

**15-1275-ag(L),
15-1751-ag(CON), 15-1753-ag(XAP)**

United States Court of Appeals
for the
Second Circuit

R & S WASTE SERVICES, LLC,

Petitioner-Cross-Respondent,

– v. –

NATIONAL LABOR RELATIONS BOARD,

Respondent-Cross-Petitioner.

ON APPEAL FROM THE NATIONAL LABOR RELATIONS BOARD

**FINAL FORM REPLY BRIEF FOR PETITIONER-
CROSS-RESPONDENT**

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INTRODUCTION

R & S Waste Services, LLC (“R &S”) submits this reply in further support of its petition for review and in opposition to the National Labor Relations Board’s (“NLRB”) cross-petition to enforce.

POINT I

THE NLRB CONFIRMED THAT R & S DID NOT RECEIVE ITS CONSTITUTIONAL RIGHT TO NOTICE OF THE SINGLE EMPLOYER CHARGE.

A. R & S was constitutionally entitled to notice of the new allegation prior to the first five hearing days.

This Court holds that the “primary function of notice is to afford respondent an opportunity to prepare a defense by investigating the basis of the complaint and fashioning an explanation of events that refutes the charge of unlawful behavior.” *Pergament United Sales, Inc. v. NLRB*, 920 F.2d 130, 135 (2d Cir. N.Y. 1990). At the “core” of due process “is the right to notice of the nature of the charges and a meaningful opportunity to be heard.” *Brown v. Ashcroft*, 360 F.3d 346, 350 (2d Cir. 2004). This opportunity must be “granted at a meaningful time and in a meaningful manner,” *Burtnieks v. New York*, 716 F.2d 982, 986 (2d Cir. 1983) citing *Armstrong v. Manzo*, 380 U.S. 545, 552, 14 L. Ed. 2d 62, 85 S. Ct. 1187 (1965). This would require timely and adequate notice and “an effective opportunity to defend by

confronting any adverse witnesses and by presenting [appellant's] own arguments and evidence orally." *Burtneiks*, 716 F.2d at 986 citing *Goldberg v. Kelly*, 397 U.S. 254, 268 (U.S. 1970).

The NLRB argues that R & S received all the notice that is required under due process because it was aware of the NLRB's "intent" to amend prior to the resumption of the hearing on January 8, 2013. The NLRB attempts to avoid the unavoidable: the notice of its intent to amend and the filing of the motion was made after five days of hearing wherein the government called seven witnesses and introduced over 40 exhibits. As such, R & S had no opportunity to cross-examine those witnesses on the single employer theory. Under this Court's holding in *Burtneiks* timely and adequate notice to R & S means that R & S was required to have "an effective opportunity to defend by confronting any adverse witnesses and by presenting [R & S's] own arguments and evidence orally." 716 F. 2d at 986. It is indisputable that R & S did not have the opportunity to "confront any adverse witnesses" on the single employer theory while the government put nearly the entirety of its evidence on during the first five hearing days. Consequently, under no circumstances can R & S have been considered to have received its constitutional guarantee to due process.

This is precisely the due process deprivation the NLRB rejected in *Graphic Communs. Conference*, 2012 NLRB LEXIS 810 (NLRB 2012). The motion to

amend was made after two witnesses for the government testified and had already been cross-examined. The motion to amend was denied because the delay caused the respondent to have less than a fair opportunity to prepare and present its defense as to the additional allegations”. *Id.* at *6-7.

The same conduct was rejected in a case with near identical facts. In *Westar Marine Services*, the general counsel expressly acknowledged in her opening statement that she was not pursuing the unlawfulness of a discharge based on the employee’s engagement in union activity but only based upon the employee’s filing of an unfair labor practice charge. 1992 NLRB LEXIS 1269, *103 (NLRB 1992). The general counsel moved to include an unfair labor practice charge based on the employee’s engagement in union activity after most of the evidence had been admitted. *Id.* The motion to amend was denied because the respondent had been lead to believe that it would not need to defend itself against the proposed amended unfair labor practice charge. *Id.* at * 105-106.¹

The NLRB’s conduct here is no different than in *Westar Marine* and *Graphics Communication* – the amendment here should have been denied as well.

¹ The judge was persuaded that the general counsel included the new charge after previously disavowing because it new it would lose under the extant complaint. *Id.* at *106. It’s easy to see here that a similar motivation was present. The general counsel knew it lost the alter ego argument so it dusted off the disavowed single employer theory to salvage some kind of win against R & S at the expense of R & S’s due process right.

