UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

STANDARD PARKING, IMPERIAL PARKING, AMPCO SYSTEM PARKING d/b/a ABM PARKING SERVICES, LAZ PARKING, INTERPARK, individually and on behalf of CHICAGO PARKING ASSOCIATION,	)	
Respondents,	)	
and	)	CASE NO.: 13-CA-071259
TEAMSTERS LOCAL NO. 727,	)	
Charging Party	)	

RESPONDENTS' CROSS-EXCEPTIONS TO THE DECISION OF THE ADMINISTRATIVE LAW JUDGE AND BRIEF IN SUPPORT THEREOF

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

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CROSS-EXCEPTIONS TO THE ALJ'S DECISION[1]

Pursuant to Section 102.46 of the Rules and Regulations of the National Labor Relations Board ("NLRB" or "the Board"), Respondents InterPark, Imperial Parking, Standard Parking, LAZ Parking, and ABM Parking Services (collectively "Respondents") file the following cross-exceptions to Administrative Law Judge Geoffrey Carter's Decision in the above matter.

1. Respondents except to the ALJ's failure to fully address and/or rule on the various other arguments demonstrating they did not violate the National Labor Relations Act as alleged in the Complaint. JD at 26, n.42. The failure to address the Respondents' other arguments was contrary to law and requires the matter be remanded to the ALJ for consideration in the first instance.

2. Respondents except to the ALJ's finding that the Chicago Parking Association negotiates collective bargaining agreements on behalf of companies who opt to participate in coordinated bargaining with the Union. JD at 3, lines 19-20. This finding is contrary to fact and law.

3. Respondents except to the ALJ's failure to find that as participants in coordinated bargaining, each participant retained the right to approve or disapprove any agreements reached during bargaining. JD at 3, n.3. This failure to find is contrary to fact and law.

4. Respondents except to the ALJ's apparent finding that the Union was unaware that in the coordinating bargaining, each participating employer retained the right to approve or disapprove any agreements reached during negotiations. JD at 3, n.3. This finding is contrary to fact.

5. Respondents except to the ALJ's finding that Fred Schwartz served as the Association's bargaining representative. JD at 3, lines 25-26. This finding is contrary to fact and law.

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[1] Citations used in Respondents' Cross Exceptions and in their brief in support of their Cross-Exceptions will be as follows: citations to the ALJ's October 25, 2013 decision will be "JD"; citations to the hearing transcript will be "Tr."; citations to the General Counsel's trial exhibits will be "GCX"; citations to Respondents' trial exhibits will be "RX" citations to the Union's Exceptions Brief will be "Un. Br."; and citations to the General Counsel's Exceptions Brief will be "GC Br."

6. Respondents except to the ALJ's finding that "for approximately the past 30 years, Respondents have recognized the Union as the collective-bargaining representative of their respective employees in the following appropriate bargaining unit . . . ." JD at 3, lines 3-35. This finding is contrary to fact.

7. Respondents except to the ALJ's failure to find that the wage progression in the 1996-2001 collective bargaining agreement for existing employees only lasted three years and not five years. JD at 4, lines 30-39. This failure to find is contrary to fact.

8. Respondents except to the ALJ's apparent finding that the 1996-2001 collective bargaining agreement contained only a five-year wage progression. JD at 4, lines 30-39. This finding is contrary to fact.

9. Respondents except to the ALJ's finding that the wage rates for new hires "enabled their wages to catch up to the wages of existing employees by the end of the five-year contract term." JD at 4, lines 31-39. This finding is contrary to fact.

10. Respondents except to the ALJ's conclusion that when John Coli, Jr. advised Fed Schwartz that the Union would conduct a ratification vote, this information exchange did not constitute notice that ratification was a precondition to the agreement. JD at 5-6, n 9. This conclusion is contrary to law.

11. Respondents except to the ALJ's conclusion that when John Coli, Jr. used the need for ratification as leverage during the October 7, 2011[2] bargaining session, this did not constitute notice that ratification was a precondition to the agreement. JD at 8, n.16. This conclusion is contrary to law.

12. Respondents except to the ALJ's apparent conclusion that when union members limit the

[2] All dates referenced in Respondents' Cross-Exceptions and in their Brief In Support of Their Cross-Exceptions are 2011 unless otherwise noted.

authority of their bargaining Representatives by requiring ratification, that ratification is not a condition precedent to the formation of a CBA, unless the employer expressly agrees to the ratification as a precondition requirement.

13. Respondents except to the ALJ's failure to find that the Union did not redline certain aspects of the wage progression scales in its September 27, 2011 proposal that could have been redlined. JD at 6-7. This failure to find is contrary to fact.

14. Respondents except to the ALJ's failure to find that John Coli, Jr.'s explanation of the wage scales at the September 27 bargaining session was misleading in that Coli, Jr. explained that the Union merely sought to increase the existing scales by $1.00 per hour. JD at 7. This failure to find is contrary to fact.

15. Respondents except to the ALJ's conclusion that "the Association (and Darch, as its chief spokesperson) had implied authority to accept service of the December 22, 2011 ULP charge on behalf of the Association and Respondents" by virtue of Darch replacing Schwartz as the Association's attorney in November 2011. JD at 21, lines 26-28. This conclusion is contrary to law.

16. Respondents except to the ALJ's conclusion that Darch's attempt to resolve the disagreement over the wage scales was continued "negotiations." JD at 21, lines 28-32. The finding is contrary to law.

17. Respondents except to the ALJ's conclusion that "the allegations in the ULP charge in this case directly related to the Association's (and Darch's) expressly authorized activities as Respondents' chief spokesperson during contract negotiations, and thus Darch is deemed to have the authority to accept service of the ULP charge about those same negotiations on Respondents' behalf." JD at 21, lines 28-32. This conclusion is contrary to fact and law.

18. Respondents except to the ALJ's conclusion "the Union served all Respondents (as well as the Association) with the ULP charge within 6 months of the alleged unfair labor practice, as required by Section 10(b)." JD at 21, lines 32-34. This conclusion is contrary to fact and law.

19. Respondents except to the ALJ's application of the Board's decision in *United Electrical Contractors Ass'n*, 347 N.L.R.B. No. 1 (May 15, 2006) to the facts in this case. JD at 21.

20. Respondents except to the ALJ's refusal to admit Respondent's Exhibit 15, a notice of service of process of Illinois Department of Labor wage claims on LAZ Parking.

21. Respondents except to the ALJ's interpretation of the Board's decision in *Buckeye Plastic Molding*, 299 N.L.R.B. 1053 (1990) and also to the ALJ's application of that decision to the facts in this case. JD at 22-23. This interpretation and application are contrary to law.

22. Respondents except to the ALJ's failure to find that the Union committed a scrivener's error in reducing the Parties' tentative agreement to writing. JD at 24 n.40. This failure to find is contrary to fact and law.

23. Respondents except to the ALJ's denial of its Motion to Supplement the Record and refusal to admit Respondents' Exhibit 33. JD at 2 n.2.

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RESPONDENTS' BRIEF IN SUPPORT THEIR CROSS-EXCEPTIONS

STANDARD PARKING, IMPERIAL PARKING,
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I. INTRODUCTION

In their August 30, 2013 Post-Hearing Brief, Respondents argued, based on a variety of alternate and at times inconsistent legal theories, that they were under no obligation to execute the Union's version of the 2011-2016 collective bargaining agreement (CBA) and implement the incorrect wage scales therein. In his October 25, 2013 Decision, the ALJ substantively addressed only two of the arguments raised by Respondents, namely (1) the underlying charge was not properly served and (2) that the parties failed to achieve a meeting of the minds on a material term of their agreement (i.e., the wages scales).[3] The ALJ, however, failed to adequately discuss and rule upon Respondents' other theories. Rather, the ALJ either made cursory and oftentimes contradictory findings related to those arguments or ignored them totally.

It is important to note that if the Board affirms the ALJ's conclusion that no meeting of the minds occurred and thus no enforceable contract exists, it will be unnecessary to reach any of Respondents' alternative bases for dismissal of the complaint or to review any of the ALJ's other findings and conclusions. Respondents, however, submit the service issue must be reached given the ALJ's far-reaching and radical deviation from normal service rules. Notwithstanding the foregoing, if, on the other hand, the Board reverses the ALJ's ruling on the "meeting of the minds" issue, it must first address whether the ALJ correctly concluded that Respondents were timely served with the charge in this matter. As discussed below, Respondents submit the ALJ failed to properly apply Board law and rendered erroneous findings on this issue. JD at 20-23. As such, the complaint should be dismissed because the Union did not timely serve the Charge on Respondents.

[3] Respondents do not challenge the ALJ's conclusion that the parties failed to reach a meeting of the minds as to a material, but ambiguous term (namely, the wage scales) in their October 13-14 tentative agreement, thereby precluding an enforceable contract on that aspect of the tentative agreement.

If, however, the Board reverses the ALJ on the meeting of the minds issue and affirms the ALJ on the service question, it must then review the ALJ's decision to reject Respondents' alternative argument that the Union committed a scrivener's error in reducing the parties' tentative agreement to a formal, written document. JD at 24 n.40. Respondents again submit that the ALJ erred in concluding that no scrivener's error occurred and in refusing to reform the 2011-2016 CBA to reflect the true intent of the parties (i.e., to reflect the agreed-upon $0.55 per hour raise and to preserve the $2.00 / hour wage differential from the prior, 2006-2011 CBA).

Finally, if the Board reverses the ALJ on the meeting of the minds issue and affirms the ALJ on both the service and scrivener's error issues, it must then remand the case to the ALJ for further findings on certain of Respondents' alternative arguments. As discussed below, Respondents contend that the ALJ erred by failing to adequately address two of Respondents' alternate theories, namely: (1) Respondents were entitled to withdraw their offer and/or revoke their acceptance of the agreement prior to ratification; and (2) certain of the Respondents were not bound by the agreement once Schwartz began acting adversely to their interests. JD at 26 n.42. Respondents submit the ALJ erred by declining to reach these alternative arguments.

II. FACTS IN SUPPORT OF CROSS-EXCEPTIONS BRIEF

Respondents adopt and incorporate herein the Findings of Fact contained in the ALJ's October 25, 2013 Decision, with the exception of those Facts to which the Respondents have filed exceptions herein. Nonetheless, Respondents have provided a brief recitation of the most salient background facts and have also supplemented or recounted particular facts found by the ALJ in the argument section of their brief in support of their exceptions

A. The Parties' Bargaining History & Historical Treatment Of Wages

Respondents are each in the business of owning, operating, and/or managing parking garages in the Chicago-metropolitan area. JD at 2-3. For approximately thirty years,

Respondents [with the exception of LAZ Parking] have recognized the Union as the exclusive collective-bargaining representative of their respective employees in a bargaining unit consisting of employees who hold various parking garage positions. JD at 3-4.[4] Respondents and the Union have entered into "a number of successive collective-bargaining agreements, with the most recent agreement being in effect from November 1, 2006 to October 31, 2011." JD at 4.

Since at least November 1, 1996, the parties' agreements have included two avenues by which an employee's hourly wage rate increases. Employees receive raises based on their years of service, which are determined by wage progression scales set forth in the agreements. JD 4. Employees also receive annual raises effective on the contract anniversary date. *Id.* Employees with seniority in excess of the periods covered by the wage scales, however, only receive anniversary raises. JD 4 n.5.

1. The 1996-2001 & 2001-2006 Collective Bargaining Agreements

In both the 1996-2001 and 2001-2006 CBAs, "the parties agreed to use two wage scales or 'tiers' to establish minimum hourly wages." JD at 4. "Specifically, one tier applied to existing employees while the other wage tier applied to employees who were hired [on or] after the November 1 effective date of the collective bargaining agreement (November 1, 1996 for the 1996-2001 agreement, and November 1, 2001 for the 2001-2006 agreement)." JD at 4.

Also, in both the 1996-2001 and 2001-2006 CBAs, "the new hires were offered lower minimum hourly wages than existing employees;" however, the wage tier applicable to new hires

[4] Respondents except, in part, to this finding. While it is true that certain of the Respondents have recognized the Union for nearly 30 years, it is not correct with respect to LAZ Parking. As Anthony DiPaolo (LAZ Parking's representative) testified at trial, LAZ Parking first entered the Chicago market in December 2006. Tr. 521 (AD). At that time, it signed a separate collective bargaining agreement with the Union in order to gain a city contract. Tr. 521-22 (AD). LAZ Parking participated for the first time in coordinated bargaining in connection with the 2011-2016 CBA. Thus, the ALJ erred in failing to find that LAZ Parking, unlike the other Respondents, has not recognized the Union for the past 30 years.

enabled their wages to theoretically "catch-up" to the wages of the existing employees. JD at 4. The structure of the wage scales in the 1996-2001 CBA, however, differed from those in the prior CBA. Specifically, one wage scale in the 1996-2001 CBA contained a three-year (3) progression for existing employees, while the wage scale for newly-hired employees was extended and required five years (5) of service to reach the top of the progression. GCX 5. In the 2001-2006 CBA, there were two five-year progressions, one applicable to new hires and one for existing employees. GCX 6. Regardless of the length of service required, in the 1996-2001 CBA, the maximum wage rates within the two wage scales were identical – $10.90. GCX 5. Likewise, in the 2001-2006 CBA, the two wage scales "caught up" and contained identical maximum wage rates after five years of service, namely $13.40. GCX 6.

