

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

ARLINGTON METALS CORPORATION,)
)
 Respondent,)
)
 and)
)
 UNITED STEEL, PAPER AND)
 FORESTRY, RUBBER,)
 MANUFACTURING, ENERGY,)
 ALLIED INDUSTRIAL AND SERVICE)
 WORKERS INTERNATIONAL UNION,)
 AFL-CIO (USW),)
)
 Charging Party.)

CONSOLIDATED

Case No. 13-CA-122273

Case No. 13-CA-125255

Case No. 13-CA-133055

**REPLY TO THE GENERAL COUNSEL'S OPPOSITION BRIEF
AND IN SUPPORT OF RESPONDENT'S MOTION TO
REOPEN AND SUPPLEMENT THE ADMINISTRATIVE RECORD**

William G. Miozzi
Derek G. Barella
Benjamin M. Ostrander
WINSTON & STRAWN LLP
35 West Wacker Drive
Chicago, Illinois 60601
(312) 558-5600
wmiozzi@winston.com
dbarella@winston.com
bostrander@winston.com

Attorneys for Respondent

The facts that are the subject of the present Motion to Reopen and Supplement the Record were elicited in a failed 10(j) proceeding initiated by the Counsel for the General Counsel that Respondent opposed as entirely unwarranted from the outset. Thus, it not only is ironic, but it is deeply troubling that the Counsel for the General Counsel of the National Labor Relations Board now vigorously seeks to prevent the Board from considering these undisputed, critical facts necessary to ensure a fair and proper review of the ALJ's decision.

In its Opposition to Arlington Metal's Corporation's ("AMC") Motion to Reopen and Supplement the Record ("Opposition"), Counsel for the General Counsel does not contest that the testimony elicited at the Section 10(j) evidentiary hearing conclusively shows the ALJ erred in finding: (a) an employee disaffection petition signed by 16 out of 26 bargaining unit members was not authentic; (b) the petition was "tainted" by pending unfair labor practices by AMC; and (c) AMC provided false or misleading production data to the Union. Instead, Counsel for the General Counsel rests its Opposition on two fallacies: (1) despite the General Counsel's repeated, unequivocal assertions that it was *not* challenging the *validity* of the employee disaffection petition at issue, AMC nevertheless could and should have presented evidence at the administrative hearing to rebut this position that the General Counsel repeatedly disclaimed it was taking; and (2) Board law requires an employer to authenticate an admittedly authentic petition prior to withdrawal. Both contentions are easily dispelled.

I. General Counsel's Shifting Theories Deprived AMC of the Ability to Present Relevant Evidence That Renders the ALJ's Conclusions Untenable.

Counsel for the General Counsel contends AMC is at fault for not presenting evidence to the ALJ on the very theory that it repeatedly disclaimed—that the admittedly authentic petition was valid. *See* GC 1(k) at 4; Tr. 107; GC Ans. Br. to Intervenor's Exceptions at 3. This specious contention is squarely undermined by the finding in *Ohr ex rel. NLRB v. Arlington Metals Corp.*,

2015 WL 7731959 (N.D. Ill. Dec. 1, 2015), where the United States District Court held that the General Counsel's pre-hearing and trial concessions prejudiced AMC at the administrative hearing of the opportunity to present employees as witnesses to refute the ALJ's presumptions that the petition was not authentic. *Id.* at *14. Indeed, in denying the Board's Petition for Section 10(j) relief, the Court held that the ALJ's finding that AMC failed to satisfy its burden of establishing that the loss of majority support was weakened because the General Counsel's "shifting stance" toward the petition's validity resulted in a lack of relevant evidence:

Given the NLRB's position prior to the hearing, AMC was never notified that it would need to establish the petition's validity at the April 2015 hearing. Had it been, AMC may have called as witnesses the myriad of employee signers who testified at the November 2015 Section 10(j) hearing to authenticate the petition and satisfy the burden, if any, the Act imposes. Instead, the NLRB's shifting stance toward the petition's validity resulted in a lack of relevant evidence before the ALJ and, accordingly, deprived AMC of the opportunity to present further evidence. The ALJ did not have the opportunity to examine the demeanor or review the testimony of any of the employees before ruling on the petition's validity. Consequently, the ALJ's likelihood of success suffers.

