UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

SMI/DIVISION OF DCX-CHOL
ENTERPRISES, INC.

and

INDIANA JOINT BOARD, RETAIL, WHOLESALE, DEPARTMENT STORE UNION, UNITED FOOD & COMMERCIAL WORKERS UNION, LOCAL 835 a/w INDIANA JOINT BOARD, RETAIL, WHOLESALE, DEPARTMENT STORE UNION, UNITED FOOD & COMMERCIAL WORKERS UNION

Cases 25-CA-117090
25-CA-117093
25-CA-117097
25-CA-117151
25-CA-117254
25-CA-120437
25-CA-125968

GENERAL COUNSEL'S ANSWERING BRIEF TO RESPONDENT'S EXCEPTIONS TO THE ADMINISTRATIVE LAW JUDGE'S DECISION

Comes now Counsel for the General Counsel and respectfully submits the following Answering Brief to Respondent's Exceptions to the Administrative Law Judge's Decision. The General Counsel hereby requests that Respondent's exceptions be denied and that the Judge's decision in this case issued on September 23, 2014 be affirmed with the exception of the limited item to which the General Counsel filed Exceptions on October 21, 2014. In support of this position, the General Counsel offers the following:

I. STATEMENT OF THE CASE

A consolidated complaint issued on April 30, 2014 upon the basis of six charges filed by the Indiana Joint Board, Retail, Wholesale, Department Store Union, United Food &

Commercial Workers Union Local 835 (the Union). A second consolidated complaint issued on June 9, 2014 covering one additional charge filed by the Union. The consolidated complaint alleges that SMI/DCX-Chol Enterprises, Inc. (Respondent) violated Sections 8(a)(5) and/or (1) of the National Labor Relations Act (the Act) by: 1) on August 19, 2013, threatening employees with job loss and plant closure if they did not agree to accept Respondent's proposal to contractually change the employees' pay dates; 2) on August 22, 2013, denying Union officials access to the employee break room; 3) on October 16, 2013, threatening employees with the division of Respondent into two separate companies, one unionized and one non-union; 4) on October 16, 2013, bypassing the Union and direct dealing with employees by soliciting that they resign from Respondent and begin working for a non-union company; 5) on November 4, 2013, bypassing the Union and direct dealing with employees by distributing $100 bills to unit employees; 6) on January 3, 2014, withdrawing recognition from the Union as the exclusive representative of the bargaining unit and thereafter refusing to meet and bargain with the Union to negotiate a successor contract; and 7) on March 27, 2014, changing the pay dates for unit employees.

Administrative Law Judge Geoffrey Carter issued his decision on September 23, 2014, finding that Respondent unilaterally denied the Union access as alleged, threatened employees that it would divide into two separate companies, one union and one non-union, and unilaterally changed employees' terms and conditions of employment by implementing a $100 bonus and by changing the employees' pay dates. Judge Carter also found that Respondent unlawfully withdrew recognition from the Union and has failed and refused to bargain with the Union to negotiate a collective-bargaining agreement. The General Counsel filed a limited exception requesting that the Board find that Respondent was not only barred from withdrawing

recognition from the Union based on the Board's decision in *UGL-UNICCO Service Co.*[1], but it also could not withdraw recognition because the claimed loss of majority support was tainted by significant, unremedied unfair labor practices. Respondent filed exceptions requesting that the Board reverse all of Judge Carter's findings and that the consolidated complaint be dismissed in its entirety.

This Answering Brief is based on the same statement of facts made by the General Counsel in its Brief in Support of General Counsel's Exceptions to the Administrative Law Judge's Decision. Counsel for General Counsel hereby incorporates that statement of facts to this Answering Brief.

II. ARGUMENT

A. Judge Carter Correctly Found that Respondent Unlawfully Denied Union Officials Access to the Employees

It is well settled that an employer's regular and longstanding practices that are neither random nor intermittent become terms and conditions of employment even if these practices are not required by a collective-bargaining agreement." *Prime Healthcare Serves.-Garden Grove LLC,* 357 NLRB No. 63 (Aug. 26, 2011), citing *Sunoco, Inc*., 349 NLRB 240, 244 (2007). Testimony from both Respondent's and General Counsel's witnesses reflects that Union President David Altman was allowed access to meet with union members at the employee break room for at least the past seven years. (TR 56-57, 99, 111, 236) Respondent's argument that the Union did not meet its burden of demonstrating that the Union met with employees on a regular and frequent basis is simply wrong. Contrary to Respondent's claim, the testimony at trial left little doubt that Altman always requested to meet with employees right after the monthly grievance meeting with Respondent ended and that the only time he was denied access was on

