



UNITED STATES GOVERNMENT
NATIONAL LABOR RELATIONS BOARD

REGION 02
26 Federal Plaza, Room 3614
New York, NY 10278-3699

Agency Website: www.nlr.gov
Telephone: (212)264-0300
Fax: (212)264-2450

October 5, 2015

National Labor Relations Board
Attn. Gary Shinnars, Executive Secretary
1015 Half Street SE
Washington, DC 20570-0001

Re. Apogee Retail NY, LLC d/b/a Unique Thrift Store
and Local 338, RWDSU/UFCW
Case Nos. 02-CA-133989, 02-CA-134059, and 02-CA-137166

Dear Mr. Shinnars,

Below please find Counsel for the General Counsel's Reply Brief in Support of Exceptions to the Decision and Order of the Administrative Law Judge in the above-referenced matter. Also enclosed is an affidavit of service.

Thank you,

A handwritten signature in black ink, appearing to read "M. Berger".

Moriah Berger

Counsel for the General Counsel

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 2**

**APOGEE RETAIL, NY, LLC d/b/a UNIQUE
THRIFT STORE**

and

**Case Nos. 02-CA-133989
 02-CA-134059
 02-CA-137166**

LOCAL 338, RWDSU/UFCW

**GENERAL COUNSEL’S REPLY BRIEF IN SUPPORT OF EXCEPTIONS TO THE
DECISION AND ORDER OF THE ADMINISTRATIVE LAW JUDGE**

Pursuant to Section 102.46(h) of the Rules and Regulations of the National Labor Relations Board, Counsel for the General Counsel (“General Counsel”) respectfully submits this Reply Brief to Respondent’s Brief in Support of the Administrative Law Judge’s Decision.¹ (Respondent’s brief will hereinafter be referred to as “Answering Brief”.) In its Answering Brief, Respondent has presented, for the first time since the closing of the administrative hearing, an argument that documentary evidence and witness testimony were intentionally withheld by Local 338, RWDSU/UFCW (“the Union”) and the General Counsel. Respondent’s assertions are not supported by the trial record. Further, even if the record evidence supported Respondent’s arguments, and the Board were to draw the adverse inferences Respondent urges it to draw, the record supports the conclusion that Respondent failed and refused to bargain collectively and in good faith, in violation of Section 8(a)(5) and (1) of the National Labor Relations Act (“the Act”).

Respondent’s suggestion that the Union and General Counsel engaged in nefarious conduct in order to avoid development of the record in a manner favorable to Respondent is nothing more than conjecture, and a distraction from the ample record evidence of Respondent’s unlawful conduct. Respondent submits that “General Counsel’s failure to present the testimony of Union representatives

¹ No portion of Respondent’s Answering Brief should convince the Board that the General Counsel’s Exceptions to the Decision and Order of the Administrative Law Judge should be rejected; however, General Counsel submits this limited reply to only a portion of Respondent’s Answering Brief, specifically to arguments Respondent has raised before the Board in the first instance.

[Jack] Caffey and [Yomaira] Franqui with respect to this crucial meeting [on June 26, 2014]² should not be lost on the Board.” (Answering Brief, p. 25). Respondent then suggests that the Board draw an adverse inference, and conclude that additional testimony would have favored Respondent. Respondent argues next “that [Neil] Gonazlo, [Director of Contract Administration and Research for the Union], did not even provide his true bargaining notes from the [June 26] meeting.” (Answering Brief, p. 29). Neither argument is convincing, and neither argument should lead to the rejection of the General Counsel’s exceptions, for the reasons below.

I. Respondent’s claims of missing evidence are based on pure conjecture.

First, Respondent’s submission that Gonzalvo “did not even provide his true bargaining notes” is utter speculation, and unsupported by the evidence adduced at the hearing. Although Respondent’s witnesses testified to observing Gonzalvo in the act of taking notes, not a single one of them saw the product that resulted from Gonzalvo’s note-taking; nor did they have knowledge of the content of Gonzalvo’s notes. (Transcript, p. 688:2-22; 800:23-801:23). Respondent’s assertion that simple observation of a pen moving in Gonzalvo’s hand across a page leads to the conclusion that the Union selectively produced its bargaining notes is ludicrous. Such a claim, that harmful evidence was intentionally withheld, must be supported by more than pure conjecture.³

II. Even if additional evidence exists supporting the testimony of Respondent’s witnesses, the record still supports the conclusion that Respondent bargained in bad faith, in violation of § 8(a)(5) and (1) of the Act.