Id. The foregoing finding, which the General Counsel's Opposition altogether ignores, renders indefensible the General Counsel's claim that AMC's position that it was deprived of the opportunity to present relevant evidence is "false and misleading" and "spurious." (Opp'n at 2, 5.)

Counsel for the General Counsel does not dispute that at the preliminary injunction hearing: (a) AMC called 11 of the 16 signers of the July 10, 2014 petition to withdraw union recognition; (b) the initiator of the petition testified that he personally presented the petition to each employee for them to consider to sign, and, in collecting the signatures, witnessed each person sign the document (10(j) Tr. 171); (c) each petition signer testified without contradiction as to the authenticity of his signature (*id.* at 171-74; 183-186, 266, 268, 270-72, 277-83); and (d) in testifying about the motivation for seeking withdrawal of union recognition, not a single

petition signer testified they signed the petition because of the alleged unfair labor practices asserted against the Company, much less that they were even aware of such allegations (*id.* at 168–90, 195–215, 244–84).

Consequently, even assuming (1) AMC was required to authenticate the admittedly valid petition, which, as explained *infra*, it was not obligated to do under *Levitz Furniture Co. of the Pacific*, 333 NLRB 717, 725 n.49 (2001); and (2) AMC’s Executive Vice President’s un rebutted testimony that he examined the petition and recognized each of the signatures, Tr. 101–02, 105–06, was insufficient to authenticate the petition, the record developed at the Section 10(j) hearing removes any doubt as to the authenticity of the petition. Further, the testimony squarely refutes the ALJ’s fact-free finding that AMC’s conduct at the October and December, 2013, bargaining meetings at issue in the Complaint, which represented only 5 percent of the parties’ overall bargaining conduct, tainted a petition signed by employees who had zero knowledge of the bargaining.

Accordingly, the administrative record should be reopened and supplementary evidence bearing directly on the merits of General Counsel’s claims and ALJ’s findings concerning the employee disaffection petition’s validity should be received and considered as the Board reviews the pending Exceptions. *See Wal-Mart Stores, Inc.*, 348 NLRB 833, 833–35 (2006) (remanding proceeding to ALJ for purpose of reopening the record to receive relevant evidence, making findings, and taking further appropriate action); *see also Point Park Univ. v. NLRB*, 457 F.3d 42, 51–52 (D.C. Cir. 2006) (remanding case to Board, holding that findings underlying Board’s decision denying respondent’s motion to reopen and supplement the administrative record was not supported by substantial evidence where decision “did not ‘tak[e] into account contradictory evidence or evidence from which conflicting inferences could be drawn’”) (quotation omitted).

II. The General Counsel Again Blatantly Misstates Board Law With Respect to Petition Authentication.

As it is done throughout the entirety of this litigation, Counsel for the General Counsel persists in asserting a manifestly incorrect “account” of Board law concerning disaffection petition authentication. Without discussing actual Board law in any substance, the General Counsel asserts in conclusory fashion that such law required AMC to authenticate an admittedly valid petition prior to withdrawing recognition. (Opp’n at 2–3.) But, Board law is clear the burden of an employer to present evidence of authentication **only** arises where the General Counsel first comes forward with evidence rebutting the employer’s initial showing a union has lost actual support through a disaffection petition.

In *Levitz Furniture Co. of the Pacific*, 333 NLRB 717 (2001), the Board ruled that an employer may lawfully withdraw recognition from an incumbent union only if it can prove that the union has actually lost majority support. *Id.* at 725. An employer that withdraws recognition bears the initial burden of proving that the union suffered a valid, untainted numerical loss of its majority status. *Id.* The employer can establish this loss by a variety of objective means including an antiunion petition signed by a majority of the unit employees. *Id.* “[A]n Employer with objective evidence [e.g., an antiunion petition] that the union has lost majority support – for example, a petition signed by a majority of the employees in the bargaining unit – withdraws recognition at its peril. *If the union contests the withdrawal of recognition in an unfair labor practice proceeding, the employer will have to prove by preponderance of the evidence that the union had, in fact, lost majority support at the time the employer withdrew recognition.*” *Id.* (emphasis added). Notably, the Board explained:

An employer who presents evidence that, at the time it withdrew recognition, the union had lost majority support should ordinarily prevail in an 8(a)(5) case if the General Counsel does not come forward with evidence rebutting the employer’s evidence. If the General Counsel does present such evidence, then the burden

remains on the employer to establish loss of majority support by a preponderance of the evidence.

