

UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD

Arlington Metals Corp.,
Employer-Respondent,

and

United Steel Paper and Forestry etc. (USW),
Union-Charging Party,

and

Brandon DeLaCruz,
Employee-Intervenor.

Case No. 13-CA-122273

Case No. 13-CA-125255

Case No. 13-CA-133055

**BRANDON DELACRUZ'S REPLY BRIEF IN SUPPORT OF
HIS EXCEPTIONS AND IN OPPOSITION TO
THE GENERAL COUNSEL'S ANSWERING BRIEF**

Glenn M. Taubman, Esq.
c/o National Right to Work
Legal Defense Foundation
8001 Braddock Road, Suite 600
Springfield, VA 22160
(703) 321-8510
gmt@nrtw.org

Attorney for Brandon DeLaCruz

Pursuant to NLRB Rules and Regulations § 102.46(h), Brandon DeLaCruz (“DeLaCruz” or “Intervenor”) files this Reply Brief in Support of his Exceptions and in Opposition to the General Counsel’s Answering Brief.

I. Intervention¹

Without a single citation to a Board case or to the NLRB’s Rules & Regulations, the General Counsel’s Answering Brief argues that Mr. DeLaCruz was under a duty to file a Motion for Special Permission to Appeal to the Board once the ALJ denied his Motion to Intervene. (G.C. Brief at 2). While the G.C. cites no case or Board rule for that proposition, it is clear that “special appeals” from ALJs’ interlocutory rulings are not mandatory and, indeed, may well be disfavored under the Board’s rules. *See, e.g.*, NLRB Rules & Regulations § 102.26. Moreover, the Intervenor is not aware of any case law suggesting that parties waive substantive rights, issues, or claims if they fail to initiate an interlocutory and discretionary “special appeal” to the Board from an adverse ALJ ruling, and the G.C.’s bare bones Answering Brief is devoid of any such citations. Thus, the

¹ The G.C.’s Answering Brief is unprofessional and personally derogatory towards the Intervenor and his retained counsel. The G.C. asserts that “Attorney Glenn Taubman of the National Right to Work Legal Defense Foundation *purports* to represent Intervenor Brandon de la Cruz, an employee of Respondent.” (G.C. Brief at 2, emphasis added). Yet the G.C. knows full well that the undersigned attorney filed an appearance in this case for Mr. DeLaCruz over a year ago. (*See* Ex. 1, attached). If the G.C. has any doubt about the validity of that representation or believes that the undersigned attorney has filed a false assertion regarding his actual representation of Brandon DeLaCruz, the G.C. should perhaps contact the appropriate state bar authorities. Otherwise, the G.C. should cease the unprofessional aspersions and unseemly use of “purports” to describe a *bona fide* and longstanding attorney-client relationship. Additionally, as the G.C. also well knows from Ex. 1 and the Motion to Intervene, the private entity known as the National Right to Work Legal Defense Foundation is not a party to this case, has filed no motion or entry of appearance in this case, and seeks no participation or role in this case. Any documents that have been filed herein by Mr. DeLaCruz – such as his Motion to Intervene – were filed by him as an individual employee through his undersigned, retained attorney.

alleged “failure” to launch a special appeal in this case is of no import as regards the Intervenor’s Exceptions from the ALJ’s denial of his Motion to Intervene.

Next, the G.C. argues that the ALJ considered all of Intervenor’s arguments and case citations supporting his Motion to Intervene, so the Board is, apparently, relieved of any independent obligation to review that decision. (G.C. Brief at 3-4). To the contrary, the ALJ’s misreading of the law and denial of intervention does *not* relieve this Board of its obligation to review that decision and decide the issue *de novo* and as a matter of law. While the G.C. decries the Intervenor for presenting the Board in Exception No. 1 with “an almost verbatim recitation of case law, facts and arguments that were already submitted to and ruled on by the ALJ” (G.C. Brief at 3), the G.C. perhaps needs a refresher course in appellate litigation because most appeals, in fact, present the reviewing entity with the same “recitation of case law, facts and arguments” that were presented below. Indeed, it is telling that the G.C. devotes much of his Answering Brief to *ad hominem* attacks on the Intervenor and his retained counsel rather than spending even one page on the merits of Intervenor’s Exception No. 1 and the case law supporting the Motion to Intervene.

Finally, the G.C. takes issue with the Intervenor’s suggestion that the Board can and should order the record reopened for the Intervenor’s testimony that was wrongfully excluded. (G.C. Brief at 7). Ironically, the G.C. opposes such a reopening because the evidence Intervenor seeks to present at a renewed hearing is not “newly discovered.” (*Id.*). This assertion is laughable because it was the G.C.’s *opposition* to Intervenor’s Motion to Intervene that *prevented* him from entering his evidence into the record. If

Intervenor's evidence is not "newly discovered," that is only because it was readily available at trial but both the G.C. and the ALJ prevented it from being presented.