2. The 2001-2006 CBA's Rates Were Determined By Reference To The 1996-2001 Agreement

A comparison of the 1996-2001 and 2001-2006 CBAs reveals that the wage scales within the later, 2001-2006 CBA were determined by reference to the immediately preceding 1996-2001 CBA. Per Article 7.3 of the 1996-2001 CBA, a newly-hired employee could earn the following wage rates during the final year of that contract:

Effective Date	**START**	**6 MONTHS**	**1 YEAR**	**2 YEARS**	**3 YEARS**	**4 YEARS**	**5 YEARS**
11/1/00	$7.25	$7.85	$8.45	$9.05	$9.65	$10.25	$10.90

GCX 5, Art. 7.3.

The above-cited final year's wage rates from the 1996-2001 CBA were then combined with the newly negotiated $.50 per hour anniversary raise (effective November 1, 2001) and adopted as the wage rates for existing employees during the first year of the 2001-2006 contract:

Effective Date	**START**	**6 MONTHS**	**1 YEAR**	**2 YEARS**	**3 YEARS**	**4 YEARS**	**5 YEARS**

11/1/00	$7.25 (+ $.50)	$7.85 (+ $.50)	$8.45 (+ $.50)	$9.05 (+ $.50)	$9.65 (+ $.50)	$10.25 (+ $.50)	$10.90 (+ $.50)
11/1/01	$7.75	$8.35	$8.95	$9.55	$10.15	$10.75	$11.40

GCX 6, Art. 8.2; Tr. 243-44 (JCJ). Mr. Coli Sr. admitted that this was the case on cross:

> Q: [Mr. Darch]: So you take the wage scale from the prior agreement and you add 50 cents to the numbers, and they're exactly the numbers that are in 8.2 of General Counsel's 6, correct?
>
> A. [John Coli Sr.]: They are 50 cents more than the numbers, yes.

Tr. 71-72 (JCS). Simply put, the first-year wage rates under the 2001-2006 CBA for existing employees consisted of the wage rates for new hires during the last (final) year of the prior, 1996-2001 CBA, plus the contract anniversary increase of fifty cents. *Compare* GCX 5, Art. 7.3 *to* GCX 6, Art. 8.2; Tr. 243-44 (JCJ).

3. The 2006-2011 CBA

In 2006, the parties implemented two significant changes with respect to the wage scales. First, the 2006-2011 CBA separated the wage scales for commercial employees and residential employees. JD at 5, n.7. Second, and most critically, "the parties did not continue the practice of having the wages of new hires catch up to the wages of existing employees." JD at 5; GCX 7. Rather, "the parties agreed that the wage tier for newly hired employees would have minimum rates that were $2 per hour less than the wages of existing employees who worked under the contract for the same time period." JD at 5; GCX 7. Thus, under Article 8.2, the wage rate for an existing employee (i.e. one hired prior to November 1, 2006) topped out at $16.15, while the wage rate for a newly-hired employee (i.e. one hired on or after November 1, 2006) topped out at $14.15. JD at 5 n.8; GCX 7.

A comparison of the 2001-2006 and 2006-2011 CBAs again reveals that the wage rates for existing employees were determined by reference to the immediately preceding 2001-2006

CBA. Under the 2001-2006 CBA, an newly-hired employee could earn the following wage rates during the final year of that contract:

Effective Date	**START**	**6 MONTHS**	**1 YEAR**	**2 YEARS**	**3 YEARS**	**4 YEARS**	**5 YEARS**
11/1/05	$8.50	$9.00	$9.75	$10.50	$11.25	$12.00	$13.40

GCX 6, Art. 8.3.

At the expiration of the 2001-2006 CBA, the negotiated $.55 per hour anniversary raise (effective November 1, 2006) was added to the above-cited wage rates and constituted the wage rates effective the first year of the 2006-2011 CBA for existing employees:

Effective Date	**START**	**6 MONTHS**	**1 YEAR**	**2 YEARS**	**3 YEARS**	**4 YEARS**	**5 YEARS**
11/1/05	$8.50 (+ $.55)	$9.00 (+ $.55)	$9.75 (+ $.55)	$10.50 (+ $.55)	$11.25 (+ $.55)	$12.00 (+ $.55)	$13.40 (+ $.55)
11/1/06	$9.05	$9.95	$10.30	$11.05	$11.80	$12.55	$13.95

GCX 7, Art. 8.2; Tr. 245-46 (JCJ). Mr. Coli Jr. admitted this was the practice on cross:

> Q. [Mr. Darch]: [I]f we add 55 cents to each column that's in GC Exhibit 6 and refer to the corresponding column in GC Exhibit 7, we will see that the 55 cents added to the number in GC Exhibit [6] is reflected in the number that's in GC Exhibit 7, correct?
>
> A. [John Coli Jr.]: So, if you compare the last row, just so I'm clear, the last row of [G.C. Exhibit 6, Article] 8.3, you add 55 cents, you get the first row of[G.C. Exhibit 7, Article] 8.2, the first chart[?].
>
> Q. Yes.
>
> A. Yes.

Tr. 246 (JCJ). Thus, the wage rates effective the first year of the 2006-2011 CBA for existing employees were the wage rates for new hires during the final year of the prior, 2001-2006 CBA, plus the contract anniversary increase of fifty-five cents. *Compare* GCX 6 *to* GCX 7.

B. The 2011-2016 CBA Negotiations

1. The September 27 Bargaining Session & The Parties' Initial Proposals

On August 16, Coli Jr e-mailed Schwartz to schedule bargaining dates for a successor, given that the 2006-2011 CBA was set to expire on October 31. JD 5 n.0; GC Ex. 7. In that exchange, Coli Jr. sought to complete the negotiations "sooner rather than later so the Union would have time to ratify the new contract." JD 5 n.9. Coli Jr. reiterated this ratification obligation throughout the negotiations.

The first bargaining session between Respondents and the Union for a successor contract took place on September 27. JD 6. At that meeting, the Union presented its initial, written proposal, which "generally included 'redlined' notations to indicate how the proposal differed from the expiring collective bargaining agreement." JD at 6. There was an exception, however. Unlike its other proposed changes, the Union's suggested changes to the wage progression scales in Articles 8.2 and 8.3, including the proposed changes to cutoff dates in the text and the actual wage rates, were not in redline. JD at 6.

In addition to the written proposal, Coli Jr. provided an oral explanation of the Union's suggested changes. On the issue of wages, the Union proposed that Respondents agree to $1-per-hour annual wage increases. JD at 6. As Mr. Coli Jr. testified, the Union represented that the wage scales in its proposal had been amended consistent with a $1 per hour annual increase:

> Q. [Ms. Friedheim-Weis]: Please explain generally what changes the union made in Article 8.2 in the first chart from the 2006 contract to the proposed 2011 contract.
>
> A. [Mr. Coli Jr.]: Well, these charts reflect dollar increases where the other chart reflects 55-cent increases.

Tr. 116 (JCJ). Schwartz's notes from the September 27 bargaining session also indicate that the Union's proposal included a $1 increase in the wage progression scales, stating in the margin that "changes reflect anniversary proposal [of] plus $1.00. R. Ex. 32, pg. 6.

As the ALJ found, notably absent from Coli Jr.'s explanation or the parties' discussion that day was "the fact that 'new hires' under the expiring 2006-2011 contract would become old hires under the Union's proposed contract and thus receive an immediate $2/hour raise (plus the $1/hour annual wage increase) based on the updated wage tiers." JD at 7; *see also* JD at 7 n.14 (discussing how the Union's proposal compressed the wage scales in the 2006-2011 and eliminated the $2.00 differential). Likewise, the parties did not "discuss how the Union came up with the wages in the proposed scales." *Id.*

Respondents also presented a written proposal at the September 27 bargaining session. JD at 8. With respect to wages, Respondents proposed implementing a 3-year wage freeze and also creating a "3rd tier that would eliminate [a] wage progression and thus limit employees in that tier to only receiving annual salary increases." JD at 8. Schwartz explained Respondents' proposals verbally during the session. Tr. 536 (EU).

2. The October 7 Bargaining Session

The parties' second bargaining session occurred on October 7, where they discussed exclusively non-economic issues. JD at 8. As such, wages were not addressed. Tr. 536 (EU). However, as the parties negotiated the non-economic terms of the contract that day, Coli Jr. repeatedly used the need for ratification as a tactic to obtain concessions from Respondents. Tr. 606-07 (JD). As the ALJ found, "occasionally during October 7 session, Coli, Jr. asserted that he would not be able to get employees to approve some of the Association's proposals." JD at 8 n.18.

3. The October 12 Bargaining Session & The Union's Final Offer

The third bargaining session between Respondents and the Union took place on October 12. At this session, the Union verbally made an economic offer, which it "characterized… as final." JD at 8. The Union's final offer provided in pertinent part:

- A 6.5% increase in benefits to be allocated across the health and welfare, pension, and legal education funds at the Union's discretion;
- A $0.55 per hour annual wage increase and "maintain tiers";
- The six-month anniversary increase for new hires would be eliminated;
- Funeral leave would be authorized for grandchildren and significant others.

JD at 8; R. Ex. 16.

At the time of the October 12 bargaining session, the City of Chicago was considering implementing a new congestion tax that would increase parking taxes. JD at 9 n. 19. Parking garage employers, including Respondents, opposed the tax, and wanted the Parking Industry Labor Management Committee (PILMC) to lobby against the tax. *Id.* Since the PILMC board is composed of two Employer representatives and two Union representatives, the Union was in a position to block the PILMC from taking action because a majority of the PILMC board would have to approve any lobbying effort. *Id.* Thus, after tendering its final offer, the Union also "warned the Association that it might not be willing to work with the Association in opposing a new city congestion tax if the Association did not accept the Union's offer." JD at 8-9.

Despite this ultimatum, Respondents did not immediately accept the Union's final offer. Rather, it informed the Union that "it would consider the Union's offer and respond to the Union by email with its final offer." JD at 9. Notably, however, "the parties did not discuss the fact that 'new hires' under the expiring 2006-2011 contract would become old hires under the Union's proposed contract, and thus receive an immediate $2/hour raise based on the updated tiers" at the October 12 bargaining session. JD at 9.

4. Respondents' Final Offer & The October 13-14 Tentative Agreement

On October 13, Respondents submitted their final offer to the Union. JD at 9. With respect to wages, Respondents "reiterated [their] position that the parties should eliminate the 6-month wage increase" and further proposed to amend the contract "to reflect .55 cents per hour annual increases, with scales proportionate to prior agreement." JD at 9; GCX 13(b). "In stating that the wage scales should be proportionate to the prior collective-bargaining agreement, the Association meant that wage scales in the 2011-2016 contract should maintain the $2/hour difference between the wages of new hires and existing employees that was established in the 2006-2011 contract." JD at 9, n. 20.

That same day, Coli Jr. responded by e-mail with three points of clarification and stated that "with those points understood, . . . we have a Tentative Agreement." JD at 9; GCX 14. None of the Union's points of clarification addressed Respondents' proposal regarding wage scales; rather, with respect to wages, Coli, Jr. merely reiterated that the Union "agreed to remove the 6-month increase, [but] the proportional 1 year wage rate would remain the same. In other words, they get the same amount of total raise but not until the one-year anniversary." *Id.* After sending this e-mail, Coli Jr. "notified the PILMC's public relations firm that it could proceed with plans to oppose the new city congestion tax." JD at 9; R. Ex. 28.

The following day, on October 14, Schwartz responded, stating "we are in accord with [the points raised in Coli, Jr.'s October 13 email]. We look forward to ratification." JD at 9; GCX 15. Thus, as of October 13-14, the parties had reached a tentative agreement subject to ratification. Tr. 742 (FS), 756 (FS). In fact, that very same day, the Union posted a newsletter to its website announcing that it had "reached an agreement with management on a new five-year Master Parking Agreement." JD at 10; R. Ex. 12. Regarding wages, the Union's newsletter

conveyed that it had "secured annual raises of $0.55." *Id.* There was no mention of a $2/hour increase for employees hired during the prior five years. R. Ex. 12.