[1] 357 NLRB No. 76 (2011)

August 22, 2013, just days after Respondent became the successor to Stuart Manufacturing. (TR 86, 110, 225, G.C. ex. 2). It is clear that access by the employees' representatives constitutes a mandatory bargaining subject. *See, e.g., Campo Slacks, Inc.*, 250 N.L.R.B. 420, 429, enforced without opinion, 659 F.2d 1069 (3d Cir. 1981); *Boyer Bros. Inc.*, 217 N.L.R.B. 342, 344 (1975; *N.L.R.B. v. Great W. Coca-Cola Bottling Co.*, 740 F.2d 398, 403 (5th Cir. 1984). Respondent's General Manager stated that the reason he denied the Union access was so that employees would not be confused and to avoid more speculation among themselves about the ownership transition. (TR 86-87) However, the Board's longstanding principles reject the notion that a business justification permits a party to avoid its obligation to bargain collectively. *Murphy Oil USA*, 286 NLRB 1039, 1042 (1987), quoting *Granite City Steel Co.*, 167 NLRB 310 (1967); *Peerless Food Products*, 236 NLRB 161 (1978).

The Judge also correctly found that this unilateral change to Respondent's long-time practice of allowing Union access to employees after grievance meetings was material, substantial and significant. The change unilaterally imposed must, initially, amount to "a material, substantial, and a significant" one. *Peerless Food*, supra. In this instance, the change was significant because of the timing of the change. It was critical for the Union to have access to its members on August 22, 2013 because employees were full of questions, speculating about their future, and did not know what would eventually change under the new ownership. The impact of the denial of access is clearly demonstrated by the fact that more than half of the employees who signed the decertification petition signed it on or after August 22, 2013. (R. ex. 1). As Judge Carter correctly found, the Board has held that denying union access, even on one occasion, is a unilateral action that is material in nature. *Frontier Hotel & Casino*, 323 NLRB 815 (1997), enfd. in pertinent part 118 F.3d 796 (D.C. Cir. 1997).

B. Judge Carter Correctly Found that Respondent Threatened Employees with Dividing the Company into Two Companies, One Union and One Non-union

Judge Carter found that Respondent's Vice-President of Human Resources, Carol Goods-North, told the Union that Respondent would operate under the collective-bargaining agreement but that Lionel Tobin's company (Stuart Manufacturing) would be non-union. (TR 122, 227, G.C. ex. 2) It is important to note that Goods-North made this statement in the presence of employees, too. It is undisputed that at the time Goods-North made this statement, Tobin planned to start up a separate operation in the back of the facility by leasing office space and equipment from Respondent and by hiring back his former employees. (TR 20, 22, 25, 85) It is also undisputed that Tobin shared his plans with his sister, Goods-North, and with General Manager Gerald Pettit. (TR 25-26, 85) Tobin also shared his plans with at least 15 bargaining unit employees he interviewed. (TR 26-27, 85) Respondent argues that Tobin's plans never came to fruition and that the relationship between Tobin and Respondent is somewhat strained. The fact that Tobin has not been able to restart Stuart Manufacturing or that he has had conflicts with Respondent, does not alter that the statement made by Goods-North that Tobin's company would be non-union was a threat that as many as 25 employees in the unit could eventually leave Respondent's employment to go work for a non-union company under the same roof. *See,* e.g., *Bay Area-Los Angeles Exp*., 275 NLRB 1063 (1985).

C. Judge Carter Correctly Found that the $100 Bonus was an Unlawful Unilateral Change

Respondent does not dispute that it announced and distributed a $100 bill to employees without notifying the Union or bargaining with the Union. It is also undisputed that employees had never received a cash bonus like this in the past under the predecessor employer. (TR 229, 232) Respondent argues that the $100 was a gift and not part of employees' compensation.