Second, even if there were voluminous notes in the record listing the exact questions and concerns that Respondent claims it posed about union security and dues check-off, the evidence of Respondent’s conduct after the June 26 bargaining meeting would still support a finding of bad faith bargaining. Similarly, even if additional attendees at the June 26 bargaining meeting had been called to

² All dates herein are in 2014.

³ For example, the General Counsel, in contrast to Respondent, supported its argument, before the administrative law judge, for an adverse inference on the issue of Naomi Santana’s supervisory status by producing documentary evidence of Santana’s authority to discipline employees – evidence that was mysteriously left out of the records Respondent supplied the General Counsel in response to the Agency’s subpoena.

testify,⁴ and even if those witnesses corroborated Respondent's Counsel and Chief Executive Officer, Respondent's subsequent actions still show that it was trying to frustrate reaching agreement on a first contract.

In this regard, Respondent maintained its rejection of the Union's union security and dues check-off proposals, but refused to articulate its concerns at any point after the June 26 bargaining meeting. Respondent's refusal is telling. Within two weeks of the June 26 bargaining meeting, Respondent and the Union reconvened, on July 9. Between June 26 and July 9, the Union had modified its contract proposals. However, it had not changed its proposal for union security or its proposal for dues check-off. Further, the Union brought its attorney, William Anspach, to the July 9 meeting. Anspach was no mere observer. He immediately became actively involved in representing the Union at the bargaining table. But, even though the Union had not changed its union security and dues check-off proposals, and even though Anspach was new to the negotiations, Respondent refused to repeat its questions and concerns about union security and dues check-off. Instead, Respondent stated only that it was not agreeing at that time. (Transcript, p. 348:1-2; 425:22-24; 724:24-725:1; 797:20-21). When Anspach asked why – even though Respondent was fully aware that Anspach was just joining the negotiations and therefore may not know all that was said at prior bargaining sessions – Respondent *still* said nothing more than that it did not have to agree. (Transcript, p. 348:3-4; 637:9-10; General Counsel Exhibit 10). Shockingly, Respondent did not even inform Anspach that his client was well aware of its reasons. Respondent *never* simply told Anspach that union security and dues check-off had been discussed at a prior bargaining meeting, or that Respondent had already shared its position on those particular Union proposals. Respondent's behavior, essentially hiding from the Union's attorney its reasons for rejecting union security and dues check-off, evidences an attempt to maintain control over the negotiations, and a motive to ensure that no collective-bargaining agreement resulted.

⁴ At no point before its Answering Brief did Respondent argue for the finding of an adverse inference. It is procedurally inappropriate for Respondent to ask the Board to make that finding now. *See e.g. Conditioned Air Systems, Inc.*, 360 NLRB No. 97 (Apr. 30, 2014) (finding untimely arguments made not before the administrative law judge, but for the first time in exceptions to the Board) (citing *Yorkaire, Inc.*, 297 NLRB 401(1989) enf. 922 F.2d 832 (3d Cir. 1990)).

