

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 13**

ARLINGTON METALS CORPORATION

and

**Cases 13-CA-122273
13-CA-125255
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 OPPOSITION TO RESPONDENT'S
MOTION TO REOPEN AND SUPPLEMENT THE ADMINISTRATIVE RECORD**

Respondent Arlington Metals Corporation's ("Respondent") Motion to Reopen and Supplement the Administrative Record is contrary to the Board's Rules and Regulations, and relies on a misleading account of the General Counsel's litigation posture and a faulty understanding of Board precedent.

Respondent bases its Motion on Section 102.48(b) of the Board's Rules, which provides that "upon the filing of timely and proper exceptions, . . . the Board may reopen the record and receive further evidence . . ." In relying on that section, Respondent overlooks Section 102.48(d)(1), which provides that "[o]nly newly discovered evidence, evidence which has become available only since the close of the hearing, or evidence which the Board believes should have been taken at the hearing will be taken . . ." The evidence that Respondent seeks to include, purporting to show that a decertification petition was "authentic" and untainted "by any pending unfair labor practices or other alleged wrongdoing by [Respondent]." Yet such evidence was clearly available to Respondent at the

time of the trial, Respondent had every opportunity to present it but did not, and there is no reason now to include it.

Perhaps realizing this flaw in its motion, Respondent makes the false and misleading argument that it was effectively deprived of the opportunity to present the evidence at issue by the General Counsel's shifting theories. Respondent cites to three instances where Counsel for the General Counsel asserted that the General Counsel was not challenging the validity of the petition. Respondent is certainly correct that the General Counsel took that position; but it errs in representing that such position shifted, or that it is inconsistent with the ALJ's subsequent finding that the evidence, including the petition, was insufficient to demonstrate that the Charging Party Union no longer enjoyed majority support, thereby privileging Respondent to withdraw recognition. Respondent could take that position only by a mischaracterization of Board precedent regarding an employer's duty to recognize an exclusive collective-bargaining representative.

A brief account of the Board's jurisprudence in this area is useful here. It is beyond dispute that an incumbent union enjoys a presumption of continuing majority support. In some circumstances, for example, in the year following certification as the exclusive 9(a) representative, or during the life of a collective-bargaining agreement up to 3 years, that presumption is irrebuttable.¹ However, even in circumstances where the presumption of majority support becomes rebuttable, it is the employer's burden to "prove by the preponderance of the evidence that the union had, in fact, lost majority support at the time the employer withdrew recognition."² Otherwise, an employer withdrawing recognition acts at its peril. But stating that Counsel for the General Counsel does not challenge the validity of

¹ *Levitz Furniture Co. of the Pacific*, 333 NLRB 717, 720 n. 17.

² *Id.*, 333 NLRB at 725.

the petition does not relieve an employer of its duty to support its defense to an allegation that it unlawfully withdrew recognition.

Respondent's dual contentions that it does not have a burden to authenticate the signatures on the petition, and that in any event, Respondent Executive Vice President Tim Orłowski authenticated the signatures (Motion p. 7) is wrong on both the law and the facts. The *Levitz* footnote that Respondent cites for the legal proposition that it does not have to authenticate signatures only clarifies that an employer has the burden of proof on the issue of lack of majority support; the General Counsel's duty is to rebut such proof.³ Subsequent cases have further explained that in relying on a decertification petition to carry its burden to prove a lack of continuing majority support, an employer must authenticate the signatures.⁴ And although on direct examination Orłowski answered "yes" to a leading question of whether he recognized the names and signatures on the petition, (Tr. 102) on voir dire he admitted that only "some" of the names were "legit," and that he did not compare the petition signatures to known examples of the employees' signatures in Respondent's files. (Tr. 105). Even when Respondent's counsel attempted to rehabilitate Orłowski, he could only admit that he has known some of the employees for a long time, and that all of those signatures "looked good" to him. (*Id.*) And on cross examination, he further admitted that several of the signatures on the petition were from fairly recent employees whose signatures he had not seen many times; several others were from working supervisors. (Tr. 108-110).

Contrary to Respondent, the Administrative Law Judge never found that the petition "represented a clear majority of the unit employees." (Motion p. 4). Rather, he correctly found that Respondent could only establish the signatures represented the desires of at most

³*Levitz*, 333 NLRB at 725 n. 49.

⁴ See *Latino Express*, 360 NLRB No. 112, slip op. at 15 (2014).

10 of the 26 employees that he found comprised the bargaining unit. Accordingly, he properly found, not that the petition was invalid, but that it was not properly authenticated.

This finding brings us to the evidence Respondent seeks to add to the record. As Respondent ably describes it in its Motion, much of it concerns the authenticity of the signatures on the petition, which Respondent should have presented at the trial. Some of it concerns the lack of involvement by Respondent management in supporting the petition, or the lack of Respondent “instruction, threats, or rewards,” (Motion p. 6)—all issues concerning the validity of the petition that Counsel for the General Counsel has repeatedly conceded.

The rest of the evidence concerning the lack of support is either testimony or a stipulation concerning employees who were hired at various times after Respondent withdrew recognition based on the decertification petition in July 2014. Such evidence is doomed, as is any employee’s testimony concerning their current sentiments towards the Charging Party Union. The Board has wisely disregarded such expressions of non-support in situations like the instant case where the employer has unlawfully withdrawn recognition, cognizant that employees whose lawful desires for union representation have been held captive by their employer tend to develop a Stockholm syndrome-like response in favor of their employer’s wishes.⁵

Similar flaws afflict the proposed additions to the record concerning Respondent’s failure to provide information. To the extent that the record was unclear regarding the metal

⁵ See *Lee Lumber & Building Material Corp.*, 322 NLRB 175, 177 (1996) (“If a union is unlawfully deprived of the opportunity to represent the employees, it is altogether foreseeable that the employees will soon become disenchanting with that union, because it apparently can do nothing for them.”)

sales work that Respondent claims is encompassed by its toll processing work, (Motion p. 9), that evidence is neither newly discovered nor previously unavailable. Nor does Respondent even continue its spurious claim that General Counsel “shifted its position” with regard to this issue.

At best, Respondent’s showing demonstrated that it had a good faith reasonable doubt of the Charging Party’s continued majority support. While that showing might have been enough to support an RM petition, had Respondent chosen to avail itself of that procedure, it clearly is not enough to satisfy Respondent’s burden of rebutting the presumption in favor of the Charging Party’s continuing majority support.

Having failed to prove an essential element of its affirmative defense, Respondent looks for a second chance to cure its error by accusing Counsel for the General Counsel of deception. Yet this is not a case of deception, but rather that of an employer hastily trying to rid itself of the union that had plagued it through years of fruitless bargaining by seizing on a petition without bothering to authenticate signatures. The same haphazard approach carried through to the litigation of this case before the Administrative Law Judge. The Board should not allow Respondent a second chance to try and fix its mistakes now when it had both the evidence and the ability to present that evidence at the time of the ULP trial.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that the foregoing COUNSEL FOR THE GENERAL COUNSEL'S OPPOSITION TO RESPONDENT'S MOTION TO REOPEN AND SUPPLEMENT THE ADMINISTRATIVE RECORD was electronically filed with the Executive Secretary of the National Labor Relations Board on December 26, 2015, and true and correct copies of the document have been served on the parties in the manner indicated below on that same date.

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