C. The Parties' Efforts To Convert The Tentative Agreement Into A Complete, Written Contract

1. Schwartz Repeatedly Requests A Redlined Draft Of The 2011-2016 CBA From The Union

On October 18, Brinson sent Schwartz a draft 2011-2016 CBA for review. JD 10; GCX 16(a)-(b). This copy of the agreement was in PDF format and did contain wage scales; however, it was not redlined. JD at 10-11. Furthermore, the wage scales in the October 18 draft differed from those that appeared in the Union's September 27 proposal:

> To create [the wage scales in the October 18 draft agreement], the Union worked from the wage scales in the 2006-2011 contract . . . . This formula produced different wage scales than the Union proposed on September 27 (even after taking the different annual raises into account).

JD at 10-11 n. 21.

Three days later, on October 21, Brinson contacted Schwartz regarding the status of his review and forwarded the same, unredlined PDF version of the agreement previously sent on October 18. JD at 11; GCX 17(a)-(b). Schwartz responded soon thereafter, stating "I didn't open this yet, but if not in redline can you send a redlined version? It will make my review much quicker." JD at 11; GCX 35.

On October 24, having received no response from Brinson, Schwartz again asked if there was a "red-lined version of the contract, as opposed to the PDF?" GCX 18(a). Brinson replied that same day and sent another, *unredlined* draft of the agreement, this time in Microsoft word format. JD at 11; GCX 18(a)-(b). Thus, on October 25, Schwartz again asked, for the third time, for a redlined copy of the agreement. JD at 11; GCX 19. Schwartz did not review any of the unredlined drafts sent between October 18 and October 24. JD at 10-11.

2. The Union Sends A Redlined Draft Without Wage Scales On October 25 And The Parties Proceed To Clarify The Tentative Agreement

Following Schwartz's third request, Brinson sent a redlined version of the draft agreement on October 25. JD at 10-11. This version did not include rates in the wage progression scales. JD at 11; GCX 20(a)-(b). Moreover, instead of using the prior, 2006-2011 CBA as the template document, Brinson used the Union's September 27 proposal as the base document, in effect providing Schwartz a redline of a redline. G.C. Ex 20(a)-(b); Tr. 233-34 (JCJ), 657 (JB), 743 (FS), 771 (FS). In addition, the October 25 draft contained numerous errors.

Schwartz reviewed the redlined agreement he received on October 25 and submitted six comments to the Union on October 28 at 11:09 a.m. JD 12; GCX 21; Tr. 773. Those comments addressed several errors attributable to the use of the September 27 proposal and included (1) funeral leave (Article 13, Section 13.1); (2) vacations (Article 14, Section 14.1-14.2); (3) benefit fund contributions (Article 20, Section 20.4(a)); and (4) drug testing and background checks (Article 40, Section 40.5). JD at 12.

The Union responded at 11:54 a.m., agreeing to all but two of Schwartz's six points of clarification. JD at 12; GCX 21. In the Union's response, Coli Jr. emphasized the "need to get [the agreement] done today in order to move [the Union's] ratification process forward." JD at 12; GCX 21; Tr. 750-52. After Schwartz replied at 12:03 p.m. that the Association accepted the Union's position as to Section 14.2, Brinson then incorporated the agreed-upon changes and sent Schwartz another draft of the agreement at 12:05 p.m. on October 28, but with no wage scales included. JD 12; GCX 23(a)-(b).

Subsequently, Schwartz and Coli Jr. had a telephone discussion regarding language in Article 40.5 of the agreement. JD 12. Following this telephone call, Schwartz e-mailed the Union a draft of the agreement at 12:57 p.m. on October 28 and stated:

> Per my conversation with John, I have made one revision to 40.5. Subject to that, ***as well as subject to the appropriate wage progression schedules to be inserted per your earlier e-mail***, we are in accord with the attached.

JD at 12; GCX 25(a)-(b) (emphasis added).

Shortly thereafter, at 1:38 p.m. on October 28, Brinson sent Schwartz another version of the agreement, this time *with* the wage scales. JD 12-13; GCX 26(a)-(b). In her cover e-mail, Brinson noted that the Union had made one change to Article 40.5 and that this change was in redline. JD 13; GCX 26(a). Brinson did not, however, alert Schwartz that the wage scales had been reinserted into this draft of the agreement. JD at 13. Minutes later, Schwartz replied "We are fine with <u>that change</u>," (emphasis added). JD 13 GC Ex. 27(a). At 3:07 p.m. that same day, Brinson sent Schwartz an unredlined draft of the agreement. *Id.*

D. The Draft Agreements Prepared By The Union Contained Errors

The final two drafts sent at 1:38 p.m. and 3:07 p.m. on October 28 did contain wage rates in the wage progression scales. JD at 12-13; G.C. Exs. 26(b), 27(b)). Those wage rates, however, were not increased by only the parties' agreed-upon $.55 per hour wage increase, nor did they reflect the parties' agreement that the wage scales remain "proportionate to [the] prior agreement." G.C. Exs. 13(a)-(b), 14, 15, 26(b), 27(b); R. Ex. 12. Rather, the Union inexplicably increased the wage rates for new hires under the prior, 2006-2011 CBA by an additional $2.00, a figure that was never discussed nor agreed upon by the parties.

As discussed above at pages 2-6, when computing employees' wage rates, the practice of the parties since at least 2001 was to combine the wage rates for new hires during the last year of the immediately-preceding agreement with the anniversary increase and use those as wage rates applicable to existing employees for the initial year of the new agreement. *Compare* GCX 5 *to* GCX 6; *Compare* GCX 6 *to* GCX 7. Under the prior, 2006-2011 CBA, a newly-hired employee could earn the following wage rates in the final year of that contract:

Effective Date	START	6 MONTHS	1 YEAR	2 YEARS	3 YEARS	4 YEARS	5 YEARS
11/1/10	$9.25	$9.75	$10.50	$11.25	$12.00	$12.75	$14.15

GCX 7, Art. 8.2.

Had the Union followed the parties' past practice when it calculated the first-year wage rates for existing employees in 2011-2016 CBA, the Union should have added $.55 (the agreed-upon wage increase) to the final-year wage rates for new hires under the prior, 2006-2011 CBA. Thus, the above-cited wage rates for 2010 (the final year) should have been combined with the negotiated $0.55 per hour contract anniversary raise (effective November 1, 2011 under the 2011-2016 CBA) and carried over to form the first-year wages for existing employees in the 2011-2016 CBA. If this method were followed, the wage scale for the first year would be:

Effective Date	START	1 YEAR[5]	2 YEARS	3 YEARS	4 YEARS	5 YEARS
11/1/10	$9.25 (+ $.55)	$10.50 (+ $.55)	$11.25 (+ $.55)	$12.00 (+ $.55)	$12.75 (+ $.55)	$14.15 (+ $.55)
11/1/11	$9.80	$11.05	$11.80	$12.55	$13.30	$14.70

Compare GCX 7, Art. 8.2 *to* GC Ex. 34(b), Art. 8.2. Instead of the above wage rates, the Union's draft agreement provided:

Effective Date	START	1 YEAR	2 YEARS	3 YEARS	4 YEARS	5 YEARS
11/1/10	$9.25 (+ $2.55)	$10.50 (+ $2.55)	$11.25 (+ $2.55)	$12.00 (+ $2.55)	$12.75 (+ $2.55)	$14.15 (+ $2.55)
11/1/11	$11.80	$13.05	$13.80	$14.55	$15.30	$16.70

JD 10. *Compare* GCX 7, Art. 8.2 *to* G.C. Exs. 26(b), 27(b), 33(b), Art. 8.2.

[5] The parties agreed to eliminate the 6-month wage increase in the 2011-2016 CBA. JD at 9.

The incorrect wage rates were not the only mistake in the Union's draft of the 2011-2016 CBA. In Article 20.2, which covers Pension benefits, the Union deleted a key date in Section 20.2(c), thereby rendering the provisions governing Respondents' obligation to make pension contributions inconsistent. JD at 14 n.28; G.C. Exs. 11, 33(f). Specifically, this omission caused Article 20.2(c) and 20.2(d) to contradict each other and provide for conflicting dates as to when Respondents' obligation to make pension contributions began. *Id.*; Tr. 500-02 (AD).

E. The Exclusion of LAZ, ABM, & Imperial From the Draft Review Process

As discussed above, the ALJ found that the parties reached a tentative agreement on October 13-14 via a series of three e-mails. JD at 9, 24. Notably, a representative from each Respondent was copied on the three e-mail communications comprising the parties' tentative agreement. G.C. Exs. 13(a)-(b), 14, 15. As the Union proceeded to formalize the written contract, however, LAZ, ABM, and Imperial were intentionally excluded from the drafting process. This, as Schwartz explained, was because "Prussian instructed him only to provide the draft agreement to Buczek [at Standard Parking] and Prussian [at InterPark] (and not the other Respondents)." JD at 11 n.23.

As a consequence, Uhlig (Imperial) first received a complete draft of the 2011-2016 CBA on October 28, and then only after he contacted Schwartz and requested a copy. Tr. 546 (EU), 563-64 (EU); JD at 13. Likewise, DiPaolo (LAZ) learned that a draft 2011-2016 CBA had been created and requested one from Schwartz only after he received Uhlig's October 31st email raising concerns about the wage rates. JD at 14 n. 28; Tr. 497-98 (AD). He obtained a copy of the draft 2011-2016 CBA on November 2. R. Ex. 17. Daniels (ABM), on the other hand, never obtained a copy of the draft 2011-2016 CBA (despite his requests) and received no communications after October 14. JD at 14 n. 28, 15 n. 31; Tr. 342 (SB), 613-14 (JD).

As of October 28, the Union was on notice of the fact that LAZ, ABM, and Imperial were denied access to drafts of the 2011-2016 CBA. On that date, Schwartz e-mailed the Union with several clarifications to the redlined, October 25 draft agreement. JD at 12; G.C. Ex. 21; R. Ex. 33.[6] Schwartz copied only representatives from InterPark and Standard. *Id.* No one from LAZ, ABM, or Imperial was included on Schwartz's October 28 e-mail to the Union. *Id.* Nor were representatives from any of these companies copied on subsequent e-mail exchanges between the Union and Schwartz on October 28 or on later dates, while representatives from InterPark and Standard were clearly included. JD at 12 nn. 25, 26; G.C. Exs. 21, 22, 25(a), 28, 29, 30.

F. Respondents Discover the Union's Mistake & Revoke Their Offer Prior To Ratification

On October 28, Schwartz forwarded a copy of the draft 2011-2016 CBA to certain of Respondents, including Uhlig. JD at 13. Upon reviewing the wage scales in the agreement the following Monday, October 31, Uhlig noticed that "employees hired between November 1, 2006 and October 31, 2011, would receive an immediate raise of $2.55 per hour on the effective date of the new contract." JD at 13-14. Uhlig immediately e-mailed the other Respondents as well as Schwartz to apprise them of this issue. JD at 14. DiPaolo (LAZ) then noticed the date on which Respondents' obligation to make pension contributions began, found in Section 20.2, was in error. Tr. 500-02; JD at 14 n.28.

After learning of the issue from Uhlig, Schwartz sent an e-mail to the Union on November 2 in an effort to resolve the wage rate error and explained:

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[6] The ALJ denied Respondents' request to supplement the record and admit R. Ex. 33 into evidence. JD at 2 n.2. This was in error. Respondents' Exhibit 33 was a complete copy of an e-mail appearing as part of the e-mail chains in G.C. Exs. 21, 22, 23(a), 24. Respondents sought to introduce this e-mail so that the recipients, as well as the text, would be part of the record. The ALJ noted that there were questions of "authenticity and relevance" that could not be addressed outside of trial. Such concerns are baffling, considering that the actual substance of the e-mail was already in the record as part of other e-mail chains admitted as exhibits.

> The review of the wage scale indicates something that we obviously should have raised, as we believe it is a mutual mistake in drafting. Specifically, this issue is for the wage scale for those employees hired after November 1, 2006. Under the scale as drafted, effectively we take everyone that was in Tier 2 under the old contract and push them into Tier 1 which would include $2+ raises. The scale as drafted would then reset the Tier 2 deadline from 2006 to 2011, something we believe was never discussed or agreed to, particularly within the context of our agreement for .55 cent per hour wage increase

JD 14; GCX 29. In this e-mail, Schwartz also included for the Union's review a wage scale that reflected both the $0.55 increase actually agreed upon by the parties and the $2.00 differential from the prior 2006-2011 CBA. *Id.* The Union, however, refused to correct the draft 2011-2016 CBA, stating that the agreement had already been mailed for "ratification" and that "there was nothing [the Union] can do to change the document now." JD at 14; GCX 30.

Moreover, as the ALJ found, Schwartz's November 2 e-mail to the Union again copied only Prussian from InterPark and Buczek from Standard and excluded LAZ, ABM, and Imperial. JD at 14; GCX 29. In the text of that e-mail, Schwartz explicitly informed Coli Jr. of this fact, emphasizing that "[f]or purposes of this communication, I have copied ONLY Michael Prussian and Jim Buczek" *Id.* (emphasis in original).