Thereafter, as the Union continued to display its willingness to resolve all outstanding contract proposals, Respondent remained vague and opaque about its rejection of union security and dues check-off. From July 24 onward, at the point those two proposals were the only items remaining on the bargaining table, Respondent Counsel Stuart Weinberger withheld from his communications with Anspach all of the points he and his client had allegedly raised on June 26. Notably, when Anspach asked Weinberger, during a conference call on July 24, for Respondent's position on union security and dues check-off, Weinberger responded that he would check with his client, Respondent's Chief Executive Officer David Kloeber.⁵ (Transcript, p. 394:24-25; 728:15-16; 738:9-10; General Counsel's Exhibit 11). This response, which Weinberger admits he gave – I will check with Dave – implies that, after doing such checking, Weinberger would share with Anspach his client's position. But then, about a week later, when Anspach pointed out to Weinberger that he had yet to hear Respondent's reasons for rejecting union security and dues check-off (*email from Anspach to Weinberger*, 7.30.14:8:44 a.m., Joint Exhibit), Weinberger perplexingly stated only that "there are contracts with unions that do not have dues check-off;" that "many employers do not wish to get involved in the check-off of dues for many reasons;" and that "I am sure the Union is aware of the reasons why employers have not agreed to union security clauses that have been proposed by the Union." (*Email from Weinberger to Anspach*, 7.30.14:11:39 p.m., Joint Exhibit). There is no lawful explanation for Weinberger's refusal to include in his communications with Anspach the questions his client had raised about union security and dues check-off.⁶ The substance of Weinberger's communications, particularly when placed in the context of the Union's willingness to withdraw bargaining proposals and concede to Respondent's position on others, shows that information

⁵ Again, Weinberger did not suggest to Anspach that he question Gonzalvo regarding Respondent's position on union security and dues check-off.

⁶ Respondent suggests in its Answering Brief that it did not repeat for Anspach its concerns and questions, because Anspach never asked outright what issues Respondent had with union security and dues check-off. However, Anspach did ask Respondent for its reasons for rejecting union security and dues check-off, first at the July 9 bargaining meeting (Transcript, p. 348:3-4; 576:23-24; General Counsel Exhibit 10), again during the July 24 conference call (Transcript, p. 394:24-25; General Counsel Exhibit 11), and yet again via email (*Email from Anspach to Weinberger*, 7.30.14:8:44 a.m., Joint Exhibit). To insist that he rephrase his question to refer to Respondent's "issues" is nothing short of ridiculous. Good faith bargaining is not predicated on the Union's use of Respondent's terminology or other magic words.

was intentionally withheld, and Weinberger was intentionally evasive, in order to prevent agreement on a first contract before employees cast their ballots in the decertification election.

III. The evidence simply does not support Respondent's assertion that it raised questions and concerns about union security and dues check-off, even if an adverse inference is drawn.

Finally, the foregoing evidence, and entire trial record, expose a serious vulnerability in Respondent's position: Respondent never raised the questions and concerns about union security and dues check-off its witnesses cited at trial. This vulnerability remains even if the Board agrees that additional Union witnesses were intentionally not called to testify because they would have failed to corroborate the substance of the bargaining meetings to which Gonzalvo and Anspach testified. The record evidence, even with the drawing of an adverse inference, overwhelmingly shows that the questions and concerns Weinberger and Kloeber listed on the witness stand were posed for the first time at trial.

In this regard, it is particularly revealing that Respondent's questions and concerns appear nowhere in the administrative record *except* in the testimony of Kloeber and Weinberger. Numerous written communications between Respondent and the Union, the vast majority of which post-date the June 26 bargaining meeting, are void of the questions and concerns Respondent allegedly raised on June 26. This is true despite the fact that Union Counsel Anspach asked Respondent for its position on union security and dues check-off on multiple occasions, including in person, over the phone, and in writing; and despite the fact that not long after the June 26 bargaining meeting, union security and dues check-off were the only items remaining on the bargaining table. In other words, Respondent's failure to repeat its position on union security and dues check-off at any point after June 26, even when asked to do so and even when there was nothing else over which to bargain, suggests that those questions and concerns did not exist.

Additionally, it is perplexing that, when Anspach asked Weinberger over the phone on July 24 for Respondent's position on union security and dues check-off, Weinberger responded that he would check with his client. Weinberger was present at the June 26 bargaining meeting at which Kloeber allegedly asked questions about union security and dues check-off, and Weinberger readily repeated those questions

on the witness stand many months later. If one believes Respondent, Weinberger was and is well aware of his client's thoughts on union security and dues check-off. It is curious, then, that on July 24 Weinberger had to check with Kloeber to find out for Anspach Respondent's position on union security and dues check-off. The only logical explanation for Weinberger's response on July 24 is that, as of that date, and continuing thereafter, Respondent had not provided its justification for rejecting union security and dues check-off.