Respondent also disingenuously argues that the $100 cash award was not unprecedented because it was a practice at Respondent's other facilities. Although employees had in the past received turkeys during Thanksgiving, doughnuts during employee meetings, and other small value items at employee raffles, those items were not significant in value. (TR 65) Moreover, those gifts are distinguishable from the bonus distributed in November 2013 because this incentive was given in cash and was awarded for having achieved a production goal. (TR 76-77) In fact, Respondent's co-owner Neil Castleman testified that he would authorize additional cash bonuses if employees reached the production goal again. (TR 78-80). Thus, by Respondent's own admission, additional cash bonuses could be anticipated by employees. Additionally, Respondent's argument that the bonus was not unprecedented is baseless because bonuses had only been granted at their non-unionized divisions prior to the asset buyout, and it is undisputed that this had never been done at this facility in the past. (TR 69, 80, 90, 102) Thus, Judge Carter correctly found that the bonus was not a gift that did not require bargaining but was an "unprecedented award of additional compensation at the facility" and as such was a form of compensation subject to a mandatory duty to bargain under Section 8(a)(5) of the Act. Since Respondent undeniably did not bargain with the Union prior to awarding this bonus, it follows that it committed an unfair labor practice.

D. Judge Carter Correctly Found that Respondent Unlawfully Withdrew Recognition from the Union

On January 3, 2014, by letter, Respondent informed the Union that it would not bargain with the Union for a successor contract, effectively withdrawing recognition from the Union, based on evidence they had received indicating that the Union had lost its majority status. (Jt. ex. 3) In refusing to bargain and withdrawing recognition from the Union, Respondent violated Sections 8(a)(1) and (5) of the Act as a matter of law.

Respondent is a successor employer of Stuart Manufacturing and adopted the collective-bargaining agreement in effect at the time it bought Stuart Manufacturing's assets. Respondent also recognized the Union at the time of the purchase. Where a successor employer recognizes a union and makes no initial changes to the bargaining unit employees' terms and conditions of employment, the employer is obligated to bargain with the union for a reasonable period of time. *UGL-UNICCO*, supra. The Board in *UGL-UNICCO* specified that a reasonable time in such an instance was to be no less than a period of six months. The six months reasonable period of time starts from the date of the first bargaining meeting between the union and the employer. *Id*. In addition, during this period, an employer may not unilaterally withdraw recognition from a union based on a claimed loss of majority support. *UGL-UNICCO*, supra, slip op. at 8. In reestablishing the successor bar doctrine in *UGL-UNICCO*, supra, slip op. at 3, the Board noted that the Supreme Court in *Fall River Dyeing & Finishing Corp. v. NLRB*, 482 U.S. 27, 40 (1987), observed that after being hired by a successor company "employees initially will be concerned primarily with maintaining their new jobs… they might be inclined to shun support for their former union, especially if they believe that such support will jeopardize their jobs with the successor…"

Applying the successor bar doctrine in *UGL-UNICCO* to the instant case, Respondent's obligation to recognize and bargain with the Union matured at the time of the purchase, and the Union was entitled to a reasonable period of time of bargaining without challenge to its majority status. Since Respondent has refused to bargain with the Union entirely, the reasonable period of time has not begun and the six month period has not elapsed. Respondent asserts that it met with the Union during a "span" of six months. However, those meetings were not bargaining meetings. The parties met many times to discuss grievances or to discuss questions about the

asset buyout. The parties were arguably trying to initiate bargaining in December 2013 when the Union sent Respondent a contract proposal and tried to set up bargaining meetings. Nevertheless, Respondent never engaged in an exchange of proposals or counter-proposals with the Union, certainly never sat across the bargaining table with the Union, and instead sent the January 3, 2014 letter. Even if the initial meetings between Respondent and the Union were to be considered bargaining, six months had not elapsed between August 2013 and January 3, 2014. Therefore, Respondent could not refuse to bargain with the Union as of January 3, 2014 based on a loss of majority support argument.

Respondent also argues that the instant case is distinguishable from *UGL-UNICCO* because it was in actual possession of an unsolicited petition for decertification. In *UGL-UNICCO,* the employer had a petition for an election from a rival union in hand. Slip op. at 2. The employer and the union who had represented its employees for over 20 years were in the middle of negotiations for a new contract when the petition from the rival union was filed with the Board. The employer was presented with the dilemma of either continuing to bargain with a union that had represented its employees for 20 years or stop negotiations until after the Board held an election allowing employees to vote on whether they wanted to be represented by a different union. Thus, the situation at issue here is not that different from the situation in *UGL-UNICCO*. At the core of *UGL-UNICCO* was the question of whether employees would be allowed to vote in an election or whether the employer would be allowed to continue to bargain with a union that its employees may or may not support any longer without an election. The Board answered that question unequivocally stating that applying the successor bar, "the union is entitled to a reasonable period of bargaining during which no question concerning representation that challenges its majority status may be raised through a petition for an election filed by

employees, by the employer or by a rival union; nor, during this period, may the employer unilaterally withdraw recognition from the union based on a claimed loss of majority support, whether arising before or during the period." Slip. op. at 8. Thus, the Board made no distinction between when an employer is faced with a petition for an election filed by the employees or by a rival union. The outcome is the same.