Id. at 725 n.49 (emphasis added).

The General Counsel's stubborn and unsupported contention that the foregoing footnote "only clarifies that an employer has the burden of proof on the issue of lack of majority support" (Opp'n at 3) ignores the Board's plain instruction that an employer, like AMC, lawfully withdraws recognition based on an employee petition has no further evidentiary obligation to meet where, as here, the General Counsel has no evidence rebutting the petition. Because the validity of the signatures is conceded, AMC had no further burden to meet. *Levitz*, 333 NLRB at 725.

Beyond ignoring *Levitz's* unequivocal holding, the General Counsel does not even attempt to reconcile its argument with Board decisions squarely holding that employers need not authenticate a challenged petition *prior* to withdrawing union recognition. See *Latino Express, Inc.*, 360 NLRB No. 112 (2014) (affirming ALJ's finding that an employer's withdrawal based on *contested* petition was unlawful because the employer failed to establish an actual loss of majority where "no effort to authenticate the petition's signatures was undertaken by Respondent *at trial or, as far as the record reveals, otherwise.*") (emphasis added); *Flying Foods Grp., Inc.*, 345 NLRB 101, 103 n.9, 103-04 (2005) (noting that an employer's withdrawal of recognition is not unlawful where the employer does not verify the authenticity of the signatures on a disaffection petition *before* withdrawing recognition, but if the withdrawal is *challenged*, the ultimate determination relating to objective evidence justifying withdrawal of recognition because of a loss of majority status does require that the signatures upon a disaffection petition be authenticated). Consequently, even assuming the validity of the petition was challenged, the

record developed at the Section 10(j) hearing removes any doubt as to the authenticity of the petition.

III. Conclusion.

For the reasons stated in AMC's motion and above, AMC respectfully requests that the Board (1) reopen and supplement the administrative record with (a) the Section 10(j) hearing transcript and exhibits; and (b) the December 1, 2015, Memorandum Opinion and Order in *Ohr ex rel. NLRB v. Arlington Metals Corp.*, 2015 WL 7731959 (N.D. Ill. Dec. 1, 2015); and (2) consider the supplementary evidence in ruling on AMC's Exceptions to the ALJ's Recommended Decision and Order or, in the alternative, remand the proceeding to the ALJ to receive and consider supplementary evidence.

Date: January 4, 2016

Respectfully submitted,

ARLINGTON METALS CORPORATION

By: /s/ Benjamin M. Ostrander
One of Its Attorneys

William G. Miossi
Derek G. Barella
Benjamin M. Ostrander
WINSTON & STRAWN LLP
35 West Wacker Drive
Chicago, IL 60601-9703
(312) 558-5600
wmiossi@winston.com
dbarella@winston.com
bostrander@winston.com

CERTIFICATE OF SERVICE

The undersigned, one of the attorneys for Respondent, hereby certifies that he has caused a true and correct copy of the foregoing Reply to the General Counsel's Opposition Brief and in Support of Respondent's Motion to Reopen and Supplement the Administrative Record be served upon:

via electronic and U.S. Mail, first-class postage prepaid:

Daniel E. Murphy, Esq.
Melinda Hensel, Esq.
Counsel for the General Counsel
National Labor Relations Board, Region 13
209 S. LaSalle Street, Suite 900
Chicago, IL 60604
Daniel.Murphy@nlrb.gov
Melinda.Hensel@nlrb.gov

Peter Sung Ohr
Regional Director
National Labor Relations Board, Region 13
209 S. LaSalle Street, Suite 900
Chicago, IL 60604
peter.ohr@nlrb.gov

Stephen A. Yokich, Esq.
Dowd, Bloch, Bennett, Cervone, Auerbach & Yokich
8 S. Michigan Ave., 19th floor
Chicago, IL 60603
syokich@dbb-law.com

via e-filing:

Gary Shinnars
Executive Secretary
National Labor Relations Board
1015 Half Street SE
Washington, D.C. 20570

this 4th day of January, 2016.

By: /s/ Benjamin M. Ostrander
Benjamin M. Ostrander