II. Authentication of the Withdrawal Petition.

The G.C.'s brief belittles the notion that Intervenor could have added anything to the inquiry about the validity of the signatures on his withdrawal/decertification petition, (G.C. Brief at 5), but the G.C.'s assertion is self-contradictory. Who is better situated to prove the authenticity of employee signatures on a petition than the individual who collected those signatures? Why should the Board exclude Intervenor's highly probative evidence when questions are raised about the authenticity of the signatures he collected?

The G.C. neither provides answers to these questions nor cites any policy reasons to exclude such probative testimony – because none exist. Rather, the G.C. seeks through litigation tactics to have a valid majority petition disregarded, all for the purpose of forcing an unwanted and unpopular minority union back onto this workforce. But such a result would be a perversion of the NLRA's overriding principle of employee free choice. *Int'l Ladies' Garment Workers' Union v. NLRB*, 366 U.S. 731, 737 (1961) (“[t]here could be no clearer abridgment of § 7 of the Act, assuring employees the right ‘to bargain collectively through representatives of their own choosing’ or ‘to refrain from’ such activity, . . .” than “grant[ing] exclusive bargaining status to an agency selected by a minority of its employees, thereby impressing that agent upon the nonconsenting majority” (citation omitted)); *see also McKinney ex rel. NLRB v. Southern Bakeries, LLC*, 786 F.3d 1119, 1124 (8th Cir. 2015) (“This case presents unique circumstances as the unrefuted evidence before us indicates a majority of Southern Bakeries’ employees have

not supported the Union since at least May 2012 when [the employee] circulated his first petition.”).

At trial, “the General Counsel [alleged] that the Respondent had not established, by a preponderance of the evidence, that there was an actual loss of majority status at the time it withdrew recognition from the Union.” ALJD at 31, n.18. Yet that was the very testimony Intervenor could have submitted, since he collected the signatures on the withdrawal petition. To exclude him from this case, and then use an alleged “lack of evidence” to force a minority representative on him and the others who signed his valid petition, is folly.

III. The Alleged ULPs Did Not Taint the Withdrawal Petition.

Even assuming, *arguendo*, that some employer ULP occurred in this case (which Mr. DeLaCruz denies), “[t]he wrongs of the parent should not be visited on the children, and the violations of [the employer] should not be visited on these employees.” *In re Overnite Transp. Co.*, 333 NLRB 1392, 1398 (2001) (Member Hurtgen, dissenting); *see also Int’l Ladies’ Garment Workers’*, 366 U.S. at 737. Since re-imposition of an unwanted union deprives employees of rights expressly granted to them under Section 7 of the Act, re-imposition should only be done (if at all) if the union can show a direct causal nexus between the unfair labor practice and the employees’ desire to rid themselves of the union.

Moreover, the party asserting that unfair labor practices taint a petition must bear the burden of proof. *Saint-Gobain Abrasives*, 342 NLRB 434 (2004). Here, the union

and the G.C. have not made such a showing of taint. *Tenneco Automotive, Inc. v. NLRB*, 716 F.3d 640 (D.C. Cir. 2013).

In short, it was wrong to exclude the Intervenor from this case, as he could have rebutted any notion that employer unfair labor practices had any causal nexus with the employees' desire to rid themselves on an unwanted and unpopular union. Here, the G.C. forgets these principles and ignores the fundamental and overriding policy of the Act: employee free-choice and voluntary unionism. *Pattern Makers' v. NLRB*, 473 U.S. 95, 102-03 (1985).

IV. Conclusion

Intervenor's Exceptions should be granted in their entirety. In particular, his Motion to Intervene should be granted, and the hearing reopened so that his highly relevant evidence may be presented.

Respectfully submitted,

/s/ Glenn M. Taubman

Glenn M. Taubman, Esq.
c/o National Right to Work
Legal Defense Foundation
8001 Braddock Road, Suite 600
Springfield, VA 22160
(703) 321-8510
gmt@nrtw.org

Attorney for Brandon DeLaCruz

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Reply Brief was filed electronically with the NLRB Executive Secretary using the NLRB e-filing system, and copies were sent to the following additional parties via e-mail:

William G. Miozzi, Esq.
Derek G. Barella, Esq.
Benjamin M. Ostrander, Esq.
Winston & Strawn
35 West Wacker Drive
Chicago, IL 60601
wmiozzi@winston.com
dbarella@winston.com
bostrander@winston.com

Richard Brean, Esq., General Counsel
United Steel, Paper and Forestry, Rubber, Manufacturing
Allied-Industrial & Service Workers Int'l Union
Five Gateway Center
Pittsburgh, PA 15222
rbrean@usw.org

Anthony Alfano, Organizing Counsel
United Steel Workers AFL-CIO-CLC
1301 Texas Street, Rm 200
Gary, IN 46402
aalfano@usw.org

Stephen A. Yokich, Esq.
Cornfield and Feldman LLP
25 East Washington Street, Suite 1400
Chicago, IL 60602
syokich@cornfieldandfeldman.com

Jose L. Gudino
United Steel, Paper and Forestry, Rubber, Manufacturing
Allied-Industrial & Service Workers Int'l Union
7218 W. 91st St.
Bridgeview, IL 60602
jgudino@usw.org

Regional Director Peter Sung Ohr
National Labor Relations Board, Region 13
The Rookery Building
209 South LaSalle Street, Suite 900
Chicago, IL 60604-5208
peter.ohr@nlrb.gov and
Melinda.Hensel@nlrb.gov

this 12th day of October, 2015.