It bears repeating Justice Frankfurter's wisdom: "no better instrument has been devised for arriving at the truth than to give a person in jeopardy of serious loss notice of the case against him and opportunity to meet it." *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U.S. 123, 171-72, 71 S. Ct. 624, 95 L. Ed. 817 (1951). The NLRB certainly disregarded that truism by holding that R & S was not surprised by the amendment and that the new single employer theory was fully litigated. It is indisputable that R & S had no opportunity to cross-examine the government's seven witnesses during the government's case-in-chief. The most malleable definition of "due process" cannot conceivably include the deprivation of that right which befell R & S. *J.R.L. Foods*, 336 NLRB 111, 132 (NLRB 2001) (motion to amend denied where made after general counsel excused witness because respondent denied right to cross-examine.) Consequently, the petition for review must be granted and the cross-petition for enforcement denied.

B. Awareness of an intent to amend after five hearing days is constitutionally insufficient notice.

The NLRB nevertheless disjointedly argues that R & S's constitutionally guaranteed right to notice was accorded because R & S was aware of the government's "intent" to amend after five hearing days held two months prior to the motion being granted. The government argues R & S had all the time the government believes R & S needed to prepare its defense to the newly added theory. This

argument is stunningly flawed because it contravenes its own rulings and ignores this Court's pronouncements.

In *NY Post Corp.* the NLRB explicitly rejected the idea that knowledge of the intent of a putative motion to amend is sufficient notice. 283 NLRB 430, 431 (1987). In that case, the amendments were proposed by the general counsel at the conclusion of his case-in-chief but formally moved upon at the end of the hearing. The Board held that even though the respondent may have earlier surmised that amendments to the complaints might be proposed, it found such notice was insufficient and prejudiced the respondent. *Id.*

In *Oncor Elec. Delivery Co., LLC*, the hearing was held April 28-31 and from June 18-20, 2014. 2014 NLRB LEXIS 853 (NLRB 2014). On April 30, the general counsel raised the issue of inserting a new charge but did not move to amend at that time. *Id.* at *6. On June 19, 2014, at the conclusion of the second day of the resumed trial, the general counsel stated that he wished to move to amend the complaint to include the allegation that the respondent unreasonably delayed furnishing information in response to all three information requests. *Id.* at * 4. The ALJ granted the amendment and then reversed himself. *Id.*

The ALJ held that there was no reason that the general counsel should not have moved earlier. *Id.* at *6. The ALJ held that even though respondent had additional days to present its defense, it was the general counsel's burden "to aver

violations, and the [r]espondent's burden is to refute them once they are made--not to rebut them in advance.” *Id.* at * 6. The ALJ sharpened this point by stating it would be wrong to require “the respondent to alter or expand its evidence at the end of the trial” or seek a continuance because it contravenes timely and efficient administrative adjudication. *Id.* at *7.

In *Stagehands Referral Serv.*, the general counsel moved at the end of the hearing to amend the complaint. The Board held that the general counsel’s offer to the respondent for additional days to present evidence to address the new charge was insufficient. 347 NLRB 1167, 1172 (NLRB 2006).

These cases all demonstrate the fact that being aware of a coming amendment, i.e. the intent to amend, does not establish sufficient notice and that affording the respondent additional time at the end of the hearing to put on more evidence to refute the newly added unfair labor practice charge does not pass constitutional muster. Here, the NLRB’s singular reliance on R & S’s “two month notice” of the government’s “intent” to amend is therefore insufficient. Since the intent to amend is not tantamount to the amendment itself, the NLRB’s argument stating as such is wrong.

The NLRB’s heavy reliance on *CAB Associates*, 340 NLRB 1391 (NLRB 2003) is misguided because it is easily distinguishable. In *CAB*, the general counsel stated in her opening that she intended to pursue an alternate theory of liability even

though it was not alleged in the complaint. *Id.* at 1397. The respondent had the opportunity to cross-examine on the issue and was therefore not surprised by the amendment. *Id.* at 1398. Here, the government expressly disavowed the single employer theory by withdrawing it from the case on the first day of the hearing and then sought to re-introduce it after it had submitted nearly the entirety of its case.

Also, in *CAB* the motion to amend was based mostly on the admissions of the respondent's own witness that were adduced on the second day of the hearing. *Id.* at 1398. Here, no such facts exist.

