UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

E-Z PARK, INC.

and Case 04-CA-092571

TEMESGEN DASA,
an Individual

RESPONDENT'S ANSWERING BRIEF TO THE CHARGING PARTY'S EXCEPTIONS

E-Z Park, Inc. (hereinafter referred to as "Respondent," unless otherwise indicated), by and through its undersigned attorneys, hereby provides the following Answering Brief to the Charging Party's Exceptions in this matter, and avers as follows:

I. Statement of the Case

On August 13, 2013, Chief Administrative Law Judge Robert Giannasi (hereinafter the "ALJ") issued a decision ("Decision") in the instant matter, finding, *inter alia*, that the Respondent **did not** violate § 8(a)(1) and (3) of the National Labor Relations Act (hereinafter the "Act") by discharging the charging party, Temesgen Dasa (hereinafter the "Charging Party").

The Charging Party filed 11 exceptions to the Decision, alleging that the ALJ erred in virtually every decision of fact and law unfavorable to the Charging Party. In his exceptions, the arguments made by the Charging Party boil down to three (3) contentions: (1) the ALJ was wrong when he did not sufficiently credit the Charging Party and the General Counsel's other witness's testimony over that of the Respondent's witnesses; (2) the ALJ failed to consider evidence not of record; and (3) the ALJ should consider new arguments. The General Counsel

has not entered exceptions in this matter. As set forth *infra*, the record fully supports the ALJ's conclusions of fact and law.

This Brief is submitted in support of the Decision issued by the ALJ.

II. Facts

The Respondent, a corporation that operates parking lots and garages in the Philadelphia area, employed the Charging Party as a "cashier and valet" (i.e. parking lot attendant) from 2008 until his termination for willful misconduct on October 6, 2012. In the unfair labor practice charge ("Charge") filed on November 5, 2012, the Charging Party alleged that he was fired because he engaged in protected activity — specifically, he claimed to have supported Laborers Local 332 (hereinafter the "Union") by having other employees sign union authorization cards.

As the parking lot attendant of two (2) of its busiest lots in Center City Philadelphia on weekends, the Respondent relied on the Charging Party to be honest with his cash handling. The Charging Party's duties included writing tickets for vehicles and collecting money with respect to same. It is the Respondent's policy that tickets be filled out properly upon a vehicle's arrival. In his testimony, the Charging Party acknowledged the importance of filling out tickets correctly. See ALJ Hearing of July 8, 2013 Transcript ("T.") at 42, 44. He further stated it takes only seconds to fill out a ticket.

On October 6, 2012, the Charging Party was working the 3 p.m. to 2 a.m. shift at the Respondent's lot located on the 400 block of Bainbridge Street in Philadelphia. Earlier that afternoon, Gregg Spear, one of Respondent's supervisors, received a call from another supervisor, Zawdu Mengesha, that there were suspicions that the Charging Party was engaging in theft during his shifts. Mengesha received this tip from another parking attendant, Ebbsa Muktar, who often worked with the Charging Party. Upon learning this information, Spear

decided to relocate Muktar (who was scheduled to work at the Bainbridge lot with the Charging Party that evening) to another lot. See T. at 116. Spear then called supervisor-in-training Dorian Rrapushaj[1] and instructed Rrapushaj to meet him at the Bainbridge Street lot, without explaining the purpose of the visit.

Spear and Rrapushaj arrived at the Bainbridge lot sometime after midnight, finding no customers waiting for service and all cars parked. Spear then informed Rrapushaj that they were there to conduct an investigation. The two (2) supervisors split up and checked separate areas of the parking lot where they both found tickets that were incorrectly filled out. At that time, the Charging Party was the only trained employee working at the Bainbridge lot after 8:30 p.m. (approximately the time Muktar was reassigned to another lot). By the numbering on the tickets, it was obvious to the supervisors that all of the inaccurate tickets were issued to customers later in the shift. The only other person working in the Bainbridge Street parking lot that night was Daniel Mekonnen, a new employee who was training at the time. **Mekonnen was not taking or issuing tickets that night because of his status as a trainee.** See T. at 110.

