor did the General Counsel subpoena any employees or supervisors who supposedly participated in these deals to fill in the blanks. Without more, therefore, the record provides no credible basis for concluding that The Post negotiated any "deal" with any employee "to give up" any right to a lunch break after working through lunch, as the General Counsel asserts.

The General Counsel's reliance on Forsythe's testimony is likewise misplaced. According to the General Counsel, there is "little dispute" about these supposed deals based on Forsythe's testimony (GC Br. at 4 (emphasis added)):

> Forsythe testified that supervisor Joe Malenabe [sic] and Wanda Jackson *admitted* to him in November 2010 that they were *asking employees to "volunteer" to give up their contractual right to a break* after working through lunch, in exchange for a guaranteed

> hour of overtime, and that [Vice-President of Labor] Jay Kennedy *admitted the same* during grievance meetings.

But The Post's witnesses admitted no such thing, and the General Counsel's summary completely misrepresents the testimony:

- The General Counsel misrepresents Forsythe's testimony: he merely testified that he said, during a grievance meeting, that "when it's required for us to work through lunch we're to get time to get lunch" and that either Jay Kennedy, Allan Martin, or someone else responded that "[W]e're asking people to volunteer. We didn't know that they still need an opportunity to get lunch." Tr. 54-55; *see also id.* 56-57. And, as to his alleged discussion with Malenab, Forsythe testified that Malenab admitted to asking employees to volunteer to forego "whatever" (*id.* 50), but did not identify the "whatever" – whether that meant their regular 30-minute lunch period, or time to get lunch later, or something else. *Id.*
- The General Counsel completely misrepresents the testimony of Post Vice President Kennedy: he never "admitted" that The Post was "asking employees to 'volunteer' to give up their contractual right to a break after working through lunch, in exchange for a guaranteed hour of overtime" (GC Br. at 4); rather, Kennedy testified that, in a grievance meeting, he disputed any "contractual right" to a 20-minute break and told the Union that "if people [who voluntarily worked through lunch] needed time to get something to eat, [The Post] didn't have a problem with that, but there just wasn't going to be a fixed 20 minutes." Tr. 321-22. Indeed, though the General Counsel completely ignores it, Forsythe himself testified that Kennedy never said that The Post "won't provide time for people to get lunch or anything like that" and, to the contrary, "said [The Post] would provide time." *Id.* 86.

- And it blatantly misrepresents Jackson's testimony: she never "admitted" anything close to asking employees to "give up their contractual right to a break after working through lunch"; rather, she testified that she is not familiar with the contract and does not recall the alleged discussion with Malenab about contractual rights that Forsythe describes. *Id.* 181, 186. Most importantly, she testified directly that, as a foreman, she has asked employees to work through lunch when operations so warrant, that she did not (and was not told to) link that request to "not . . . giv[ing] them a break after lunch" (*id.* 185), and that she would in fact allow employees time to get lunch if they asked (*id.* 188).

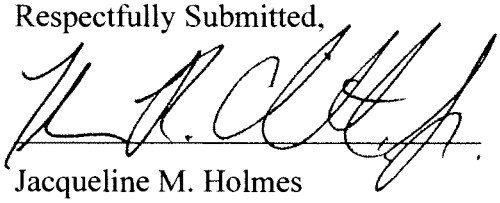
In short, none of The Post's witnesses "admitted" to asking employees to "give up their contractual right to a break after working through lunch" (GC Br. at 4), and the General Counsel cannot prove otherwise through unreliable hearsay accounts and fabricated admissions. Because the ALJ correctly found that The Post did not engage in direct dealing – after weighing all the testimony and assessing the demeanor of all the witnesses[7] – the Board should overrule the General Counsel's Exceptions.

[7] The ALJ's credibility determinations are entitled to deference. *See Vons Grocery Co.*, 320 N.L.R.B. 53, 53 n.1 (1995) (noting in the context of a case in which the ALJ found that the employer did not engage in direct dealing that "[t]he Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces [them] that they are incorrect") (citing *Standard Dry Wall Prods. Inc.*, 91 N.L.R.B. 544 (1950), *enforced*, 188 F.2d 362 (3d Cir. 1951)).

CONCLUSION

Based upon the facts adduced at the hearing, and the arguments and authorities set forth above, the General Counsel's Exceptions to the ALJ's decision should be overruled, and the Board should affirm the ALJ's finding that The Post did not engage in direct dealing.

Respectfully Submitted,



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CERTIFICATE OF SERVICE

Attorneys for Respondent hereby certify that on this 24th day of January, 2012, they caused a true and correct copy of the foregoing The Washington Post's Brief in Response to Counsel For The Acting General Counsel's Exceptions to be served by email and overnight delivery upon:

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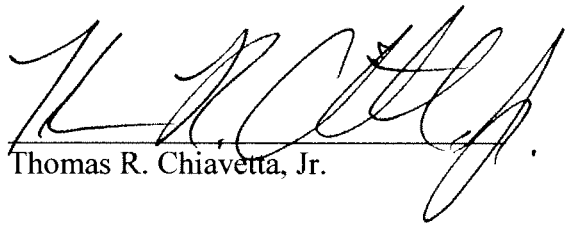

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