

UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD

ARLINGTON METALS CORPORATION.

And

13-CA-122273  
13-CA-125525  
13-CA-133055

UNITED STEEL, PAPER AND FORESTRY,  
RUBBER, MANUFACTURING, ENERGY,  
ALLIED INDUSTRIAL AND SERVICE  
WORKERS INTERNATIONAL UNION, AFL-  
CIO (USW)

COUNSEL FOR THE GENERAL COUNSEL'S  
ANSWERING BRIEF TO INTERVENOR'S EXCEPTIONS  
TO THE DECISION OF THE ADMINISTRATIVE LAW JUDGE<sup>1</sup>

Administrative Law Judge Mark Carissimi<sup>2</sup> correctly held that Respondent Arlington Metals Corporation violated Section 8(a)(5) of the Act by bargaining in bad faith and engaging in surface bargaining with no intent to reach agreement, refusing to provide the Union with relevant and necessary information based on its claim of inability to pay and reliance on specific factual assertions in bargaining, withdrawing recognition from the Union based upon an unauthenticated employee petition and when serious ULPs were pending, and thereafter refused to permit the Union access to conduct a health and safety inspection based on its unlawful withdrawal of recognition.

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<sup>1</sup> Throughout this brief, the use of the term "Intervenor" is used only to assist with ease of identification and to avoid confusion. The "Intervenor" purports to be an individual that spearheaded a petition seeking Respondent to withdraw recognition from the Union. Appropriately however, the "Intervenor" was not granted intervenor status.

<sup>2</sup> Throughout this Answering Brief, the Administrative Law Judge will be referred to as "ALJ," the National Labor Relations Board will be referred to as the "Board," and the National Labor Relations Act will be referred to as the "Act." The Administrative Law Judge's Decision will be referred to as "ALJD \_\_\_." References to Respondent's Exceptions will be referenced as "Exceptions \_\_\_." With respect to the parties in this case, USW will be referred to as "the Union" and Arlington Metals Corp. will be referred to as "Respondent."

The Intervenor has filed three Exceptions to the denial of his motion to intervene, and factual findings of the ALJ related to the motion. The ALJ's decision explains in exacting detail the facts and reasoning supporting his decision that the Respondent violated the Act. Nothing contained within the Intervenor's Exceptions detracts from the ALJ's factual findings, conclusions or legal analysis, or decision to deny the intervention motion. Counsel for the General Counsel posits that the Intervenor has failed in his Exceptions to show that any of the ALJ's findings are incorrect and necessitate overturning the ALJD. Accordingly, Intervenor's Exceptions must properly be dismissed in their entirety.

**I. The Intervenor's argument that the ALJ erred when he denied the Intervenor's Motion to Intervene is without merit. (Exception 1)**

Attorney Glenn Taubman of the National Right to Work Legal Defense Foundation purports to represent Intervenor Brandon de la Cruz, an employee of Respondent. Intervenor allegedly circulated and delivered a decertification petition to Respondent on July 10, 2014, just one day after the one-year extension of the certification year pursuant to *Mar-Jac Poultry* expired.<sup>3</sup> Prior to the commencement of the unfair labor practice hearing in these matters, Attorney Taubman moved to intervene on behalf of the Intervenor. On April 8, 2015, the ALJ appropriately denied the Intervenor's Motion to Intervene. After the Motion was denied, the Intervenor did not move for special permission to appeal the ALJ's decision to the Board. In its Exceptions, the Intervenor fails to introduce any new facts or cite to any case authority that was not presented to the ALJ in the original Motion.

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<sup>3</sup> Although Taubman makes repeated reference to multiple "employees" of Respondent throughout his brief, there is no evidence that he represents any employee other than the purported Intervenor.

In support of his Exception No. 1, Intervenor presents an almost verbatim recitation of case law, facts, and arguments that were already submitted to and ruled on by the ALJ, and to which no appeal was taken. Although the Intervenor's case authorities highlight the fact that the Board has previously granted intervenor status to employees, he failed to provide any case authority that wasn't previously presented for the proposition that the ALJ and Board must grant all Motions to Intervene, a position that the Board has previously considered and rejected. The Board has consistently held that the issue of intervention is subject to the discretion of the judge and will not be disturbed absent abuse or prejudice. *Auto Workers v. NLRB*, 392 F.2d 801, 809 (D.C. Cir. 1967), cert. denied 392 U.S. 906 (1968); and *Biles-Coleman Lumber Co.*, 4 NLRB 679, 682 (1937). The ALJ has previously considered the exhaustive list of cases presented by the Intervenor in support of his Motion, and did not find them persuasive. Intervenor's case law is no more persuasive now than when the Motion was denied by the ALJ.