Spear and Rrapushaj discovered five (5) tickets that were filled out incorrectly on that Saturday night: four (4) tickets had numbers written on them that did not match the vehicle's license plate or inspection numbers; and one (1) ticket was left blank with no identifying information. Spear motioned to the Charging Party that he found problematic tickets, then took the Charging Party around the lot, pointing out the deficiencies.[2] At that time, Spear asked for an explanation as to why the tickets were incorrect, to which the Charging Party offered no response. T. at 119-120. **In fact, never once did the Charging Party assert that he did his job properly by filling out tickets correctly.** Moreover, the Charging Party admitted that the

[1] Dorian's name is incorrectly spelled in the Hearing Transcript.
[2] Spear had time to do this because there were no vehicles waiting to enter the lot.

tickets found by Spear and placed into evidence at the Hearing were his. T. at 29. Spear then sent the Charging Party home, before the end of his shift. **This was the first, and only, time the Charging Party had been sent home from work, yet he did not question Spear's decision.** That night, based on the results of the inspection, Spear — and he alone — decided to terminate the Charging Party. As evidence of his thought process, Spear testified at the Hearing that incorrectly filled-out tickets certainly raise suspicions of theft, but blank tickets are even worse. T. at 112-13. By telephone conversation the next day, Spear gave notice to the Charging Party that he was fired.

Over the past several years, many employees of the Respondent have been fired for theft and/or failure to fill out parking tickets correctly. See General Counsel Exhibit ("GCX") 5-F (forms documenting other employees terminations for theft, originally submitted as "Exhibit F" to Employer's Position Statement, submitted November 20, 2012). The latter is often indicative of theft or attempted theft. T. at 50, 96, 123. Spear, David App (a former manager for the Respondent and the General Counsel's star witness), and Dorian Rrapushaj all testified that incorrect or blank tickets were often used as a means of employee theft. T. at 96. App personally experienced employees pocketing customers' money by incorrectly filling out tickets: he explained that parking attendants often filled in the control numbers incorrectly and/or left tickets blank so they could use the tickets later on a different vehicle and keep the difference for themselves. T. at 50. Moreover, App, testified that supervisors, including Spear, would routinely check tickets in parking lots due to previous, companywide problems with employee theft. It is a well-established policy that the penalty for employee theft is termination. T. 103.

On August 6, 2012, the Union filed a petition seeking to represent the Respondent's parking lot attendants. Subsequently, the Union lost the election held on September 14, 2012, by

a vote of 48 to 11. See T. at 7. The Charging Party contends that his termination a month later was due to his alleged engagement in protected activity, specifically handing out authorization cards to other employees and encouraging them to support the Union. However, there is **not one scintilla of evidence** in the record that Spear — the sole member of management who decided to terminate the Charging Party — had any knowledge whatsoever of the Charging Party's alleged protected activity.

The Charging Party did claim, however, that he discussed union activity with App, the former manager. T at 56. App was separated in September 2012 shortly before the election, because the Respondent correctly believed that he, a statutory supervisor under the Act, was the lead Union organizer. Respondent was entitled to demand absolute loyalty of App and he violated that lawful requirement when he surreptitiously attempted to help the Union organize Respondent's employees.

App's testimony about the Charging Party's supposed protected activity was utterly unconvincing for several reasons. First, App admitted that the Charging Party was not one of the lead employee organizers. When asked which employees he personally took to meet with the Union, App responded that **he took four (4) employees to meet with Union organizers and "Temesgen was not with them."** T. at 56. Second, App and the Charging Party explicitly stated that neither of them ever informed Spear, the sole party who decided to terminate the Charging Party, or any other member of management for that matter, that the Charging Party supported the Union. When specifically questioned whether he ever told Spear that the Charging Party supported the Union, App responded, **"I didn't tell any of the Spears, would be the best way to answer that.**" T. at 86. Similarly, the Charging Party testified that he never told any of the Spears that he supported the Union. T. at 37-38. In sum, neither App nor the Charging Party

ever told Spear (the sole member of management responsible for deciding to terminate the Charging Party) or any of the owners of the company, that the Charging Party supported the Union.