The parties then met on November 4 to discuss Respondents' concerns about the wage scales and to attempt to resolve their disagreement. JD at 15. The November 4 meeting, however, was not successful and concluded without an agreement about the contract or how to resolve the parties' dispute. *Id.* Subsequently, on November 8, Schwartz sent the Union a letter withdrawing Respondents' offer. JD at 15; GCX 31(a)-(b). In that letter, Schwartz stated:

> In view of the parties' marked difference of opinion as to the economic terms of the parties' respective offers and the substance of the parties' tentative agreement . . . Respondents hereby withdraws [sic] their offers or, in the alternative, revokes [sic] their acceptances of Local 727's proposal, relating to the second tier wage scale.

JD 15-16; GCX 31(a). In this letter, Schwartz also included versions of the wage progression scales for the 2011-2016 CBA, reflecting the $0.55 increase agreed upon by the parties and preserving the $2.00 wage differential from the prior agreement. JD at 16; GCX 31(b).

The Union's version of the contract was ratified on November 15. JD at 17. Later that month, the Union sent each Respondent a copy of its version of the 2011-2016 CBA for execution. JD at 17-18; GCX 33(a)-(f). Respondents, however, refused to sign this version of the agreement, as it contained incorrect wage progression scales. JD at 18. Rather, Respondents signed a version of the CBA that maintained the $2 per hour wage differential and a correct pension contribution date and forwarded it for the Union's signature on December 16. *Id.*; GCX 34(a)-(b).

G. The Union's Charge & Respondents' Retention of Douglas Darch

On December 22, the Union filed an unfair labor practice charge against Respondents, alleging their refusal to sign its version of the agreement violated Sections 8(a)(5) and 8(a)(1) of the National Labor Relations Act (NLRA). JD at 18; GCX 1(a). Neither the Union nor the General Counsel, however, served a copy of the charge upon any of the Respondents directly or upon any of Respondents' registered agents for service of process, all of which were listed on the Illinois Secretary of State's website. JD at 18-19.[7] Rather, the General Counsel mailed a copy of the charge to Douglas Darch, whom Respondents had retained in mid-November 2011 to assist them in their discussions with the Union. JD at 17. Darch received a copy of the charge on or around December 27. JD at 18. Darch, however, was not authorized by any of the Respondents to accept service on their behalf. JD at 19.

[7] Specifically, as indicated on the Illinois Secretary of State's website, the ALJ found that ABM's authorized agent for service of process was CT Corporation System; Imperial Parking's was CT Corporation System; InterPark's was Illinois Corporation Service Company; LAZ Parking's as Illinois Corporation Service Company; and Standard Parking's was CT Corporation System. JD at 18-19.

III. ARGUMENT IN SUPPORT OF CROSS-EXCEPTIONS BRIEF

A. The ALJ Failed To Make Or Erroneously Made Certain Factual Findings

While Respondents do not challenge the ALJ's decision to dismiss the complaint based on his conclusion that the parties failed to reach a "meeting of the minds" on a material (but ultimately ambiguous) term of their October 13-14 tentative agreement, Respondents submit the ALJ failed to make, or erroneously made, certain factual findings in his October 25, 2013 Decision. Respondents address these issues below in order to (1) further clarify the record or (2) lend additional support to the ALJ's conclusion that no meeting of the minds existed.

1. The ALJ Made Inaccurate Findings Regarding The Effect Of Coordinated Bargaining

In his opinion, the ALJ found that Respondents engaged in coordinated bargaining with the Union. Neither the Union nor the General Counsel has excepted to these findings. JD at 3, 21, 21 n.36. Furthermore, the General Counsel's Complaint in this matter alleged – and Respondents admitted – that the parties engaged in coordinated bargaining. Specifically, the Complaint states that "that on or about September 27, 2011, the Union initiated coordinated bargaining with the Association" and that "between September 27, 2011 and October 28, 2011 Standard Parking, Imperial, ABM Parking Services, LAZ Parking, and InterPark engaged in negotiations for a new collective bargaining agreement with the Union for themselves *and on behalf of the Association*." GCX 2(a), ¶ IX(a)-(b) (emphasis added); *see also* JD at 1. In response, each Respondent admitted that it had engaged in coordinated bargaining. GCX 1(o)-(s), ¶ IX(1)(b). In light of both the ALJ's undisputed findings and the pleadings in this matter, it stands – as a matter of law – that the parties engaged in coordinated bargaining.

As both the Board and the federal courts have recognized, coordinated bargaining occurs when "parties share information and coordinate efforts but ultimately retain the authority to

negotiate contract terms individually" *See Don Lee Distrib. v. NLRB*, 145 F.3d 834, 843 (6th Cir. 1998), *enf'g* 322 N.L.R.B. 470 (1996); *see also King Soopers*, No. 27-CA-19325, G.C. Advice Memo (Feb. 17, 2005) (employers engaged in lawful coordinated bargaining where they shared strategies, conducted joint sessions, and used the same bargaining team for joint sessions, but did not cede their respective individual decision-making authority to the group).

Despite the fact that, as a matter of law, the parties engaged in coordinated bargaining, the ALJ made a number of factual findings inconsistent with this determination. For example:

- "The Association negotiates collective-bargaining agreements on behalf of parking companies who choose to participate in coordinated bargaining with the Union." JD at 3.
- "Attorney Fred Schwartz served as the Association's bargaining representative for the 2006-2011 collective bargaining agreement between the Union and Respondents . . . ." JD at 3 (citing Tr. 51-52, 462, 675-676).
- "Respondents [never] notified the Union that Schwartz's authority to negotiate was limited" and that Respondents "retained the right to approve or disapprove any agreements that the Association reached during negotiations." JD at 3, n. 3.

As discussed above, it is undisputed that the parties engaged in coordinated bargaining. Thus, to the extent the ALJ's characterizations of (1) the relationship between the bargaining parties and/or (2) the relationship between Schwartz, the Association, and Respondents conflict with the structure of coordinated bargaining under the law, those findings should be reversed.

Likewise, to the extent the ALJ implies that the Union was unaware that in the coordinated bargaining context, each individual employer retains the authority to bargain and to accept agreements during negotiations and that the Union required notification of such, those finding should be reversed. Board law is clear on this aspect of coordinated bargaining, and the Union was on notice that they were participating in coordinated bargaining. *See* GCX 8 (requesting list of employers who "have NOT opted out of coordinated bargaining") (emphasis

in original). Any suggestion that the Union was ignorant of the law and/or of the parameters of coordinated bargaining is without merit.

2. The ALJ Made Inaccurate and Incomplete Findings Regarding The Contractual Wage Scales

In his decision, the ALJ provided an overview of the Parties' agreements from 1996 to the present. Noting that to understand the instant dispute, "it is important to be familiar with how the wage scales have changed over the years," the ALJ found as follows:

> In the 1996-2001 and 2001-2006 collective-bargaining agreements, the parties agreed to use two wage scales, or "tiers," to establish minimum hourly wages. Specifically, one wage tier applied to existing employees, while the other wage tier applied to employees who were hired after the November 1 effective date of the collective-bargaining agreement . . . . While new hires were offered lower minimum hourly wages than existing employees, their wage tier included higher "wage progressions" that (at least in theory) enabled their wages to catch up to the wages of existing employees by the end of the 5-year contract term.

JD 4.

The ALJ's description omits important details regarding how the wage scales changed between the 1996-2001 CBA and the 2001-2006 CBA. First, the ALJ failed to find that while the 1996-2001 CBA was for a five-year term, the wage scales within that contract contained both a three-year progression for existing employees (i.e. those hired before the contract's effective date) and a five-year progression for new employees (i.e. those hired during the term of the 1996-2001 agreement). *See* GCX 5. In the 2001-2006 agreement, both wage progressions were five years in length. These are key facts, as they further undermine the Union's and the General Counsel's (incorrect) argument that the parties had always structured the wage scales in the same manner. Un. Br. at 8-9; GC Brief at 20-23. To the contrary, the scales (beginning at least in 1996) changed from contract to contract. *See also* JD at 5 (finding that in the 2006-2011 CBA "the parties did not continue the practice of having the wages of new hires catch up to the wages of existing employees by the end of the contract" but rather "the parties agreed that the wage tier

for newly hired employees would have minimum rates that were $2 per hour less than the wages of existing employees").

Relatedly, the ALJ slightly mischaracterizes how the wage scales operated. In his decision, the ALJ found that the wage scales in the 1996-2001 and 2001-2006 CBAs "enabled [the new hires'] wages to catch up to the wages of existing employee *by the end of the 5-year contract term*. JD at 4 (emphasis added). Newly-hired employees, however, did not necessarily achieve the maximum wage rates under the applicable wage scale during the term of the contract, as the ALJ's finding implicates. Rather, to reach the top of the scale, employees had to work a total of five years, and that five-year term necessarily would span two different contracts for every single employee hired during a contract's term.

Moreover, the wage progression in each agreement was made obsolete by the passage of time. After five (5) years of employment, an employee reached the maximum wage rate provided by the scale and thereafter was no longer subject to a progression. That employee merely received annual contract raises after achieving his or her maximum hourly rate. As Coli Jr. admitted, once an employee completes five years of employment and thus completes the wage progression, that employee's wage rate is determined by adding contract anniversary raises to his base rate:

> Q. [Mr. Darch]: For those employees whose wages are above the wages in the table, where do you find their wage rates anywhere in GC Exhibit 7?
>
> A. [Mr. Coli, Jr.]: Well, what you would do is you would take the wage rate that they're making and you would take their, the longevity increases that you find in the chart, as well as the contract anniversary raises that you would find in 8.1 and you would have to do the individual math.
>
> Q. Okay. So, it's possible to do, you don't need to know what their wage scale is, you can just do the math and figure it out, right?
>
> A. Yes.

Tr. 247-48 (JCJ).

3. The ALJ Made Inaccurate And Incomplete Findings Regarding The Union's September 27 Proposal & The Parties' Statements During Bargaining

a. The Union's Failure To Redline The Wage Scales In Its September 27 Proposal

In his decision, the ALJ recounts the parties' exchange of proposals and discussions at the September 27 bargaining session. JD at 6-8. The ALJ found that the Union's September 27 proposal contained wages scales that "were not in redline format." JD at 6. The ALJ recounts Coli Jr.'s testimony that "the Union did not put the wage scales in redline format because the redlining process would make the scales look confusing and messy because rows and tables in the scales could be displaced," but does not determine whether it was credible. JD 6 n.12. While Coli Jr. did explain this was the Union's rationale for failing to redline the *rates* within the wage scales, he did not explain why other aspects of the wage scales – such as the cutoff date and other dates that appeared in text – were not redlined. The ALJ's failure to address this distinction was in error as well.

In fact, during cross-examination, Coli Jr. admitted that certain portions of the wage scales could be and, in fact, were submitted in redline. Tr. 235 (JCJ). For example, the redlined version of the draft 2011-2016 CBA sent by the Union on October 25 contained a redlined change in the wage scales. GCX 20(b); Tr. 235 (JCJ). Specifically, the "6 Months" longevity increase was deleted and appeared in redline as follows: ~~"6 Months"~~. GCX 20(b). This redlined change was made without disrupting the format of the wage scale chart.

This evidence reveals that it was possible to redline some (specifically the dates in the text appearing above the wage scales and the rates themselves) - if not all - of the wage scales. The Union, however, utterly failed to do so, thereby suggesting that its drafting tactics were

deliberately intended to avoid bringing the wage scales to Respondents' attention. What is more, the fact that the actual wage rates may have been impacted by redlining does not excuse the Union's failure to redline the changes to the cut-off dates that appear in text in the wage tables. Tr. 235 (JCJ), 237 (JCJ).

b. The Union's Verbal Explanation Of Its September 27 Proposal

The ALJ properly concluded that at the September 27 bargaining session, the parties "did not discuss the fact that 'new hires' under the expiring 2006-2011 contract would become old hires under the Union's proposed contract and thus receive an immediate $2/hour raise (plus the $1/hour annual wage increase) based on the updated wage tiers." JD at 7. Likewise, the parties failed to "discuss how the Union came up with the wages in the proposed scales." *Id.* Respondents do not challenge these findings. Rather, Respondents submit that the ALJ failed to provide sufficient detail regarding the actual (and undisputed) *verbal* representations made by the Union regarding its proposal at the September 27 bargaining session.

First, the ALJ failed to specifically find that in addition to distributing the written proposal, Coli Jr. provided an oral explanation of the Union's suggested changes and verbally proposed an annual $1.00 per hour wage increase. Tr. 484 (AD), 533 (EU), 604 (JD), 642-43 (JB). As Coli Jr. testified on direct examination, the Union represented that the wage scales in its proposal had been amended consistent with a $1 per hour annual increase:

> Q. [Ms. Friedheim-Weis]: Please explain generally what changes the union made in Article 8.2 in the first chart from the 2006 contract to the proposed 2011 contract.
>
> A. [Mr. Coli Jr.]: Well, these charts reflect dollar increases where the other chart reflects 55-cent increases.