The NLRB's citation to *Amalgamated Transit Union Local No. 1498 (Jefferson Partners)*, 2014 NLRB LEXIS 323 (NLRB 2014) is similarly distinguishable. In *Jefferson Partners*, the respondent's witness raised a defense during the hearing that it had not previously raised. *Id.* at fn. 7. The general counsel moved to amend when it learned of the new defense to include a new charge. *Id.* The NLRB found that there was no surprise given the timing of the previously unraised defense. *Id.* Here, those facts are not present. Therefore, *Jefferson Partners* is inapposite.

In sum, R & S was lead to believe that it would not have to defend itself against the single employer theory because of the government's express disavowal of it on the first day of the hearing. Based upon that reliance, R & S was indisputably not on notice that the government would pursue the abandoned theory during the

first five hearing days wherein the government proffered nearly the entirety of its evidence. As such, R & S indisputably had no opportunity to defend itself during that time, which contravenes this Court's clear mandate that R & S be given "an effective opportunity to defend by confronting any adverse witnesses and by presenting [appellant's] own arguments and evidence orally." *Burtneiks*, 716 F.2d at 986 citing *Goldberg v. Kelly*, 397 U.S. 254, 268 (U.S. 1970). Consequently, R & S was deprived of its constitutional right to due process and the petition for review must be granted and the cross-petition for enforcement denied.

POINT II

THE NLRB HAS NOT REFUTED THAT R & S WAS PREJUDICED BY THE DENIAL OF ITS RIGHT TO DUE PROCESS

The NLRB contends that the single employer allegation was "fully and fairly litigated" because R & S has not shown how it was prejudiced by the grant of the motion to amend. The NLRB's argument ignores this Court's precedent, its own precedent and the record.²

² Contrary to the NLRB's statement, R & S explicitly challenges the single employer finding. R & S explained in its brief (pp. 23-35) that it was not the single employer of Rogan and that the true single employer was ARJR Trucking. R & S further averred that it was impeded in its ability to dispute the cross-petition to enforce because of the due process violation. In other words, this appeal is precisely because R & S challenges the finding it was a single employer with Rogan Brothers Sanitation, Inc. ("Rogan").

A. Precedent requires that R & S should have been given the opportunity to defend itself during the five hearing days preceding the motion to amend.

The NLRB's flippant argument that R & S has not shown prejudice because it has not shown what it would have done differently betrays its transmogrified view of how it has previously held a hearing should be conducted:

A trial record, like itself, proceeds in one direction only. One may regret but cannot change what is past. An evidentiary record may be augmented but augmentation is an addition to and not a substitution for what has gone before.

Consolidated Printers, 305 NLRB 1061, 1064 (NLRB 1992). Thus, according to the NLRB's precedent its argument here is meritless.

In fact, the Court of Appeals for the D.C. Circuit recently rejected the NLRB's same argument. In *Bruce Packing Co.*, the court reversed the NLRB's granting of a motion to amend the complaint after the hearing closed based on a denial of due process.³ 795 F.3d 18, 24 (D.C. Cir. 2015). The court, in relying on a previous decision, stated: "as we made clear in *Conair*, Bruce Packing has no burden to show that it could have elicited specific testimony or countered with different defenses

³ The NLRB contends that R & S's cited cases wherein the late amendment was made at the end of the hearing are inapposite. The cases cited by R & S on appeal all stand for the proposition that a respondent in an NLRB hearing is constitutionally entitled to fair notice of the charges against it, an opportunity to prepare its defense and that the matter be fully litigated. The NLRB has failed to cite any case that establishes the suspension of the constitutional guarantee to due process when the government presents its amendment at the end of its case-in-chief.

that would have defeated the belated claim.” *Id.* at 1372 citing *Conair v. NLRB*, 721 F.2d 1355, 1371 (D.C. Cir. 1983). The court further stated:

When a late amendment deprives an employer of notice and the opportunity to fairly litigate its liability, we will find prejudice warranting reversal so long as there is even a chance that the company could have successfully defended against the charge.