In a Hail Mary attempt to impute knowledge to the Employer, App claimed both he and Supervisor Mengesha assisted the Union with organizing efforts. App testified that he told Mengesha the names of other employees that he knew supported the Union. **Mengesha vehemently denied any participation in organizing the Respondent's employees for the Union or any knowledge of the Charging Party's alleged solicitations.** Even assuming that App's testimony was true, it is simply a bridge too far to posit that Mengesha would convey any information about the Charging Party's Union support to the owners of the Respondent. First, Mengesha is still employed by the Respondent. Any hint that he was involved in the Union organizing effort as a supervisor would certainly put his job in jeopardy. App's termination certainly confirms that misgiving. If Mengesha had a change in heart about his Union sympathies, the only sensible approach would be to keep any knowledge regarding the Union, including employees who supported the Union, to himself. Second, if Mengesha truly did support the Union, and continues to support the Union, why would he "rat-out" his Union brothers to the owners? In the end, any finding that Spear, the sole party who decided to terminate the Charging Party, or any of the owners of the Respondent for that matter, knew that the Charging Party supported the Union requires mental leaps and bounds in logic that are not supported by the record or common sense. As stated at the Hearing, the General Counsel failed to connect the dots and establish knowledge on the part of the party who decided to terminate the Charging Party and the parties who ultimately control the direction of the entire business.

Finally, the only evidence provided at the Hearing regarding Mengesha's alleged interrogation of the Charging Party was the Charging Party's own self-serving testimony. The Charging Party claims that he would not reveal names when asked by Mengesha which employees signed authorization cards. Mengesha has firmly and consistently denied this allegation throughout these proceedings.

Based on the record, including the testimony presented at the Hearing, the ALJ concluded that the Respondent did not violate the Act as alleged and dismissed the Complaint in its entirety.

III. Argument

1. The ALJ correctly held that Mengesha did not interrogate the Charging Party about his alleged protected activity. The factual findings surrounding this holding involved credibility determinations, review of which should be limited unless they are contradicted by a clear preponderance of the evidence. See Standard Dry Wall Prod., Inc., 91 NLRB 544 (1950).

In his Decision, the ALJ reviewed the conflicting testimony of the Charging Party and Supervisor Zawdu Mengesha regarding Mengesha's alleged interrogation of the Charging Party. Decision at 3-4, citing T. at 20-21, 128-29. Said testimony was the only evidence of record regarding this issue. The ALJ noted, "[T]he Acting General Counsel had the burden of proving the allegation of coercive interrogation . . . [including] proof of the credibility of the witness whose account supports the allegation." ALJ Decision at 4. The ALJ then concluded that "Mengesha was the more reliable witness." With the ALJ's credibility determination that Mengesha's testimony regarding the alleged interrogation was more compelling, the Charging Party's Exception fails, as a clear preponderance of the evidence does not support his position that he should be believed over Mengesha. See Standard Dry Wall, 91 NLRB 544. Therefore, the ALJ correctly held that Supervisor Mengesha did not interrogate the Charging Party.

Next, the information regarding the total number of attendants who signed union authorization cards was never admitted into evidence. In fact, the only explicit mention of cards signed was testimony given by the Charging Party regarding the alleged number of attendants he asked to sign cards, which was seven (7). T. at 19. The Charging Party should not be permitted to allege new facts in his Exceptions that are not contained in the record, and therefore his statement regarding the alleged number of attendants who signed cards should be disregarded. See Seattle Bakers Bureau, Inc., 108 NLRB 104, n.2 (1954).

Additionally, the Charging Party attempts to introduce new evidence regarding previously unalleged unfair labor practices. As the ALJ correctly noted, allegations of additional acts supposedly committed by the Respondent were of no moment, because they were not alleged as unfair labor practices in the Complaint. Decision at 6. In all, this Exception should be rejected.

2. The ALJ correctly held that the Charging Party altered the control number on a parking ticket during the Charging Party's last night of work for the Respondent. Again, the Charging Party takes issue with the ALJ's credibility determinations.

At the Hearing, four (4) mismatched tickets and one (1) blank ticket were submitted into evidence to show that the Charging Party was responsible for improper ticketing. GCX 5-C. The General Counsel failed to offer any evidence that the Charging Party filled out the tickets in question properly. Further, the ALJ found that the Charging Party's testimony was internally inconsistent regarding proper vehicle ticketing at the Bainbridge lot on the night in question. Decision at 5, n.3. He also found Spear's testimony regarding his inspection of the Bainbridge lot on that night uncontradicted and supported in part by another supervisor who accompanied Spear and assisted in the lot inspection. Decision at 5, n. 4. It should also be noted that the ALJ

found that the lot inspection, in itself, was an investigation into the suspected wrongdoing of the Charging Party, contrary to the Charging Party's new allegations. See Decision at 7.