As Counsel for the General Counsel argued in its opposition to Intervenor's Motion to Intervene, the Complaint does not allege any violation with regard to the "validity" of the employee petition and, in particular, any actions carried out by employees in preparing the petition or presenting it to Respondent. The Complaint only challenges Respondent's actions in response to Intervenor's petition. The ALJ, in his order denying Intervenor's Motion, correctly ruled that the case clearly dealt with the statutory duties owed by Respondent to the Union, there were no representation issues as raised by Intervenor before him, and his intervention would therefore only delay and complicate the hearing.

In all of the cases cited by the Intervenor, the Board only granted intervenor status after concluding that the intended intervenor had information that would aid the ALJ in making a final determination regarding the merits of the case. But here, despite all of Intervenor's assertions, he

has nothing to add to the ultimate resolution of the Section 8(a)(5) allegations. At most, Intervenor could only testify to the circumstances in which the petition was circulated and to the authenticity of the signatures. Based upon the ALJD, even if Respondent had called Intervenor as a witness, who as an employee of Respondent was under its direction and control, his testimony would not alter the ALJ's finding that Respondent unlawfully withdrew recognition.

The Intervenor also makes the unsubstantiated argument that it was his interests to choose or not choose Union representation that stood at the center of this case, and Respondent therefore could not and did not adequately protect his interests under the Act. Contrary to Intervenor's assertion, as noted, the ALJ ruled that the issues at the center of this case are whether Respondent violated Section 8(a)(5) by bargaining in bad faith by surface bargaining with no intent to reach agreement, refusing to provide the Union with relevant and necessary information, withdrawing recognition based on an unauthenticated employee petition and in light of Respondent's unfair labor practices, and refusing to allow the Union access to conduct a health and safety inspection based on Respondent's withdrawal of recognition. After hearing, the ALJ properly found in each instance that Respondent violated Section 8(a)(5) of the Act.

The Intervenor has made no showing that the ALJ's denial of his motion was an abuse of discretion or that the Intervenor would have had anything additional to add in the resolution of the unfair labor violations. Rather, Intervenor's Exceptions merely attempt to improperly reargue the ALJ's order denying intervention and should therefore be dismissed.

**II. The Intervenor's argument that the ALJ erred when he found the employee petition was not properly authenticated is without merit. (Exception 2)**

In Intervenor's Exception No. 2, he excepts to the ALJ's conclusion that Respondent failed to properly authenticate the employee petition and that the withdrawal of recognition was therefore invalid on that basis. Apart from a self-serving statement that nothing more should be required than Respondent Vice President's testimony that he knew the names and signatures of the employees that signed the petition, Intervenor offers no basis on which to dismantle the ALJ's finding of improper authentication. In contrast to the Intervenor's baseless assertions, the ALJ's finding that Respondent's withdrawal of recognition was unlawful is fully supported by the record evidence and controlling case authority. Contrary to Intervenor's assertion, Respondent's Vice President testified that the petition was signed by 16 individuals, but in fact he was not familiar with at least six newer employees' signatures on the petition. The ALJ therefore properly concluded that the bargaining unit was comprised of 26 individuals on July 10, 2014, but Respondent could authenticate only a maximum of 10 out of 16 signatures, an insufficient number to establish a loss of majority support. (ALJD p. 34). Finally, there is no basis in the law for Intervenor's proposition that because employers are under no constraints in granting voluntary recognition to a union to authenticate signatures on authorization cards, the same should be true when an employer withdraws recognition. The ALJ's reliance on the Board's decisions in *Levitz Furniture Co.*, 333 NLRB 717 (2001) and *Latino Express, Inc.*, 360 NLRB No. 112 (2014) in finding Respondent failed to properly authenticate signatures was proper and the finding should not be disturbed.