Id. at 24. The court found that the prejudice determination is a “low standard” for a respondent to meet. *Id.* The court found that the “low standard” was met simply by noting that earlier notice to the respondent would have provided it the opportunity to attack the credibility of the witness and cross-examined to expose any inconsistencies. *Id.*⁴ The court noted further that recalling witnesses would not have cured the due process defect either. *Id.*

Bruce Packing, although an out-of-circuit case is in alignment with the Court’s decisions in *NLRB v. Washington Heights-West Harlem-Inwood Mental Health Council, Inc.*, where the Court held that the “procedures of a hearing are fair and satisfy due process if, in general, each party has sufficient opportunity to prepare its case, and the opportunity to call and cross-examine witnesses and to present

⁴ The NLRB cited to its decision in *Bruce Packing* in the Determination & Order (“D & O”) here. (SPA. 3.) The D.C. Circuit reversed the NLRB’s decision on July 24, 2015. Therefore, the NLRB’s reliance on the reversed decision nullifies its basis for support here.

pertinent evidence in support of its case. 897 F.2d 1238, 1244-45 (2d Cir.1990) (internal citation omitted).⁵

B. R & S had more than a “chance” to have successfully defended against the charge.

In alignment with *Burtneiks*, *Washington Heights-West*, and *Bruce Packing* the undisputed fact that R & S was deprived of its opportunity to cross-examine the government’s witnesses during the first five hearing days on the single employer theory constitutes a violation of R & S’s constitutional right to due process. Consequently, R & S’s petition for review must be granted and the petition to enforce denied.

Although the deprivation of due process is apparent because R & S clearly did not have the ability to cross-examine the governments witnesses on the single employer theory, R & S demonstrated in its opening brief that the it met even the NLRB’s erroneous standard for what it believes constitutes “prejudice”.

R & S relied upon the government’s representation that it would not pursue the single employer charge at the outset of the hearing, therefore R & S focused solely on refuting the extant allegation that R & S was the alter ego of Rogan rather

⁵ The NLRB cites *Free Flow Packaging*, 19 NLRB 925, 927 (1975) *enforced in relevant part*, 566 F.2d 1124, 1131 (9th Cir. 1978) for the proposition that failure to show cross-examination would have made a difference vitiates due process argument. (NLRB Br. p. 24). The case is inapposite because the evidence at issue in that case was subject to cross-examination – that is not a fact here because of the government’s initial disavowal of the theory.

than also seeking to refute that R & S was a single employer with Rogan. Since the theories are legally distinct, R & S's inability to cross-examine the government's witnesses on the single employer theory prejudiced it – which is underscored by the fact that R & S was found to be the single employer with Rogan.

The NLRB agrees that the Court has long held that the theories of alter ego and single employer are distinct. As the Court stated in *Lihli Fashions Corp. v. NLRB*, “the alter ego test is notably different than the “four-factor” single employer test, as other courts have recognized.” 80 F.3d 743, 748 (2d Cir. 1996). The focus of the alter ego doctrine, unlike that of the single employer doctrine, is on “the existence of a disguised continuance or an attempt to avoid the obligations of a collective bargaining agreement through a sham transaction or technical change in operations.” *Id.* The Court recognizes that the single employer doctrine “generally applies where the entities concurrently perform the same function” whereas alter ego “comes into play when a new legal entity has replaced the predecessor.” *Newspaper Guild, Local No. 3 v. NLRB*, 261 F.3d 291 (2d Cir. 2001). A “single employer” situation exists “where two nominally separate entities are actually part of a single integrated enterprise.” *Arculeo v. On-Site Sales & Mktg., L.L.C.*, 425 F.3d 193, 198 (2d Cir. 2005).

If the government did not withdraw the single employer theory, R & S would have sought to challenge the government's case during the first five hearing days to

show that R & S was not “concurrently performing the same operation” with Rogan (i.e. single employer) in addition to showing that it was not a “new legal entity” that replaced Rogan (i.e. alter ego).

Nothing the NLRB states in its brief changes any of these facts that’s why R & S meets the “low standard” in showing that it had a “chance” to defend itself against the single employer theory.⁶ The NLRB offers no explanation why it withdrew the single employer allegation on August 14, 2012 only to sandbag R & S by having it reinserted into the case on January 8, 2013. The NLRB offered not a single citation to R & S challenging the single employer theory during the first five hearing days. As such, it cannot be seriously determined that R & S received due