As the preponderance of the evidence amply supported the ALJ's credibility determination, his finding that the Charging Party altered the control number on a parking ticket on the night in question should be upheld. See Standard Dry Wall, 91 NLRB 544. Consequently, the Board should reject this Exception.

3. The ALJ correctly held that the Charging Party's alleged protected activity was not a motivating factor in the decision to discharge him, and that the Respondent established that it would have discharged the Charging Party, even absent said alleged protected activity.

The General Counsel's star witness, former E-Z Park Supervisor David App, testified that the Respondent had fired many employees who were caught stealing via improper ticketing. T. at 50. Thereafter, the ALJ found the record contained "no evidence of disparate treatment," and continued to state that ". . . indeed, the evidence is that Respondent routinely fired attendants for improper ticketing that amounted to suspicion of, or actual, theft. Accordingly, I find that the reason offered by respondent for the discharge was not a pretext." Decision at 7.

The Charging Party is attempting to introduce new evidence in this Exception. Such new evidence should be disregarded. See Seattle Bakers Bureau, Inc., 108 NLRB 104. Moreover, employee files were produced to General Counsel at the Hearing. General Counsel's decision not to admit said files into evidence has no bearing on the Board's review of this matter, as the Charging Party does not get to retry this case via his Exceptions, just because he is unhappy with the ALJ's determination.

As a matter of law, the ALJ appropriately applied the *Wright Line* test to his factual determinations regarding Respondent's motivations for discharging the Charging Party. See 251

NLRB 1083 (1980), enforced, 662 F.2d 899 (1st Cir. 1981). Additional information, that was at the disposal of the General Counsel at the time of the Hearing cannot be introduced via Exceptions. See Seattle Bakers Bureau, Inc., 108 NLRB 104. Accordingly, the ALJ's findings regarding the Charging Party's allegations of pretext should be upheld.

4. The ALJ correctly held that there was no evidence of record which indicated that members of the Respondent's management had knowledge of the Charging Party's alleged protected activity, and therefore no anti-union animus was directed at the Charging Party.

In this Exception, the Charging Party posits a new theory as to how the Respondent would have knowledge of his alleged protected activity, but fails to argue the law was misapplied or point to any facts of record that support his contention. The Board disregard this Exception as to the issues it raises that were not properly brought before the ALJ. See Detroit Newspaper Agency, 327 NLRB 799 (1999).

The ALJ's decision that the Respondent had no knowledge of the Charging Party's alleged protected activity and therefore did not direct any anti-union animus toward him is amply supported by the record. There is no evidence that any animus was directed towards the Charging Party for his union activities. Decision at 6. Further, there is no specific evidence that the Spears knew whether the Charging Party even supported the Union. Id. App testified that he refused to give the Charging Party's name to the Spears and the Charging Party was not one of the four (4) employees who were first brought to the Union to initiate an organizing campaign. Moreover, Dasa could not even name the representative of the Union with whom he met on two (2) occasions. Nor is there any evidence that Respondent's union animus lingered after the election. As the ALJ pointed out: "[T]he timing of Dasa's discharge was well removed from the union campaign. He was discharged almost a month after the election which had resulted in a

resounding loss for the union. It defies belief that Respondent would have waited so long to discharge Dasa if indeed it did so because of union activities." Decision at 6.

Based on this evidence and through an apt application of *Wright Line*, the ALJ correctly determined that the Respondent had no knowledge of the Charging Party's purported protected activity and therefore did not direct any anti-union animus toward him. See 251 NLRB 1083. Accordingly, this Exception should be rejected.

5. The ALJ correctly held that the Charging Party's discharge for improper ticketing was not pretextual. Again, the Charging Party attempts to introduce new arguments that were not properly raised at the Hearing. These arguments should be ignored. See Detroit Newspaper Agency, 327 NLRB 799.