Tr. 116 (JCJ). Schwartz likewise testified:

> Q. [Mr. Darch]: All right. And was there any discussion with respect to whether or not there was going to be changes in the wage scale?

> A. [Mr. Schwartz]: The proposal that was made under Article 8, which was for $1 an hour, and as my notes reflect in 8.2 in the margin, there was, I believe a proposal or an indication that the changes reflected the $1 an hour increase.

Tr. 797-98. Schwartz's notes from the September 27 bargaining session also indicate that the Union's proposal included a $1 increase in the wage progression scales, providing in the margin next to Article 8.2 that "changes reflect anniversary proposal [of] plus $1.00." R. Ex. 32, pg. 6.

Based on this undisputed evidence, it is clear that the Union orally represented at the September 27 bargaining session that it sought an annual $1.00/hour raise and that the wage scales within its proposal reflected as much. The ALJ, however, excluded this detail from his findings. This omission is critical because it demonstrates that the Union mislead the Respondents at the September 27 bargaining session as to the actual impact of the wages scales within its proposal.

B. The ALJ Erred In Finding Service Was Timely; Thus, The Complaint Should Be Dismissed For Lack Of Proper Service

In his October 25, 2013 Decision, the ALJ concluded that service on Respondents' attorney constituted proper service. As discussed below, the ALJ erred in this finding, and his findings and conclusions in this regard should be reversed.

1. The Board's Decision in *United Electrical Contractors Association* Is Distinguishable, Inapplicable, and Misstates The Law

Applying the Board's decision in *United Electrical Contractors Association*, 347 N.L.R.B. No. 1 (May 15, 2006) (hereinafter "*UECA*"), the ALJ found that "the Union served all Respondents (as well as the Association) with the ULP charge within 6 months of the alleged unfair labor practice, as required by Section 10(b)." JD at 21. The finding was predicated, in part, on the conclusion that Douglas Darch, as (purportedly) the Chicago Parking Association's designated bargaining agent, had "implied authority" to accept service of the ULP charge on

behalf of the individual Respondents. *Id.* The ALJ's conclusion misapplied Board law and was in error.

In *UECA*, the Board held the president of a multiemployer bargaining association, *i.e.* an officer of the bargaining association, had implied authority to accept service on behalf of its members because the charge allegations directly related to the association's expressly authorized activities as the employer members' bargaining agent. The *UECA* decision is distinguishable on multiple fronts. First, unlike the instant case (which involved coordinated bargaining, JD at 3) the *UECA* case involved a multiemployer bargaining unit. As the Board has held, multiemployer bargaining is an entirely different animal from coordinated bargaining. Under coordinated bargaining, parties share information and coordinate efforts, but ultimately retain individual decision-making authority. *See Don Lee*, 145 F.3d at 843. By contrast, multiemployer bargaining occurs when "members of the group have indicated from the outset an unequivocal intention to be bound in collective bargaining by group rather than individual action, and . . . the union . . . has been notified of the formation of the group . . . and has assented and entered upon negotiations with the group representative." *Weyerhaeuser Co.*, 166 NLRB 299, 299 (1967).

Thus, contrary to the ALJ's assertion, the fact that this case involved coordinated – as opposed to multiemployer – bargaining is material. JD at 21 n.36. In multiemployer bargaining, the union and the employers expressly agree that the group will be collectively bound by negotiations and that negotiations will be conducted by a group representative. In this case (i.e. in the coordinated bargaining context), there is no express, mutual agreement among the parties that Respondents would designate a group representative.[8] Rather, the choice to utilize

[8] The ALJ determined that no agreement to make ratification a condition precedent arose by virtue of Coli, Jr.'s and Schwartz's exchanges discussing ratification both prior to and during bargaining. JD at 5 n.9, 8 n.18. By that same reasoning, there can be no finding that an express agreement to multiemployer

Schwartz (and later Darch) as their attorney was a unilateral decision by Respondents that did not require the Union's assent. Simply put, where the union and the employer mutually agree to designate an agent for bargaining, it is not unreasonable for the union to serve that designated agent. In coordinated bargaining, however, employers retain their individual bargaining rights; consequently, the union remains under an obligation to serve those employers individually.

Second, in *UECA*, the charge was served on a company/respondent whose president also served as the president of the multiemployer bargaining association and whose business address also functioned as the offices of the multiemployer bargaining association. 347 N.L.R.B. at 2, 10. Here, there was never service on any individual Respondent, much less on any officer of the Association or at the Association's business address. Likewise, Darch did not hold an office within the Association, nor was his business address used by the Association.

The basis for the holding in *UECA* that "authorization to accept service on behalf of a principal may be implied from the surrounding circumstances," was the Ninth Circuit's decision in *Focus Media, Inc. v. Pringle*, 387 F.3d 1077 (9th Cir. 2004). *See* 347 NLRB at 1. The Board, however, misread the decision in *Focus Media*, borrowing only a portion of the Ninth Circuit's test for "implied authority to accept service." In *Focus Media*, the Ninth Circuit found that a bankruptcy attorney had implied authority to accept service on behalf of its client in a related

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bargaining arose as a result of Schwartz's and Coli, Jr.'s e-mail communications discussing which employers were opting into or out of bargaining with the Association. *See, e.g.*, G.C. Exs. 8, 9, 10(a)-(b).

The ALJ's finding that ratification did not become a condition precedent, moreover, is inconsistent with his other findings on an agent's bargaining authority According to the ALJ, Respondents never notified the Union that Schwartz's "authority to negotiate was limited," and thus he refused to credit certain of the Respondents' testimony that they retained "the right to approve or disapprove any agreements . . . reached during negotiations." JD at 3 n.3. In stark contrast, Coli Jr. indicated on multiple occasions during bargaining that any agreement the parties reached would be subject to ratification, thus providing express notice that he had limited authority to bind the Union to a final contract. JD at 5 n.9, 8 n.18, 12; G.C. Exs. 8, 21. The ALJ's findings in this regard simply cannot be reconciled. The ALJ provides no explanation as to why Respondents must provide express notice in order to limit their bargaining agent's authority, but when (by contrast) Coli, Jr. – as the Union's agent – actually provides the required notice, that notification has no effect on his bargaining authority.

proceeding where (1) the attorney was representing the party in the related, underlying bankruptcy case and (2) *the totality of the surrounding circumstances demonstrates the* ***intent of the client*** *to convey such authority*. 387 F.3d at 1083 (emphasis added). In *UECA*, the Board inexplicably and improperly dispensed with this second, "intent of the client" requirement.

Here, there is no evidence that Respondents intended that Darch accept service on their behalf. Rather, as the ALJ expressly found, each of the Respondents had authorized, registered agents for service of process on file with the State of Illinois and listed on a website maintained by the Illinois Secretary of State. JD at 18-19. Likewise, the ALJ found that none of the Respondents had "authorized Darch to accept service of the ULP charge on their behalf." JD at 19. Neither the Union nor the General Counsel excepted to this latter finding. These findings are entirely inconsistent with the ALJ's ultimate conclusion that Darch had "implied authority" to accept service on behalf of Respondents, and the ALJ made no findings that suggest Respondents otherwise conveyed an intent that Darch was an authorized agent for service.

In the end, the ALJ's reliance on the Board's decision in *UEAC* was misplaced. That decision is distinguishable on its facts and misstates federal law governing implied authority to accept service. Accordingly, the ALJ erred in concluding that Darch had implied authority to accept service of the Charge on behalf of Respondents, and his findings should be reversed.

2. Darch Was Not Authorized For Service Of Other Claims

In support of his conclusion that Darch had authority to accept service on behalf of Respondents, the ALJ noted that like the situation in *UECA*, "the allegations in the ULP charge in this case directly related to Association's (and Darch's) expressly authorized activities as Respondent's [sic] chief spokesperson during contract negotiations." JD at 21. There were no ongoing contract negotiations, however, as an agreement had been struck by the end of October.

Furthermore, by the ALJ's logic, Darch would have been an authorized agent for service of *any* claims that related to the parties' dispute. In addition to filing an NLRB charge, the Union also filed wage claims with the Illinois Department of Labor (IDOL), alleging that Respondents failed to pay wages in compliance with the Union's version of the agreement. These wage claims were not served on Darch and for good reason: Darch was not the agent for service of these changes.[9]

3. The ALJ Misapplied The Board's Decision in *Buckeye Plastic Molding*

The ALJ also offered an alternative theory as to the existence of proper service, namely that Respondents "had actual notice of the ULP charge within the 10(b) period and . . . did not suffer prejudice." JD at 22. In so holding, the ALJ impermissibly expanded the Board's decision in *Buckeye Plastic Molding*, 299 N.L.R.B. 1053 (1990) and failed to properly apply Board law.

In *Buckeye Plastic Molding*, the complaint, but not the charge, was served on the respondent within the six-month time period set forth in Section 10(b). The Board determined that "failure to make timely service of a charge on a respondent will be cured by timely service within the 10(b) period of a complaint." *Id.* at 1053. The Board, in dicta, further held that service on the respondent's attorney was proper for purposes of Section 10(b) because the lawyer was "an established agent for service of process" and "no exception had been filed to this

[9] Respondents attempted to offer evidence of those wage claims. While the ALJ admitted the wage claim applications actually prepared by the Union (specifically, by Brinson, *see* R. Ex. 9), the ALJ refused to admit returns of service demonstrating that the IDOL – another government agency – had properly served the wage claims on each of Respondents through the authorized agents listed on the Illinois Secretary of State website. Tr. 477-79 (rejecting Respondents' Exhibit 15, a notice of service of process upon LAZ Parking through its registered agent CT Corporation System). If Darch implicitly became an authorized agent by virtue of his representation of Respondents in connection with the parties' ongoing negotiations, Respondents should have been permitted to dispel this notion by demonstrating that other agencies served claims – notably claims related to the same dispute that arose out of the parties' negotiations – through Respondents' registered agents and not through Darch. As such, the ALJ's refusal to admit these exhibits was in error.

conclusion." *Id.* at 1054. This fact – the existence of "an established agent" – is absent in this case. Indeed, it is entirely forestalled by the ALJ's finding that "Respondents never authorized Darch to accept service of a ULP charge on their behalf." JD 19.

In *Buckeye Molding*, the Board adopted the reasoning of another Ninth Circuit opinion, one that overturned in part the Board's decision in *Westbrook Bowl*, 274 N.L.R.B. 1009 (1985). In *Westbrook*, the Board concluded that failure to timely serve the charge in compliance with Section 10(b) warranted dismissal, even though the complaint had been served within Section 10(b)'s prescribed six-month window. 274 N.L.R.B. at 1009 n.2, 1012. On appeal, the Ninth Circuit reversed this decision, finding that respondents had actual notice of the charge via service of the complaint within the six-month time period, thus satisfying Section 10(b)'s requirements. *Local 399 v. NLRB*, 798 F.2d 1245, 1249 (9th Cir. 1986). Notably, the Board in *Westbrook* also concluded that service on the respondent's attorney was insufficient, reasoning that the attorney "had not been designated as [r]espondents' agent for purposes of service" and that his appearance in a related "representation case did not constitute representation in the unfair labor practice case." 274 N.L.R.B. at 1009 n.2, 1013. On appeal, the Ninth Circuit did not disturb this aspect of the Board's decision and with good reason: it was consistent with circuit precedent. *See Pringle*, 387 F.3d at 1083 (service on attorney not proper unless client acted in manner that indicated a grant of such authority). Thus, the holding in *Westbrook* that an attorney is not a proper agent for service of process remains viable, as demonstrated by the NLRB's explicit finding in *Buckeye Molding* that the attorney was "an established agent for service of process."

When read together, *Westbrook* and *Buckeye* clearly stand for that proposition that service on a party's attorney does not satisfy Section 10(b)'s requirements unless that attorney has been specifically designated as the party's agent for service of process. In this case, as the

ALJ expressly found, none of the Respondents designated Darch as their agent for purposes of service, and each Respondent had a registered agent for service of process on file and identifiable via the Illinois Secretary of State's website. JD 18-19. Unlike *Buckeye*, there is nothing in the record to suggest that Respondents ever expressly directed the Union to correspond exclusively with Darch on their behalf or took any other actions to indicate that Darch was an established agent for service. Moreover, as the Board concluded in *Westbrook*, the fact that Darch assisted the Respondents in connection with a related matter (i.e., settlement discussions) did not render him an agent for service of process. *See also Schultz v. Schultz*, 436 F.2d 635, 639-40 (7th Cir. 1971) (holding that a general grant of authority alone is not sufficient to make an attorney the agent of his client for receipt of service); *U.S. v. Zeigler Bolt & Parts Co.*, 111 F.3d 878, 881 (Fed. Cir. 1997) ("Even where an attorney exercises broad powers to represent a client in litigation, these powers . . . alone do not create a specific authority to receive service").