⁶ The NLRB cites *Fairfax Hospital*, 310 NLRB 299, 302 & n.3 (1993) and *Key Coal*, 240 N.L.R.B. 1013 (NLRB 1979) for the proposition that an opportunity to keep the record open to call witnesses to rebut the amended allegation satisfies due process. In *Fairfax*, the respondent had a six month hiatus in the hearing prior to closing its case; a fact not present here. 310 NLRB at n.3. In *Key Coal*, previous non-parties were brought into the action and the ALJ specifically entered an order permitting respondents a continuance and the opportunity to examine witnesses who had already testified. 340 NLRB at 1015. This case does not contain similar facts: the ALJ denied R & S its continuance request prior to the resumption of the hearing in January 2013 and did not enter an order permitting recall of witnesses. In fact, he dismissed R & S’s argument that a new theory coming in so late prejudiced its ability to defend itself by stating that there was “like total overlap” in the alter ego and single employer theories. (A. 678.) Obviously, the ALJ was not as solicitous as the judges in *Fairfax* and *Key Coal*. Similarly, the ALJ here did not offer R & S the ability to recall anyone unlike the judge in *Teamsters Local 812*, 302 N.L.R.B. 258, 259 (1991) *enforced on other grounds*, 947 F.2d 1034 (2d Cir. 1991) cited by the NLRB.

process of notice of a charge against it and the opportunity to prepare a defense. Consequently, the petition for review must be granted and the cross-petition denied.

Instead the record is replete with evidence from the first five hearing days demonstrating R & S's challenge to the extant allegation that R & S was a "new legal entity" that replaced Rogan. For example, Rogan employees Michael Roeke and Joseph Smith were cross-examined about whether Rogan was still operating and the details of their employment while at Rogan. (A. 516, 521, 432-434.) The questions were designed to elicit responses demonstrating that Rogan was still operating thereby establishing that R & S did not "replace" Rogan as a "new legal entity", i.e. the alter ego, rather than whether R & S acted as a single integrated enterprise, i.e. single employer.

Simply stated, during the time the single employer charge was withdrawn R & S was unaware that the government's witnesses' testimony might serve as a basis for liability based upon single employer status – the due process violation is blindingly apparent.

The inequity visited upon R & S is magnified because while R & S did not have the opportunity to cross-examine the government's witnesses on the new theory the government was able to cross-examine R & S's witnesses on the theory. This is a classic example of sandbagging a litigant – the Court must not tolerate such governmental abuse of process.

The NLRB's counterargument that litigating alter ego constitutes litigating single employer contravenes its own precedent.

In *Westar Marine Services*, a motion to amend was denied because the administrative law judge found that incidentally litigating an issue raised by the motion to amend did not constitute it being fully and fairly litigated:

In other words, even assuming that the record establishes that in litigating the other allegations of the complaint, the Respondent incidentally fully litigated the issues raised by the motion to amend, it would be a fiction to find that those issues were fairly litigated or that Respondent had received sufficient notice so as to have had a fair opportunity to prepare its trial strategy.

1992 NLRB LEXIS 1269, at *106 (NLRB 1992).

Given the chronology of undisputed historical events, it is beyond cavil for the NLRB to argue that the single employer theory was “fully and fairly litigated”. Indeed, the NLRB acknowledges that “not all single employers are alter egos”. *Gartner-Harf Co.*, 308 NLRB 531, 533 (1992); *NYP Acquisition Corp.*, 332 NLRB at fn. 1 (alter ego is not subset of single employer). Thus, litigating alter ego is not litigating single employer. Nothing the NLRB has stated in its brief changes the fact that R & S did not have the opportunity to challenge the government on the single employer theory during the first five hearing days – and that is why R & S did not receive its constitutional guarantee of due process.

But, the due process deprivation is thrown into its starkest relief regarding the issue of ARJR Trucking. As R & S set forth in its opening brief, R & S contends that

the true single employer of Rogan was ARJR Trucking. (Br. 26-31). That is, Rogan was a single integrated enterprise with ARJR not R & S. ARJR is key to understanding the due process violation. The government wants it so that Rogan is seen as being in a vacuum with R & S as a single employer for a limited period between March 2011 and the beginning of October 2011. Yet, as set forth in R & S's brief and further below, Rogan and ARJR acted as a single employer during that time period. The government ignored ARJR because it would undermine its argument that R & S and Rogan are a single integrated enterprise. R & S had no involvement with ARJR.⁷ Therefore, R & S could not be a single integrated enterprise with Rogan if Rogan was a single integrated enterprise with ARJR.