Respondent argues that its refusal to bargain is based on its mistaken belief that it is honoring the legal rights of its employees to vote on whether they want to continue being represented by the Union. Nonetheless, the Board faced that same argument in *UGL-UNICCO*, and held that a successor bar "does not unduly burden employee free choice, because it extends …only for a reasonable period of bargaining". Id. The Board also held that if a contract is reached within the reasonable period of bargaining during which the successor bar applied, and there was no opportunity for employees to timely file a petition for decertification of the union during the final year of the predecessor employer's bargaining relationship with the union, the contract-bar period will be shortened to a maximum of two years instead of three. Id. Thus, employees will not be burdened with an exclusive collective-bargaining representative for more than two years without having an opportunity to file for a decertification petition.

Furthermore, the Board is "entitled to suspicion when faced with an employer's benevolence as its workers' champion against their certified union, which is subject to a decertification petition from the workers if they want to file one". Auciello Iron Works, Inc. v. NLRB, 517 U.S. 781 at 790 (1996). In this respect, it should be noted that the Union tried to get Respondent to agree to have unit employees vote on the change in pay date and that Respondent never agreed to solve that issue even after the first decertification petition was dismissed and there was no question about the Union's majority status. Instead, Respondent gave a cash bonus

to all employees, right after the decertification petition was dismissed and on the exact day that there was a union meeting announced. The emails between Altman and Goods-North, trying to schedule bargaining meetings, show a clear pattern of Respondent giving the Union the runaround for a whole month. (G.C. ex. 5, 6, 7, 8) It is clear that Respondent's motives in withdrawing recognition are not altruistic as it has attempted to portray. Respondent's argument that the Union has refused to respond to Respondent's request that it provide "legal authority" regarding its majority status is ludicrous. The Union filed an unfair labor practice charge. Respondent's response was to unilaterally change employees' pay dates a little over two months later. Thus, Respondent broke its own promise that is would continue to honor the collective-bargaining agreement.

E. Judge Carter Correctly Found that Respondent Unilaterally Changed Employee Pay Dates

In the instant case, Respondent did not set initial terms and conditions of employment but instead decided to apply to its employees the terms of the existing collective-bargaining agreement in effect under the predecessor employer Stuart Manufacturing. Consequently, Respondent was obligated to refrain from unilaterally changing any of the terms and conditions of employment of its employees. In order to be able to modify any term and condition of employment during the time a collective-bargaining agreement is in effect, the employer must first obtain the Union's consent before implementing the change. Oak Cliff-Golman Baking Co, 207 NLRB 1063 (1973), enfd. 505 F2d 1305 (5th Cir. 1974); cer. denied 423 U.S. 826 (1975).

Respondent does not dispute that it did not bargain with the Union before implementing the change in pay dates. Respondent waited until the expiration of the contract to make this change but the Board has held that contractual provisions governing the employer-employee relationship survive the expiration of the contract. Gordon L. Rayner d/b/a Bay Area Sealers, 251

NLRB 89 (1980); N.L.R.B. v. Haberman Construction Co., 641 F2d 351 (5th Cir. 1981) (en banc). Since pay dates are a mandatory subject of bargaining, Respondent was not free to change them without first bargaining in good faith with the Union until agreement or impasse. Respondent argues that the change in pay dates was not material, substantial and significant and cites as an example a case where an employer changed the time keeping procedure from manual to time clocks. Clearly, that example is distinguishable from the instant case. Here, it is not a simple procedure that is being changed to make it more accurate or simpler for employees. The employee pay dates can seriously affect employees' personal financial situation. Respondent knew this was not a de minimus change for its employees and that is why Goods-North tried to discuss this change with the Union in August 2013 and inquired whether it would have to be taken to a vote by the unit members.

III. CONCLUSION

Based on the above, the General Counsel respectfully requests that Respondent's exceptions be denied and that the Board affirm the Judge's decision in its entirety except for ruling that in addition to the successor bar, Respondent could not lawfully withdraw recognition from the Union by relying on a loss of majority that is attributable to its own unfair labor practices.

Dated at Indianapolis, Indiana this 4th day of November 2014.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that the foregoing Answering Brief in Response to Respondent's Exceptions to the Administrative Law Judge's Decision has been filed electronically through the E-filing Program this 4th day of November 2014. On the same date a copy of said filing was served by electronic mail upon the following persons:

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