As the above analysis reveals, while the "actual notice" standard was applied in *Buckeye*, that finding was predicated on the fact that service had been properly effectuated by service of the complaint on an established agent. Here, the can be no such finding. This is because Darch *could not* become either an "express" or "implied" agent for service of process under NLRB precedent given that (1) Respondents never conveyed an intent to designate him an authorized agent (*see* discussion of *Focus Media*, *supra*) and (2) his representation of Respondents in connection with settlement discussions is insufficient to empower him to accept service on their behalf (*see Westbrook* and *Buckeye*). Thus, not only did the ALJ misapply *Buckeye* by improperly expanding the "actual notice" standard, he completely ignored the holdings in *Buckeye* and *Westbrook* that service on an attorney does not equate to service on his or her client. The ALJ's contrary findings should be reversed.

4. Policy Considerations Weight Against The ALJ's "Actual Notice" Standard

Policy considerations militate against the "actual notice" standard adopted by the ALJ as well. ULP charges are matters of public record, and information related to filed ULP charges are posted on the NLRB's website, including the date on which the charge was filed; the identity of the charging party; the identity of the charged party; and the nature of the charge allegations. A copy of the actual charge, moreover, can be obtained through a FOIA request. *See, e.g.*, http://www.nlrb.gov/case/13-CA-071259 (NLRB's information page for the instant case).

It is common knowledge that attorneys or non-attorney consultants monitor ULP charge filings via the NLRB's website and often attempt to solicit business by notifying employers of charges filed against them. Indeed, the NLRB's form letter enclosing charge notifies the charged party that "[i]f you are contacted by someone about representing you in this case, please be assured that no organization or person seeking your business has any 'inside knowledge' or favored relationship with" the NLRB.[10] Under the ALJ's logic then, solicitation from an attorney or consultant would be sufficient to place a charged party on "actual notice" of the charge and would render service of the ULP charge moot. Simply put, the fact that an employer receives notice of a ULP charge – whether from his or her attorney or from a third party – and takes steps to secure representation and respond to it should not relieve the Union of its statutorily-obligated duty of "timely and proper service of a copy [of the charge] *upon the person against whom such charge is made*." 29 C.F.R. § 102.14(a) (emphasis added).

[10] The Board may take judicial notice of form letters utilized by the Regional Offices of the NLRB. *See Washington Hosp. Ctr.*, 270 N.L.R.B. 396, 396 (1984) (taking judicial notice of dismissal letter).

5. Service On Darch Does Not Comply With the Federal Rules of Civil Procedure

Finally, it is evident that the Board will look to federal law on questions of service. *See United Electrical Contractors Association*, 347 N.L.R.B. No. 1 (May 15, 2006) (relying on Ninth Circuit decision in *Focus Media v. Pringle*); *Buckeye Plastic Molding*, 299 N.L.R.B. 1053 (1990) (relying on Ninth Circuit decision in *Local 399 v. NLRB*).

The federal courts have consistently held that under Federal Rule of Civil Procedure 4, service on a party's attorney is not effective unless the attorney has been specifically authorized to accept service. *See* FED. R. CIV. P. 4(h)(1)(B); *see also, e.g., Williams v. Jones*, 11 F.3d 247, 251 (1st Cir. 1993) ("Service of process is not effectual on an attorney solely by reason of his capacity as an attorney, [but] the party must have appointed his attorney as his agent for service of process."); *Santos v. State Farm Fire & Cas. Co.*, 902 F.2d 1092, 1094 (2nd Cir. 1990) ("Service of process on an attorney not authorized to accept service for his client is ineffective."); *Schultz*, 436 F.2d at 639-40 (service upon an attorney is not effective unless the attorney had authority to receive service on his client's behalf); *Bennett v. Circus U.S.A.*, 108 F.R.D. 142, 147 (N.D. Ind. 1985) ("[F]or an attorney to be considered an agent for process, he must have been appointed for that precise task."); *Miree v. United States*, 490 F. Supp. 768, 775 (N.D. Ga. 1980) ("[S]ervice upon counsel is ineffectual, unless the party has appointed his attorney his agent for service of process."); *Durbin Paper Stock Co. v. Hossain*, 97 F.R.D. 639, 639 (S.D. Fla. 1982) ("A person's attorney is not authorized to receive process simply because of his status as attorney. Service of process is not effectual on an attorney solely by reason of his capacity as an attorney."); *U.S. v. Marple Comm'y Record, Inc.*, 335 F. Supp. 95, 102 (E.D. Pa. 1971) ("For service of process to be valid upon an agent, it must be shown that he was actually appointed by the defendant for the specific purpose of receiving process.").

Here, the ALJ concluded that Respondents never expressly authorized Darch to accept service on their behalf and that each Respondent had a designated agent for service of process on file with the Illinois Secretary of State, the identity of which was easily ascertainable by a simple internet search. JD at 18-19. The Union, however, did not serve the Charge on the any of the Respondents' registered agents (nor did the Region). Service, therefore, was plainly insufficient under both Board and federal law, and the Complaint should be dismissed as untimely.

C. The Union Committed A Scrivener's Error In Reducing The Parties' Tentative Agreement To Complete Contract And That Contract Should be Reformed Accordingly[11]

In their post-hearing brief, Respondents argued that it reached a complete and unambiguous tentative agreement with the Union on October 13-14 and that in reducing that agreement to a formal written contract, the Union committed an error and mistakenly granted new hires under the prior, 2006-2011 agreement an additional $2.00 per hour raise - a figure that the parties never discussed or agreed upon. The ALJ, however, rejected these arguments, finding:

> Respondents' arguments that the parties reached an enforceable agreement on October 13-14 that included Respondents' version of the wage scales, and that the written contract should be reformed to correct a scrivener's error and reflect the October 13- 14 agreement. (See R. Br. at 48-66.) As I explain herein, the October 13- 14 agreement included ambiguous language about the wage scales for which neither party is to blame and thus the parties did not form a contract because they did not have a meeting of the minds on material terms of their apparent agreement.

JD at 24 n.40. The ALJ erred in rejecting Respondents' scrivener's error argument.

[11] Respondents' acknowledge the argument which follows is inconsistent with the argument they made in response to the Exceptions filed by the General Counsel and Charging Party. It is advanced purely in the alternative in the event the Board should grant the General Counsel's exceptions. Relatedly, the Board may take judicial notice of the fact that the Region initially refused to issue a Complaint in this matter, citing insufficient evidence to show the charge was filed and served within the statutory 10(b) period. *See* September 12, 2012 dismissal letter, attached hereto as Exhibit A.

1. The Parties Reached A Clear And Unambiguous Tentative Agreement On October 13-14 & Respondents Signed A Contract Embodying The Terms Of That Agreement

As the ALJ properly found, the record evidence unequivocally establishes that the parties reached a tentative agreement on October 13-14. JD at 24; G.C. Exs. 13, 14, 15. Any argument by the General Counsel to the contrary should be rejected. It is undisputed that the economic terms of that agreement on wages included a $.55 per hour wage increase with "scales proportionate to prior agreement" as well as eliminating the 6-month anniversary raise. Tr. 136; GC Exs. 13, 14, 15. As the ALJ found, "[i]n stating that the wage scales should be proportionate to the prior collective-bargaining agreement, the Association meant that wage scales in the 2011-2016 contract should maintain the $2/hour difference between the wages of new hires and existing employees that was established in the 2006-2011 contract." JD at 9, n. 20.

The evidence further demonstrates that the Union shared Respondents' understanding of "scales proportionate to prior agreement." The Union witnesses testified (consistent with Respondents) that the parties' agreement consisted of a $.55 per hour wage increase. Tr. 132 (JCJ), 134, 136, 259-60, 316-17 (SB), 380; R. Ex. 12. Likewise, the parties' bargaining history establishes the wages scales were prepared by reference to the immediately preceding CBA and that employees never received a wage increase higher than the agreed-upon anniversary increase during the transition from one contract to the next. *See* pages, 2-6 *supra*; G.C. Exs. 5, 6, 7. Finally, both Schwartz and Prussian testified that at the close of the 2006 negotiations, Coli Sr. stated the $2.00 differential would continue to exist and that "never the two shall meet," thereby confirming that the Union understood this $2 differential was permanent. Tr. 789 (FS); 718-19 (MP).

On December 13, each Respondent sent the Union a copy of an executed 2011-2016 CBA. JD at 18; G.C. Exs. 34(a)-(b). Respondents' version of the 2011-2016 CBA contained the

final-year wage rates applicable to new hires under the 2006-2011 CBA, to which it added the agreed-upon $0.55/hour raise (but eliminated the 6-month increase). *Id.* Thus, Respondents' version of the 2011-2016 CBA maintained the wage differential from the prior agreement (line 1 below) and adopted the following wage rates, effective during the first year of that contract:

Effective Date	**START**	**1 YEAR**	**2 YEARS**	**3 YEARS**	**4 YEARS**	**5 YEARS**
11/1/10	$9.25 (+ $.55)	$10.50 (+ $.55)	$11.25 (+ $.55)	$12.00 (+ $.55)	$12.75 (+ $.55)	$14.15 (+ $.55)
11/1/11	$9.80	$11.05	$11.80	$12.55	$13.30	$14.70

Compare GCX 7 *to* GCX 34(b). Given the existence of what the Union described as a "historical" practice (Un Br. at 8), the Union understood that "scales proportionate to prior agreement" necessarily included the prior tier applicable to new-hires. Respondents' scale is consistent with and correctly embodies the parties' October 13-14 agreement, which provided for "55 cents per hour annual increases, with scales proportionate to prior agreement." JD at 9.

Thus, contrary to the Complaint allegations, Respondents have not unlawfully refused to sign a 2011-2016 CBA. Rather, Respondents have signed the parties' October 13-14 tentative agreement. Moreover, as the testimony revealed, all Respondents are currently implementing a contract that accurately reflects the actual agreement reached during negotiations. Tr. 507 (AD), 551 (EU); G.C. Ex. 34(b). Based on this evidence, the ALJ improperly refused to find that the parties' tentative agreement clearly maintained the $2 per hour wage rate differential for employees hired between 2006-2011 and to dismiss the complaint based on the fact that Respondents have signed and are implementing a 2011-2016 CBA that reflects the parties' actual agreement.

2. Both Federal & Board Law Permit Reformation Of CBAs Due To Scrivener's Error

A scrivener's error occurs when "the intention of the parties is identical at the time of the transaction but the written agreement does not express that intention because of that error; this permits a court acting in equity to reform an agreement." *Blackshear v. Reliance Std. Life Ins. Co.*, 509 F.3d 634, 643 (4th Cir. 2007) (quoting 27 Richard A. Lord, *Williston on Contracts* § 70:93 (4th ed.)). "[T]he mistake of a scrivener in drafting a document may be reformed based upon parole evidence, provided the evidence is clear, precise, convincing and of the most satisfactory character that a mistake has occurred and that the mistake does not reflect the intent of the parties." *Int'l Union of Elec. v. Murata Erie N. Am.*, 980 F.2d 889, 907 (3d Cir. 1992) (a LMRA § 301 case).[12]

Both the Board and the federal courts have applied the scrivener's error doctrine - and the reformation remedy - in the collective bargaining context. *See, e.g., NLRB v. Cook County School Bus*, 283 F.3d 888, 895 (7th Cir. 2002), *enforcing* 333 N.L.R.B. 647 (2001) (reforming contract termination provision of CBA to reflect parties' actual agreement); *Americana Health Ctr.*, 273 N.L.R.B. 1728, 1734 (1985) (reforming CBA to reflect parties' actual agreement); *see also Pioneer Elec. Contractors, Inc.*, G.C. Advice Mem., Case No. 36-CA-9339, at 6-7 (June 21, 2004) (concluding that parties' agreement should be reformed to include orally agreed-upon termination procedures and noting that "[w]hen parties reach an agreement but, because of

[12] A scrivener's error appears to be a form of mutual mistake, and courts often use the terms interchangeably. *See* RESTATEMENT (SECOND) OF CONTRACTS § 155 Reporter's Note, cmt. a (1981) (noting that cases granting relief under mutual mistake circumstances often speak of scrivener's errors); *see also NLRB v. Cook County School Bus, Inc.*, 283 F.3d 888, 893 (7th Cir. 2002) (a "mutual mistake" occurs "where a writing that evidences or embodies an agreement in whole or in part fails to express the agreement because of a mistake of both parties as to the contents...of the writing" *quoting* RESTATEMENT (SECOND) OF CONTRACTS § 155 (1981)). Again, the remedy under such circumstances is reformation of the contract upon a showing of "clear and convincing evidence that the agreement as written does not express the true intention of the parties." 283 F.3d at 894 (citing RESTATEMENT (SECOND) OF CONTRACTS § 155 cmt. c (1981)).

mutual mistake, they fail to reduce what was agreed upon to writing, the appropriate remedy is to reform the writing to the agreed upon terms").

a. The Union Erred In Reducing The Parties' October 13-14 Agreement To Writing

As discussed above, the ALJ correctly found that the parties reached a tentative agreement on October 13-14, the terms of which included a $.55 per hour wage increase with "scales proportionate to prior agreement." JD at Tr. 136 (JCJ); G.C. Exs. 13, 14, 15. Also, as discussed above, with respect to wages, the parties mutually understood and agreed that "scales proportionate to prior agreement" meant maintain the $2.00 differential in the wage scales applicable to new hires under the prior, 2006-2011 CBA. However, in reducing that tentative agreement to a formal written contract, the Union committed an error and mistakenly granted new hires under the 2006-2011 contract an additional $2.00 per hour raise.