What is particularly insidious is that the government was aware of ARJR because it had its bank records pursuant to subpoena prior to the hearing. Yet, as

⁷ The NLRB has never alleged ARJR and R & S are single employers or connected in any way. The NLRB has gone as far as saying ARJR "is simply irrelevant". (NLRB Br., fn. 9). Notably, the charging party union saw the link between Rogan and ARJR because it demanded information from Rogan regarding ARJR in September 2011. (A. 1095-1096.) ARJR continues to operate: <http://www.quicktransportsolutions.com/truckingcompany/newyork/arjr-trucking-corp-usdot-564073.php>.

Rogan is still active:

https://appext20.dos.ny.gov/corp_public/CORPSEARCH.ENTITY_INFORMATION?p_nameid=2329035&p_corpid=2283116&p_entity_name=%52%6F%67%61%6E&p_name_type=%41&p_search_type=%42%45%47%49%4E%53&p_srch_results_page=0.

explained by R & S (Br. pp. 26-28), the government withheld the ARJR bank records from R & S during the October hearing days and never produced them.

As set forth in R & S's opening brief (Br. 29) the bank records show: 1) Rogan employees were paid through ARJR; 2) that ARJR paid Rogan Brothers' bills; 3) checks payable to Rogan Brother were deposited into ARJR's account; and 4) Rogan Brother's customers were being serviced by ARJR. These are precisely the hallmarks of "single employer" status, i.e. where the entities "concurrently perform the same function". *Newspaper Guild, Local No. 3 v. NLRB*, 261 F.3d 291, 303 (2d Cir. 2001).

The NLRB does not dispute any of these facts, which bolsters R & S's argument that it should have been aware that the government would pursue the single employer allegation (after withdrawing it) and that R & S should have had the opportunity to confront the government's witnesses with the ARJR records it withheld.

Smith and Roeke, for example, could have been cross-examined with questions about whether they operated trucks for Rogan and ARJR in New York City and Connecticut; whether they hauled construction debris as the substantial part of their daily work for ARJR; and whether they dumped waste at the transfer station owned by Rogan for ARJR. As explained by R & S, it did not operate in New York City or Connecticut, it did not own a transfer facility, and garbage collection (not

construction debris removal) was its main business. (Br. pp. 24-25) – these distinguishing features of the single employer test could have been brought to bear through the government’s witnesses by R & S had the government not disavowed the theory during the October hearing days. These factors all favor R & S and would have resulted in a dismissal of the single employer charge. *Newspaper Guild, Local No. 3 v. NLRB*, F. 3d at 303 (finding that two subsidiary business of single newspaper did not share same business purpose, even though they had the same management, because the businesses had different strategic and financial goals).

Furthermore, R & S would have sought further questioning from those witnesses on who was directing them while they were performing work under ARJR and who controlled the labor relations policies of ARJR. This is a key point: R & S was challenging the government’s case during the October hearing days to show that R & S’s employees were not under the common control of Rogan – a critical factor to show that R & S did not take the place of Rogan through a corporate sleight of hand (alter ego). *Newspaper Guild, Local No. 3 v. NLRB*, 261 F.3d at 303 (finding no single employer where one company acted independent of the other). R & S should have had the right to also demonstrate that Rogan was in fact controlling ARJR’s employees and that R & S was not. Notably, the NLRB did not produce any evidence that ARJR was a single employer with R & S. R & S could have cross-

examined the government's witnesses to show that R & S had no control over ARJR's operations or employees.

Also, R & S should have had the right to cross-examine the two witnesses from the benefits funds that testified (SPA. 17, 19, 20-1, 32; A. 440-491, 536-547.) regarding what efforts were made to audit ARJR's payroll records to determine whether they would be entitled to contributions for work performed by Rogan's employees done under the ARJR name – additional evidence of ARJR (not R & S) acting as the single integrated enterprise with Rogan Brothers.

None of this happened thereby establishing that R & S did not have fair notice of the charge against, an opportunity to prepare a defense or that the issue was fully and fairly litigated.

Further illustrative of the fact that R & S did not have a full and fair opportunity to litigate the single employer allegation is the NLRB's refusal to produce the ARJR records. The NLRB contends in its brief that since R & S was aware of the government's "intent" to amend R & S had the opportunity to prepare its defense to the putative single employer allegation during the break in hearing days between October 19 and January 8. This argument is spurious given the record.