/s/ Glenn M. Taubman

Glenn M. Taubman



NATIONAL RIGHT TO WORK LEGAL DEFENSE FOUNDATION, INC.
8001 BRADDOCK ROAD, SUITE 600, SPRINGFIELD, VIRGINIA 22160•(703) 321-8510

GLENN M. TAUBMAN
Staff Attorney
Admitted in GA, NY & DC only.

FAX: (703) 321-9319
WEB: www.nrtw.org
E-MAIL: gmt@nrtw.org

August 29, 2014

Pete Sung Ohr, Regional Director
Kevin McCormick, Attorney
National Labor Relations Board Region 13
The Rookery Building
209 South LaSalle Street, Suite 900
Chicago, IL 60604-5208

Re: *Arlington Metals Corporation*, Case No. 13-CA-133055

Dear Sirs:

Please enter our Notice of Appearance for Brandon Delacruz, a cooperating witness in the above referenced case, who collected the decertification petition that is being challenged by the USWA's ULP charges. We understand that Mr. Delacruz is voluntarily coming to your office to give a statement on Tuesday, September 2, 2014 at 10AM Central Time. We want to be on the phone and participate in the giving of that statement, and to review his affidavit with him before he signs it. Kindly call me at 703-321-8510 at the commencement of the interview so that we can be on the line and participate on his behalf.

Thank you for your consideration, and please feel free to call us if we can be of any assistance in these matters.

Sincerely,

Glenn M. Taubman
Matthew Gilliam
Attorneys at Law

cc: Brandon Delacruz

Ex. 1

NATIONAL LABOR RELATIONS BOARD
NOTICE OF APPEARANCE

Arlington Metals Corp.

and

USWA

CASE 13-CA-133055

REGIONAL DIRECTOR

EXECUTIVE SECRETARY
NATIONAL LABOR RELATIONS BOARD
Washington, DC 20570

GENERAL COUNSEL
NATIONAL LABOR RELATIONS BOARD
Washington, DC 20570

THE UNDERSIGNED HEREBY ENTERS APPEARANCE AS REPRESENTATIVE OF _____
Brandon Delacruz

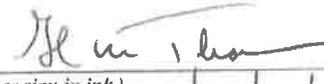
IN THE ABOVE-CAPTIONED MATTER.

CHECK THE APPROPRIATE BOX(ES) BELOW:

REPRESENTATIVE IS AN ATTORNEY

IF REPRESENTATIVE IS AN ATTORNEY, IN ORDER TO ENSURE THAT THE PARTY MAY RECEIVE COPIES OF CERTAIN DOCUMENTS OR CORRESPONDENCE FROM THE AGENCY IN ADDITION TO THOSE DESCRIBED BELOW, THIS BOX MUST BE CHECKED. IF THIS BOX IS NOT CHECKED, THE PARTY WILL RECEIVE ONLY COPIES OF CERTAIN DOCUMENTS SUCH AS CHARGES, PETITIONS AND FORMAL DOCUMENTS AS DESCRIBED IN SEC. 11842.3 OF THE CASEHANDLING MANUAL.

(REPRESENTATIVE INFORMATION)

NAME:	<u>Glenn M. Taubman and Matthew B. Gilliam</u>	
MAILING ADDRESS:	<u>c/o National Right to Work Legal Defense Foundation, 8001 Braddock Road, Suite 600, Springfield, VA 22160</u>	
E-MAIL ADDRESS:	<u>gmt@nrtw.org mbg@nrtw.org</u>	
OFFICE TELEPHONE NUMBER:	<u>703-321-8510</u>	
CELL PHONE NUMBER:		FAX: <u>703-321-9319</u>
SIGNATURE:	<u></u>	<u></u>
DATE:	<u>8/29/14</u>	<u>8/29/14</u>

¹ IF CASE IS PENDING IN WASHINGTON AND NOTICE OF APPEARANCE IS SENT TO THE GENERAL COUNSEL OR THE EXECUTIVE SECRETARY, A COPY SHOULD BE SENT TO THE REGIONAL DIRECTOR OF THE REGION IN WHICH THE CASE WAS FILED SO THAT THOSE RECORDS WILL REFLECT THE APPEARANCE.