Crediting Spear's testimony over that of the Charging Party, the ALJ determined the Charging Party was responsible for improper ticketing on October 6, 2012. Even before the lot inspection, the Charging Party admitted to Spear that he had reused a ticket after scratching out previously written information on it. The ALJ found the Charging Party's testimonial explanation for that was unconvincing. The Charging Party admitted responsibility for four (4) mismatched tickets and one (1) blank ticket uncovered during the lot inspection, as previously discussed. T. at 21. "He could offer no legitimate explanation for the improper ticketing when confronted by Spear after the lot inspection. Moreover, there is no evidence that the report of impropriety that caused the lot inspection was not legitimate." Decision at 6-7. Based on this clear evidence of the Charging Party's improper ticketing and applying *Wright Line*, the ALJ determined the motivation behind the Respondent's decision to terminate the Charging Party was legal. See 251 NLRB 1083.

The Charging Party has failed to establish that a clear preponderance of the evidence favors his version of events; therefore, the ALJ's credibility determinations crediting Spear's testimony over that of the Charging Party should be upheld. It follows that this Exception should be rejected.

6. The ALJ correctly held that the Charging Party was responsible for the improper ticketing discovered on the Charging Party's last night of work for the Respondent.

This Exception appears to be a rephrasing of the Charging Party's second Exception, which implicitly argued he was not responsible for improper ticketing. As previously detailed, above, evidence of the Charging Party's improperly filled-out tickets was presented at the Hearing, along with testimony supporting the Respondent's assertion that the Charging Party failed to ticket vehicles appropriately. The ALJ credited the testimony of Respondent's witnesses, over that of the Charging Party. Also at the Hearing, the General Counsel failed to present evidence that the Charging Party had, in fact, performed his job duties correctly. Based on this evidence, the ALJ found the Charging Party improperly ticketed vehicles on the last night he worked for the Respondent.

Following the precedent set by *Standard Dry Wall*, the review of the ALJ's credibility determinations should be limited, as they are not contradicted by a clear preponderance of the evidence. See 91 NLRB 544. Consequently, this Exception should be disregarded.

7. The ALJ correctly held that the Charging Party did not offer a legitimate explanation for the improper ticketing. Again, the Charging Party parrots his allegations contained in his second and sixth Exceptions. He argues that additional information be considered, but such information was not properly raised before the ALJ. See Detroit Newspaper Agency, 327 NLRB 799. For the reasons stated in our response to the second and

sixth Exceptions, and because the issue raised in this Exception should have been raised prior, this Exception should be rejected.

8. The ALJ correctly held that the Charging Party was responsible for the improper ticketing that led to his termination. Once again, the Charging Party reiterates his stance in the second, sixth and seventh Exceptions. This time, however, his argument rests solely on the belief that his testimony should have been credited over Spear's testimony. As previously stated in our response to the sixth Exception, the Charging Party fails to establish that a clear preponderance of the evidence contradicts the credibility determination of the ALJ regarding the Charging Party's improper ticketing. Therefore, applying *Standard Dry Wall*, review of said determination should be limited. It follows that the Board should disregard this Exception.

9. The ALJ correctly held that the Respondent's reason for discharging the Charging Party was not pretextual. This time, the Charging Party repeats his assertions contained in the fifth Exception. As discussed in depth, above, the ALJ determined the motivation behind the Respondent's decision to terminate the Charging Party was legal, based on clear evidence of the Charging Party's improper ticketing and a proper application *Wright Line*. See 251 NLRB 1083. Therefore, the Board should disregard this Exception, too.

10. The ALJ correctly held that the Respondent did not violate the Act, as alleged in the Complaint. As consistently argued throughout this Brief, the preponderance of the evidence amply supported the ALJ's factual determinations. The ALJ then appropriately applied the *Wright Line* analysis to these factual determinations to conclude that the Respondent did not violate the Act as a matter of law. See Wright Line, 251 NLRB 1083. Consequently, this Exception should be rejected.

11. The ALJ correctly recommended that an Order be issued dismissing the Complaint. Because the ALJ found there was no violation of the Act, he rightfully dismissed the Complaint. Accordingly, this Exception should be disregarded.

IV. Conclusion

Based on the foregoing, the Respondent, E-Z Park, Inc., respectfully requests that the Charging Party's exceptions be rejected.

Respectfully Submitted,

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Dated: December 4, 2013

CERTIFICATE OF SERVICE

I, Daniel J. Sobol, Esquire, hereby certify that on December 4, I caused a true and correct copy of the foregoing to be sent via Certified Mail to the following:

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