**III. The Intervenor’s argument that the ALJ erred by finding the withdrawal of recognition was tainted by Respondent’s unfair labor practices is meritless (Exception 3).**

Intervenor’s Exception No. 3 excepts to the ALJ’s conclusion that the withdrawal of recognition was invalid because it was tainted by unfair labor practices, arguing that the Intervenor and his co-workers “are not sheep, but free thinking individuals who no longer want USW representation.” Without any discussion, Intervenor opines that the ALJ’s conclusion makes no direct causal connection between Respondent’s unfair labor practices and the employee petition, and goes on to discuss important but in this context irrelevant principles of employee free choice in countering the appropriateness of the ALJ’s conclusion.

Contrary to Intervenor’s assertion that the ALJ made no causal link between Respondent’s unfair labor practices and the employee petition, the ALJ did find that pursuant to the factors enunciated in *Vincent Industrial Plastics, Inc.*, 328 NLRB 300, 301-302 (1999), enfd in part 209 F.3d 727 (D.C. Cir. 2000), supp. decision 336 NLRB 697 (2001), and the Board’s decision in *Prentice-Hall, Inc.*, 290 NLRB 646, 672-673, Counsel for the General Counsel established that currently pending unfair labor practices against Respondent were sufficiently serious to cause employee disaffection for the Union (ALJD p. 32-33). Specifically, the ALJ noted that under *Prentice-Hall, supra.*, a finding of bad faith bargaining “completely taints” an employee petition relied upon by an employer to withdraw recognition, noting that Respondent’s unlawful refusal to provide information was ongoing and had “greatly hindered” the Union from bargaining in a knowing and intelligent fashion, which has a “detrimental and lasting effect on employees.” (ALJD p. 32). The ALJ further concluded that although eight months had passed between the refusal to provide information and the withdrawal, it was the passage of time itself in which the employees were faced “without any real prospect of a contract” that had a

“substantial tendency to cause employee disaffection with the union,” and that it was “manifest” under *Prentice-Hall* that Respondent’s bad faith bargaining and refusal to provide information adversely affected employee interest in the Union because it was so hindered from effectively representing the bargaining unit. (ALJD p. 32). Intervenor has accordingly set forth no basis on which to disturb the ALJ’s finding that the petition was tainted by Respondent’s unfair labor practices.

**IV. Intervenor has set forth no basis on which to reverse the ALJ’s Order denying his intervention or to reopen the record**

As argued above by Counsel for the General Counsel, there is absolutely no support for any of the Exceptions filed by the Intervenor. The Intervenor’s Exceptions to the ALJ’s Decision do not alter the substantial record evidence demonstrating that Respondent violated Section 8(a)(5) of the Act. Nor has Intervenor set forth any reasonable basis on which to order the record be reopened pursuant to 102.66 of the Board’s Rules and Regulations, which provides, in part: “Only newly discovered evidence—evidence which has become available only since the close of the hearing—or evidence which the Regional Director or the Board believes should have been taken at the hearing will be taken at any further hearing.” The evidence Intervenor seeks to adduce at a new hearing is neither “newly discovered,” nor is it relevant to the ultimate resolution of the case. Accordingly, the Board should deny the Intervenor’s Exceptions in their entirety.

**CONCLUSION**

Based upon the foregoing, the entire record in this case, and the Decision of Administrative Law Judge Carissimi, Counsel for the General Counsel submits that the Intervenor’s Exceptions to the Administrative Law Judge’s Decision fail to comply with Section

102.46 (c), reargue previously denied Motions and are wholly without merit. Counsel for the General Counsel respectfully requests therefore, that the Intervenors' Exceptions be dismissed in their entirety and Judge Carissimi's recommended Decision, Order and Remedy affirmed.

DATED at Chicago, Illinois, this 2nd day of October, 2015.

/s/ Melinda S. Hensel

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that the foregoing **COUNSEL FOR THE GENERAL COUNSEL'S ANSWERING BRIEF TO INTERVENOR'S EXCEPTIONS AND BRIEF IN SUPPORT OF EXCEPTIONS** was electronically filed with the Executive Secretary of the National Labor Relations Board on October 2, 2015, and a true and correct copy of the document has been served on the parties in the manner indicated below on that same date.

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