R & S sought to defend itself against the single employer allegation by showing that ARJR was the true single employer. The government actively thwarted R & S's ability to access ARJR's bank records that it had in its possession prior to

the first day of the hearing. The government defied the ALJ's Order to produce ARJR's bank records. (Br. pp. 26-28). Faced with the government's open defiance of the ALJ's request that it turn over the bank records and the motion to amend to include the single employer theory, R & S moved quickly to subpoena the records itself during the break in hearing days. When the documents could not be produced in time for the January 8 hearing date, R & S requested an adjournment. The ALJ denied the request and forced R & S to proceed without them. (Br. 29; A. 1284-1289; 1323.) This sequence alone (ignored by the NLRB in its brief) demonstrates the lack of due process accorded R & S. The deprivation of its constitutional right was compounded because the ALJ prohibited R & S from producing a witness regarding the ARJR bank records after January 15, 2013. (Br. 30; A. 1324.)

These facts eviscerate the NLRB's contention that R & S somehow had the unfettered ability to keep the record open and continue to call whatever witnesses it desired.⁸ Moreover, if R & S had access to the ARJR records during the first five

⁸ The NLRB intimates that the hearing was delayed from August 14 to October 16 because of R & S to suggest that R & S would have received whatever additional time it needed to present additional evidence to refute the single employer theory that had been disavowed for five hearing days. (Br. 4). The ALJ's Order dated August 30, 2012 recites the reasons for the break, including the unavailability of counsel for the government and the union. Another point must be made here, on August 12, the ALJ at first denied an adjournment request based on Joseph Spiezio's son's medical condition. The ALJ agreed with the government's demand that Spiezio get his son's oncologist on the phone via speakerphone in the hearing room to discuss his son's medical condition (who was in attendance at the hearing that day because he needed to go to the doctor in Manhattan) to confirm that his son needed

days of the hearing and had notice of the single employer charge, the ALJ would have seen the relevance of ARJR to the case from the outset. R & S should never have been in the position it was at the end of the hearing imploring the ALJ to let it put on more evidence. Consequently, the petition for review must be granted and the cross-petition to enforce must be denied.

C. The NLRB's failure to satisfy its own standard for permitting an amendment establishes the constitutional violation.

The prejudice to R & S is underscored by the NLRB's inability to satisfy its self-created standard for permitting an amendment. The Board evaluates (1) whether there was surprise or lack of notice, (2) whether there was a valid excuse for the delay in moving to amend, and (3) whether the matter was fully litigated. *Stagehands Referral Service*, 347 NLRB at 1171-1172.

As for the first element, while the NLRB focuses its argument on the post-October hearing days, the fact is that the due process deprivation began the moment the single employer theory was withdrawn at the beginning of the hearing. Since the government disavowed the single employer theory during the first five days of the hearing R & S did not cross-examine any witnesses during that time. It is obvious the lack of notice to R & S caused it to be surprised when the motion to amend was filed two months later.

medical attention – the shameful display shows that the government wasn't going to readily give R & S adjournments.

The NLRB has held in similar circumstances that such surprise precludes an amendment. In *Westmar Marine Services*, the NLRB found that the respondent was right to rely upon the declarative statement that a particular theory would not be pursued. 1992 NLRB LEXIS 1269, * 102 (NLRB 1992) (denying motion to amend stating “it would be an understatement to say that Respondent was surprised”); *Kingman Regional Med. Ctr.*, 2015 NLRB LEXIS 114, fn. 27 (NLRB 2015) (denying motion to amend made during a break in the trial after three days of testimony and finding surprise to respondent where the general counsel stated at the outset that it would not pursue a certain unfair labor practice that was the subject of the motion to amend).

As for the second element of the NLRB’s test for constitutional sufficiency, the NLRB hasn’t explained why it moved to amend after five days of hearings. As such, the NLRB failed to establish the second prong of its own self-created standard. *Kitsap Tenant Support Servs.*, 2015 NLRB LEXIS 560, *20 (NLRB 2015) (denying motion to amend and stating that that the new allegation was a surprise to respondent and no surprise to the government because it presumably was aware of the information serving as the basis for the amendment prior to the hearing); *Consolidated Printers, Inc.*, 305 NLRB at 1064 (“Where no or an insufficient explanation is made to explain a prosecutorial delay in proposing an amendment to the complaint” motion to amend must be denied).