The Union's claim that it merely followed past practice when drafting the wage progression scales is unavailing. GC. Br. at 20-23; Un. Br. at 8-9. As set forth on pages 2-6 above, comparisons of the various prior agreements (G.C. Exs. 5, 6, 7) reveal that wage rates in subsequent agreements were determined by reference to the immediately preceding agreement. In other words, to establish the first-year wage rates for existing employees in a successor agreement, the parties combined the base wage rates for new hires from the final year of the prior agreement with the agreed-upon anniversary increase. Thus, if the Union had followed precedent, the first-year wage rates for new hires under the 2011-2016 CBA would be:

Effective Date	**START**	**1 YEAR**	**2 YEARS**	**3 YEARS**	**4 YEARS**	**5 YEARS**
11/1/10	$9.25 (+ $.55)	$10.50 (+ $.55)	$11.25 (+ $.55)	$12.00 (+ $.55)	$12.75 (+ $.55)	$14.15 (+ $.55)
11/1/11	$9.80	$11.05	$11.80	$12.55	$13.30	$14.70

In fact, during cross-examination, Coli Jr. admitted that this was an appropriate method by which to calculate existing employees' wage rates for the first year of a new contract:

> Q. [Mr. Darch]: If the parties had followed the math, we'll use your terminology, that they had done in the prior three agreements, you would have simply added 55 cents to that whole column, correct? Excuse me, that's a row, an entire row . . .
>
> A. [Mr. Coli, Jr.]: I assume so, yes, . . . you could do it that way.

Tr. 261 (JCJ).

As the ALJ found, it is clear that the parties achieved an actual agreement on October 13-14. JD at 24. It is equally clear that an error was committed when reducing the parties' agreement to writing and that because of that error, the written agreement presented to Respondents for signature did not conform to the actual intent of the parties. Under these circumstances, and consistent with both Board and Seventh Circuit case law, contract reformation is the appropriate remedy, and the agreement should be reformed to reflect the agreed-upon $0.55 per hour raise and to eliminate the $2.00 per hour wage increase or, in other words, to reflect the version of the 2011-2016 CBA executed by the Respondents. *See Americana Health Ctr*, 273 N.L.R.B at 1734; *Cook County Sch. Bus*, 283 F.3d at 895. Due to the Union's error, Respondents are under no obligation to execute the Union's version of the 2011-2016 CBA, and their refusal to do so does not constitute a violation of the Act.

b. The Union Misunderstood The Wage Scales From The Outset

At the parties September 27 bargaining session, the Union distributed its initial proposal and orally explained (albeit incorrectly) that it sought a $1.00 per hour wage increase and that the wage scales in its proposal reflected that increase. Tr. 116 (JCJ), 484 (AD), 533 (EU), 604 (JD), 642-43 (JB), 797-98 (FS); G.C. Ex. 11. This representation is confirmed by Schwartz's notes from that bargaining session, which indicate that the Union's proposal included a $1 increase in the wage scales. R. Ex. 32, pg. 6. As the ALJ found, however, the Union failed to follow past practice and mistakenly drafted the wage scales within its September 27 proposal:

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

JD at 7-8, n. 15 (emphasis added).[13]

By contrast, the ALJ found regarding the wage scales in the Union's October 18 draft:

> To create [the wage scales in the October 18 draft agreement], the Union worked from the wage scales in the 2006-2011 contract. *This formula produced different wage scales than the Union proposed on September 27 (even after taking the different annual raises into account).*

JD at 10-11 n. 21 (emphasis added). As the ALJ found, a comparison of the two sets of wage scales drafted by the Union confirms that the Union did not understand how to properly calculate the rates within the wage scales. As such, the wage scales that appeared in the Union's October 18 draft (and any drafts thereafter) of the 2011-2016 CBA clearly were the product of a mistake.

[13] Notably, neither the Union nor the General Counsel filed an exception to the ALJ's finding that the September 27 proposal did not follow the formula or that it was unclear what alternative formula the Union used.

c. The Union's Contract Contained Other Errors, Thus Further Evidencing The Existence of Mistake

The Union's version of the 2011-2016 CBA contained other errors separate and apart from the wage scales, again evidencing the presence of scrivener's error. For example, after reviewing the October 25 redlined draft, Schwartz noticed that the Union had included "grandchildren" or "significant others" in Article 13 covering funeral leave. GCX 21. While this change was in the Union's September 27 proposal and October 12 final offer, it was not included in Respondents' October 13 final offer -- the offer that was accepted by the Union. Schwartz subsequently directed the Union to remove such language, and the Union did so. *Id.*.

The Union's acquiescence to Schwartz's demand demonstrates that the Brinson's decision to use the Union's initial proposal, as opposed to the prior version of the contract, as a base document for the written contract was inappropriate. Plainly, using the Union's initial proposal increased the risk that drafting errors would occur and, in fact, did cause drafting errors to occur, as evidenced by the mistaken funeral leave provisions included in Union's initial drafts of the 2011-2016 CBA. GCX 16, 17, 18, 20.

Not all drafting errors were discovered. In its September 27 initial proposal, the Union proposed deleting the cut-off date in Article 20.2(c), as well as the waiting periods set forth in Articles 20.1(c) and 20.2(d). GCX 11, pgs. 16-17. Respondents, however, did not agree to these changes. In fact, the only agreed-upon revision to Article 20 (which the Respondents included in their final offer on October 13) was a 6.5% increase to benefit contributions. GCX 13(a)-(b). During the drafting process, the Union's scrivener properly reinserted[14] the waiting periods in Articles 20.1(c) and 20.2(d), but neglected to reinsert the cut-off date in Article 20.2(c). G.C. Exs. 16(b), 17(b), 18(b), 26(b), 27(b). By deleting this cut-off date, the Union again mistakenly

[14] "Reinserted" rather than "did not delete" only because supposedly the Union was using its September 27 proposal as the base document.

preserved a rejected aspect of its initial, September 27 proposal and failed to conform the written agreement to the parties' October 13-14 tentative agreement. This drafting error would lead to increased pension costs of approximately $3,200 per year per newly-hired employee. Tr. 508 (AD).

As the ALJ found, by virtue of deleting a key cut-off date in Article 20.2(c), Article 20.2 in the Union's version of the 2011-2016 CBA set forth inconsistent time periods as to when Respondents must commence paying pension contributions on behalf of employees. JD at 14 n. 28; Tr. 500-02 (AD). The evidence thus reveals that the Union committed multiple mistakes in reducing the parties' October 13-14 tentative agreement to writing. This lends further support to Respondents' contention that the wage scales resulted from a scrivener's error and not a mutual mistake.

D. The ALJ Purportedly Declined To Address Respondents' Ratification Arguments And Yet Made Findings Related To That Argument

The ALJ "declined to address Respondents' other arguments for why they did not violate the Act when they refused to execute the October 28 version of the contract" including Respondents' argument that "Respondents were entitled to rescind any contract before the Union membership ratified it." JD at 26 n.42. Although the ALJ purportedly declined to reach this issue, he nonetheless made a number of related findings:

- "In connection with scheduling the negotiations, Coli, Jr. mentioned to Schwartz that it would be good to get negotiations done sooner rather than later so that Union would have time to ratify the new contract. . . . I do not find that Coli, Jr. made ratification a condition precedent to the parties reaching an agreement when he made these remarks to Schwartz." JD at 5-6 n.9;

- "[T]he evidentiary record shows that while Coli, Jr. . . . mentioned the ratification process when he communicated with Schwartz, he never took the position that ratification was a condition precedent to an enforceable agreement." JD at 8 n.16.

- "Occasionally during the October 7 session, Coli, Jr. asserted that he would not be able to get employees to approve some of the Association's proposals. Coli, Jr. did

not say, however, that ratification was a prerequisite to the parties working out a valid and effective contract." JD at 8 n.18.

- "On October 14, Schwartz advised Coli, Jr. that 'we are in accord with [the points raised in Coli, Jr.'s October 13 email]. We look forward to ratification.'" JD at 9.
- On October 28, "Coli, Jr. . . . stressed that 'we need to get this done today in order to move our ratification process forward.'" JD at 12.

The ALJ's express refusal to fully address Respondents' ratification argument while simultaneously making findings related to that argument was clear error and should be reversed.

1. If Reversed, The Case Should Be Remanded To The ALJ For Further Findings On Respondents' Ratification Arguments

In his decision, the ALJ found that despite certain statements by Coli, Jr. regarding ratification, ratification was not a prerequisite to a final, binding agreement. JD at 5-6 n.9, 8 nn. 16, 18. These findings, however, addressed only one aspect of Respondents' ratification argument, i.e. that the parties' statements and e-mail communications during bargaining revealed a mutual understanding and agreement that ratification would be a precondition to a binding contract. Respondents, however raised a number of alternative arguments with respect to ratification.

For example, Respondents argued, consistent with agency law principles and an entire line of Board precedent, that the Union may unilaterally limit its agent's authority by giving notice that any tentative agreement is contingent upon ratification. *See A.W. Farrell & Sons*, 359 N.L.R.B. No. 154, pg. 1 (July 11, 2013) ("a principal may limit its agent's authority . . . by giving clear and timely notice to the other parties that any tentative agreement is contingent upon subsequent approval or ratification."); *Good GMC, Inc.*, 267 N.L.R.B. 583, 584 (1983) (union permitted to withdraw from tentative agreement after ground rule was discussed that any agreement reached was tentative and subject to ratification); *Joe Carroll Orchestras*, 254 N.L.R.B. 1158, 1158 n.2 (1981) (ratification necessary to form binding agreement where

employers "understood that the Union's negotiators and agents had authority only to negotiate and not to execute a contract unless the agreement was ratified by the Union's membership"); *Loggins Meat Co.*, 206 N.L.R.B. 303, 307-08 (1973) (employer entitled to withdraw offer before acceptance via ratification was communicated to employer); *Sunderland's, Inc.*, 194 N.L.R.B. 118, 125 (1971) (ratification made a condition precedent where union informed employer that it did not have final authority to accept or reject contract); *Teledyne Specialty Equip.*, 327 N.L.R.B. 928, 930 (1999) (employer lawfully refused to sign revoked contract where ratification required by union's constitution and union communicated limitations on its authority; complaint dismissed); *AFSCME Dist. Council 71*, 275 N.L.R.B. 49, 51 (1985) (final agreement contingent upon ratification where company negotiators were "made aware" of union negotiator's limited authority). The ALJ did not address this argument or any of these cases in his decision.

Likewise, the ALJ ignored Respondents' arguments that any "express agreement" requirement should be rejected because (1) it fails to comport with the NLRA and with basic principles of agency law; (2) it is unworkable in practice; and (3) Board decisions applying the "express agreement" requirement are distinguishable from and inapplicable to this case. Because the ratification issue is extremely complex and nuanced, the ALJ's decision to address it only in passing and otherwise ignore this argument was in error. Thus, if necessary, the Board should remand this case to the ALJ for more complete findings on the ratification issue.

2. The Union's Statements Both Prior To And During Bargaining Made Clear That Ratification Was A Precondition To A Final Agreement

Even assuming (as the ALJ appears to have implicitly held in his decision) that the Board requires an express agreement on ratification, the record reveals that the parties did expressly deem ratification a prerequisite to a final, binding agreement and that ratification was not a gratuitous, self-imposed limitation. Thus, the ALJ's contrary finding was in error.