Finally, when presenting its position to the Regional Director during her investigation of the Union's bad faith bargaining allegation, and when reciting for the Regional Director the substance of the bargaining meetings, Respondent failed to repeat the questions it allegedly asked on June 26. (*See* General Counsel Exhibit 16). Respondent also failed to inform the Regional Director that it was waiting for the Union to respond to its questions and concerns.

In sum, Respondent's *own* communications – its emails and position statement and statements during phone calls – are inconsistent with the testimony of its witnesses. Respondent presented the Administrative Law Judge, and has presented the Board, with internally conflicting stories. The drawing of an adverse inference cannot overcome these conflicts and inconsistencies. A record replete with such overwhelming contradictions compels the conclusion that Respondent never articulated to the Union a position on union security or dues check-off. This is true even if an adverse inference is drawn against the testimony presented by Anspach and Gonzalvo. Respondent failed to justify its rejection of union security and dues check-off, all in an effort to avoid reaching agreement on a first contract. This is bad faith bargaining.

IV. Conclusion

In conclusion, it is readily apparent that Respondent never informed the Union of the reasons underlying its rejection of union security and dues check-off, regardless of whether the Board agrees with Respondent that an adverse inference should be drawn from the General Counsel's decision not to call certain witnesses. Alternatively, even if the Board agrees with the Administrative Law Judge that the evidence shows Respondent raised questions and concerns about union security and dues check-off on

June 26, and even if the Board agrees with Respondent that additional bargaining notes and witness testimony would have bolstered Respondent's version of the facts, Respondent refused to repeat its position on union security and dues check-off, all in an effort to frustrate agreement. Both of the above scenarios are unlawful.

Therefore, regardless of the factual conclusions reached, and regardless of whether the Board agrees with Respondent that an adverse inference should be drawn from the General Counsel's decision not to call certain witnesses, and that bargaining notes from June 26 are missing from the record, the evidence shows that Respondent bargained in bad faith, in violation of Section 8(a)(5) and (1) of the Act. The General Counsel respectfully requests that its exceptions be granted.

October 5, 2015

Respectfully submitted,



Moriah H. Berger
Counsel for the General Counsel
National Labor Relations Board
Region 2
26 Federal Plaza, Room 3614
New York, NY 10278

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD**

APOGEE RETAIL, NY, LLC d/b/a UNIQUE THRIFT STORE

and

LOCAL 338, RWDSU/UFCW

Case Nos. 02-CA-133989
 02-CA-134059
 02-CA-137166

AFFIDAVIT OF SERVICE OF: General Counsel's Reply Brief in Support of Exceptions to the Decision and Order of the Administrative Law Judge

I, the undersigned employee of the National Labor Relations Board, state under oath that, on the date indicated below, I served the above-entitled documents upon the following persons, in the manner indicated:

By E-File

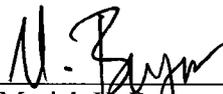
Gary Shinnars
Executive Secretary
National Labor Relations Board
1015 Half Street SE
Washington, DC 20570

By Electronic Mail

Lewis Goldberg, Esq.
Goldberg and Weinberger LLP
630 Third Avenue, 18th Floor
New York, NY 10017
LewGoldberg@aol.com

Joshua Beldner, Esq.
Tilton Beldner LLP
626 RXR Plaza
Uniondale, NY 11556
jbeldner@tiltonbeldner.com

Jae Chun, Esq.
William Anspach, Esq.
Friedman and Anspach
1500 Broadway
New York, NY 10036
jchun@friedmananspach.com
wanspach@friedmananspach.com

 10.5.15
Moriah H. Berger


STEPHEN L. BERGER
Notary Public, State of New York
01 BE ~~NEW~~ 4877518
Qualified in Queens County
Commission Expires Nov 30, 2018