On multiple occasions both prior to and during the course of bargaining, Coli Jr. indicated that any agreement the parties reached would be subject to ratification:

- In April 2011, Mr. Coli Jr. told Mr. Schwartz that the bargaining sessions should be scheduled early in order to ensure time for ratification (Tr. 752 (FS));
- On August 22, 2011, Mr. Coli Jr. requested that bargaining be scheduled "sooner rather than later" so that the Union would "have time to ratify" (GCX 8);
- At the September 27, 2011 bargaining session, Mr. Coli Jr. stated that any agreement reached during the course of negotiations was tentative and would be subject to membership ratification (Tr. 762-63 (FS)); [15]
- At the October 7, 2011 bargaining session, Mr. Coli Jr. used the need for ratification as leverage to obtain concessions from Respondents with respect to their non-economic proposals (Tr. 606-07 (JD));
- On October 13, 2011, Mr. Coli Jr. stated that Parties had reached a "Tentative Agreement" to which Mr. Schwartz responded "We look forward to ratification" (G.C. Exs. 14, 15);
- On October 28, 2011, Mr. Coli Jr. requested that the Parties finalize the written contract that day so that the Union could "move [its] ratification process forward" (GCX 21); and

As this series of events demonstrates, even before the parties commenced bargaining, Coli Jr. used ratification as a basis to obtain early negotiations dates. JD at 5 n.9. Later, at the September 27 bargaining session, Coli Jr. proposed ratification as a condition precedent, stating that any agreement reached during the course of negotiations was tentative and would be subject to membership ratification. Tr. 762-63 (FS). The parties then proceeded to bargain the terms of the contract, during which time Coli Jr. utilized the need for ratification as a means to obtain

[15] The ALJ did not credit Schwartz's testimony in this regard, finding that his testimony was not corroborated by other evidence. JD at 8 n. 16. Rather, the ALJ credited Coli, Jr.'s testimony that the Union sought ratification of the contract for political reasons. *Id.* Specifically, Coli, Jr. explained that Coli, Sr. (his father) was running for an International Union office and "having no contract . . . in the hands of the people while ballots are out for the international [union] presents a political problem for me and for my father." *Id.* (citing Tr. 226). This credibility finding was in error. The ALJ ignored that the Union has always sought ratification of its contracts, even when neither Coli, Sr. nor Coli, Jr. were running for office. Indeed, the prior, 2006-2011 CBA was ratified by the Union membership, and there is no evidence to suggest that ratification of that particular contract was motivated by political reasons. Simply put, Coli, Jr.'s post hoc explanation regarding the need to ratify the 2011-2016 CBA for political reasons simply does not comport with the bargaining history of the parties.

concessions. JD at 8 n.18. Subsequently, on October 14, after Coli Jr. confirmed that the parties had achieved what he labeled as a "Tentative Agreement,"[16] Schwartz then explicitly agreed to ratification, stating that Respondents "look forward to ratification." JD at 9. Based on these communications, it is plain the parties expressly agreed and mutually understood that ratification would constitute a precondition to a final agreement.

That the actual agreement on ratification was formed over the course of several bargaining sessions and took place after the parties negotiated the contract's substantive terms has no bearing on its validity. The Board has recognized that parties may "mutually agree at any point in ongoing negotiations that ratification procedures must precede implementation of a contract." *Hertz Corp.*, 304 N.L.R.B. 469, 469 n.2 (1991).

Furthermore, on October 28, during the draft review process, Coli Jr. emphasized the need to expeditiously finalize the contract in order to move the ratification process forward. JD at 9; GCX 21. Upon receiving this e-mail from Coli Jr., Schwartz complied with his request, accelerated his review, and took steps to tie up any loose ends that day. G.C. Exs. 22, 25(a)-(b), 26(a), 27(a)). Those steps included arranging a call with Coli Jr. to finalize contract language and refine the parties' tentative agreement on Section 40.5. JD at 12; G.C. Exs. 24, 25(a), 26(a). Thus, Schwartz's agreement to fast-track the review process to accommodate ratification further demonstrates the existence of an express agreement on ratification.

Here, it is undisputed that Respondents revoked the tentative agreements via their November 8 letter. JD at 15-16; GCX 31(a)-(b). It is also undisputed that the tentative

[16] Mr. Coli Jr.'s use of this phrase has legal import. In *Y.W.C.A. of Western Massachusetts*, 349 N.L.R.B. 762, 772 n.12 (2007), the Board observed that "[i]n collective-bargaining parlance, a 'tentative agreement' refers to an agreement that (1) has been accepted by the parties subject to ratification or other approval mechanism or (2) is an agreement on a particular issue that is subject to becoming binding if and when the parties reach agreement on all other issues." Clearly, the former definition is applicable in this case, as the Parties had reached an agreement on all material issues as of October 14, 2011 (Tr. 756 (FS)).

agreement was not ratified until November 15. JD at 17. Thus, Respondents repudiated the tentative agreements prior to ratification. Board law is clear that where the formation of final, binding contract is subject to employee ratification, a party may lawfully revoke and refuse to sign the unratified contract. *See Observer Dispatch*, 334 N.L.R.B. 1067, 1072 (2001) (company lawfully refused to sign agreement prior to agreement's acceptance by ratification vote); *Loggins Meat Co*, 206 N.L.R.B. 303, 307-08 (1973) (employer lawfully revoked contract prior to learning of ratification). Respondents, therefore, did not violate the NLRA by refusing to sign the Union's version of the 2011-2016 agreement, and the ALJ erred in finding that the parties did not make ratification a precondition to a binding agreement.

E. The ALJ Declined To Address Respondents' Argument That ABM, LAZ & Imperial Parking Were Not Bound By The Agreement

In their post-hearing brief, Respondents argued that even if Schwartz accepted or agreed to the Union's October 28 version of the contract (which he did not), his actions could not bind ABM, LAZ, or Imperial. This is because (1) Schwartz ceased acting on behalf of those three employers by intentionally excluding them from the drafting and review process that occurred between October 25 and October 28 and (2) the Union knew Schwartz had ceased acting on behalf of LAZ, ABM, and Imperial during that time period.

Based on these facts, agency law dictates that ABM, LAZ, and Imperial cannot be held accountable for their disloyal agent's actions. *See Ash v. Georgia-Pacific Corp.*, 957 F.2d 432, 436 (7th Cir. 1992) ("Although an agent's knowledge usually is imputed to the principal . . . the common law treats the principal as ignorant of facts known to an agent acting adversely to the principal, and for his own benefit."); *In re JLJ Inc.*, 988 F.2d 1112, 1116 (11th Cir. 1993) ("[T]he general rule is that an agent's act against the interest of the principal is void . . . ."); *Ash*, 957 F.2d at 436 (observing that knowledge will not be imputed to principal "where the adverse

party knew that the agent was acting adversely to his employer"); *Schlueter v. Varner*, 384 F.3d 69, 81 (3d Cir. 2004) (Ambro, J., dissenting) ("[W]hen . . . an attorney ceases altogether to serve the interests of his client, the law of agency is clear that the attorney acts alone."); *Baldayaque v. United States*, 338 F.3d 145, 154 (2d Cir. 2003) (Jacobs, J., concurring) ("[W]hen an agent acts in a manner completely adverse to the principal's interest, the principal is not charged with the agent's misdeeds."); *see also* RESTATEMENT (THIRD) OF AGENCY § 5.04 (2006) ("[N]otice of a fact that an agent knows or has reason to know is not imputed to the principal if the agent acts adversely to the principal in a transaction or matter, intending to act solely for the agent's own purposes or those of another person."); RESTATEMENT (THIRD) OF AGENCY § 5.04 cmt. b (2006) ("A third party who knows or has reason to know that an agent acts adversely to the principal, and who deals with the principal through the agent, . . . may not rely on the adverse-interest exception. Thus, imputation [of knowledge to the principal] protects innocent third parties but not those who know or have reason to know that an agent is not likely to transmit material information to the principal.").

In his October 25, 2013 Decision, the ALJ "declined to address Respondents' other arguments for why they did not violate the Act when they refused to execute the October 28 version of the contract" including Respondents' argument that "LAZ Parking, ABM Parking, and Imperial Parking were not bound by any agreement that Schwartz reached because Schwartz acted contrary to their interests during the draft review process." JD at 26 n.42. If the Board reverses the ALJ's ruling that no meeting of the minds existed, it should remand the case for further finding on Respondents' alternative theories. This necessarily includes findings of fact and conclusions of law on Respondents' argument that ABM, LAZ, and Imperial could not –

under the law of agency – be bound by the acts of a "wayward agent" who failed to act on their behalf and whose actions and decisions were in fact wholly detrimental to these three employers.

IV. CONCLUSION

For all of the foregoing reasons, Respondents respectfully request the Board affirm their Exceptions to the ALJ's October 25, 2013 decision; overrule the ALJ's findings that the complaint should not be dismissed for lack of proper service or for the presence of a scrivener's error; and/or remand the case to the ALJ for further findings on those alternate arguments that ALJ ignored or failed to fully address.

Dated: December 20, 2013

Respectfully submitted

INTERPARK, STANDARD PARKING, IMPERIAL PARKING, ABM PARKING, & LAZ PARKING

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CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that on December 20, 2013, he caused the foregoing document to be filed electronically via the National Labor Relations Board's electronic filing system. All parties below will be served via e-mail and U.S. Mail.

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EXHIBIT A

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September 12, 2012

STEPHANIE K. BRINSON, ESQ., General Counsel
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Re: Chicago Parking Association, Standard Parking, Imperial Parking, Sytem Parking, LAZ Parking, InterPark
Case 13-CA-071259

Dear Ms. Brinson:

We have carefully investigated and considered your charge that CHICAGO PARKING ASSOCIATION, STANDARD PARKING, IMPERIAL PARKING, SYSTEM PARKING, LAZ PARKING, INTERPARK has violated the National Labor Relations Act.

Decision to Dismiss: The evidence is insufficient to show that the charge was filed and served within the statutory 10(b) period on the Chicago Parking Association or any of the other employers alleged by you to be involved in the unfair labor practice charge. Accordingly, the events complained of in the charge are barred by Section 10(b). Additionally, the evidence was insufficient to show that the Chicago Parking Association or the employers involved in the bargaining which occurred were authorized to engage in bargaining encompassing a multi-employer unit. Therefore, I am refusing to issue complaint.

Your Right to Appeal: You may appeal my decision to the General Counsel of the National Labor Relations Board, through the Office of Appeals. If you appeal, you may use the enclosed Appeal Form, which is also available at www.nlrb.gov. However, you are encouraged to also submit a complete statement of the facts and reasons why you believe my decision to dismiss your charge was incorrect.

Means of Filing: An appeal may be filed electronically, by mail, or by delivery service. Filing an appeal electronically is preferred but not required. The appeal MAY NOT be filed by fax. To file an appeal electronically, go to the Agency's website at www.nlrb.gov, click on **File Case Documents,** enter the NLRB Case Number, and follow the detailed instructions. To file an appeal by mail or delivery service, address the appeal to the General Counsel at the National Labor Relations Board, Attn: Office of Appeals, 1099 14th Street, N.W., Washington D.C. 20570-0001. Unless filed electronically, a copy of the appeal should also be sent to me.

Appeal Due Date: The appeal is due on **September 26, 2012**. If you file the appeal electronically, we will consider it timely filed if you send the appeal together with any other

documents you want us to consider through the Agency's website so the transmission is completed by **no later than 11:59 p.m. Eastern Time** on the due date. If you mail the appeal or send it by a delivery service, it must be received by the Office of Appeals in Washington, D.C. by the close of business at **5:00 p.m. Eastern Time** or be postmarked or given to the delivery service no later than September 25, 2012.

Extension of Time to File Appeal: Upon good cause shown, the General Counsel may grant you an extension of time to file the appeal. A request for an extension of time may be filed electronically, by fax, by mail, or by delivery service. To file electronically, go to www.nlrb.gov, click on **File Case Documents**, enter the NLRB Case Number and follow the detailed instructions. The fax number is (202)273-4283. A request for an extension of time to file an appeal **must be received on or before September 26, 2012.** A request for an extension of time that is mailed or given to the delivery service and is postmarked or delivered to the service before the appeal due date but received after the appeal due date will be rejected as untimely. Unless filed electronically, a copy of any request for extension of time should be sent to me.

Confidentiality: We will not honor any claim of confidentiality or privilege or any limitations on our use of appeal statements or supporting evidence beyond those prescribed by the Federal Records Act and the Freedom of Information Act (FOIA). Thus, we may disclose an appeal statement to a party upon request during the processing of the appeal. If the appeal is successful, any statement or material submitted with the appeal may be introduced as evidence at a hearing before an administrative law judge. Because the Federal Records Act requires us to keep copies of case handling documents for some years after a case closes, we may be required by the FOIA to disclose those documents absent an applicable exemption such as those that protect confidential sources, commercial/financial information, or personal privacy interests.

Very truly yours,
/s/ Peter Sung Ohr
Peter Sung Ohr
Regional Director

Enclosure

cc GENERAL COUNSEL
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FRANKLIN COURT BUILDING
NATIONAL LABOR RELATIONS BOARD
1099 14TH STREET, NW
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Form NLRB–4767

UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD

APPEAL FORM

To: General Counsel
Attn: Office of Appeals
National Labor Relations Board
Room 8820, 1099 - 14th Street, N.W.
Washington, DC 20570-0001

Date:

Please be advised that an appeal is hereby taken to the General Counsel of the National Labor Relations Board from the action of the Regional Director in refusing to issue a complaint on the charge in

_____

Case Name(s).

_____

Case No(s). *(If more than one case number, include all case numbers in which appeal is taken.)*

_____

(Signature)