Adding a particularly pernicious note to the ambush strategy employed by the NLRB to find a way to nail R & S as the “single employer” with Rogan is the withdrawal of the single employer theory and its later reintroduction after nearly the entirety of the government’s case was submitted.⁹ The NLRB conveniently ignored this critical fact. The NLRB obviously thought the evidence it had in its possession prior to the hearing warranted pursuant of the single employer theory. It is no stretch to see that the NLRB obviously refrained from pursuing the single employer theory precisely to prevent R & S from cross-examining the government’s witnesses on that theory. The gambit can only be seen as a calculated effort to prevent R & S from its guaranteed right to know the charge against it and an “opportunity to meet it.” *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U.S. 123 at 171-72.

As for the third element, even if this Court were to conclude that the single employer theory was fairly litigated (it was not, as discussed further *infra*) the failure to establish proper notice and the obvious surprise inflicted upon R & S precludes a finding that R & S was accorded its constitutional right to due process. *LM Waste Serv., Corp.*, 2009 NLRB LEXIS 191, *20 (NLRB 2009) (denying motion to amend even though new unfair labor practice charge was fully litigated).

⁹The true reason is that the government obviously knew at that point it lost the alter ego and successorship allegations and could not prove that the union contract was anything other than a sham.

The record prevents the NLRB from establishing its own test for due process. Consequently, the petition for enforcement must be granted and the cross-petition denied.¹⁰

POINT III

SUMMARY JUDGMENT IS NOT WARRANTED

The NLRB held that since R & S and Rogan were single employers then they are jointly responsible for the §§ 8(a)(1) and (3) violations. Since R & S challenges the single employer finding on the basis of its deprivation of its constitutional right to due process, the illegitimacy of the finding that R & S is responsible for the § 8(a)(1) and (3) findings is encompassed by this appeal.¹¹ Consequently, summary judgment should be denied and the petition for review be granted. There is no doubt that the §§8(a)(1) and (3) violations were imputed to R & S because of the finding that it was a single employer. To wit, the ALJ stated that “[I]t is the General Counsel’s contention that R & S is liable for [Revell’s, Smith’s and Roeke’s]

¹⁰The NLRB has recently updated its ALJ Bench Book and cites this case as a greenlight for future mid-hearing amendments in similar circumstances. The due process deprivation will not be the last one this Court will see if the NLRB is not stopped now.

¹¹ As such, the NLRB’s argument that R & S did not challenge the findings in its opening brief precludes it from challenging them in its reply is wrong. Moreover, as set forth in this point, substantial evidence in the record does not support the NLRB’s contention in its brief that the violations were based on R & S’s independent conduct. The NLRB has cross-petitioned and requested summary judgment so it’s appropriate to show that substantial evidence in the record does not support the findings. *Bayway Ref. Co. v. Oxygenated Mktg. & Trading A.G.*, 215 F.3d 219, 226-227 (2d Cir. 2000).

discharges and is responsible for offering the reinstatement and backpay because at the time of their discharges, R & S was either a single employer or alter ego.” (SPA. 25.) This unambiguous statement means that if the single employer status fails, then R & S will not be liable for the violations. The ALJ further stated that: “I conclude that at the time of these discharges, R&S was still a joint or single employer with Rogan Brothers and that it should therefore be held liable for the discharges.” (SPA. 35.) Consequently, R & S’s petition to review must be granted and the cross-petition to enforce (including summary judgment) be denied.

Furthermore, the § 8(a)(1) with respect to Roeke was based on statements made by an employee of Rogan. (SPA. 8.) The NLRB attributed the alleged unlawful statement to R & S via the finding of single employer theory. The § 8(a)(3) finding for Roeke, i.e. that R & S refused to hire him, was based on the alleged statement by an employee of Rogan attributed to R & S via the single employer finding.¹²

The § 8(a)(3) unlawful termination finding of Joseph Smith was based on Rogan’s termination of him. (SPA. 23, “Joseph Smith was terminated by RBS”).¹³

The § 8(a)(3) finding that Revell was terminated unlawfully was based upon statements by James Rogan. (SPA. 35.) Also, another statement attributed to an

¹² Roeke testified he never applied for the position (A. 512.) therefore the record doesn’t support the finding.

¹³ Smith testified he never applied for a position at R & S (A. 423.) therefore the record doesn’t support the finding.

employee of R & S was that “we” can “no longer employ Local 813 drivers.” *Id.* R & S was not a signatory to a contract with the union and thus did not employ Local 813 members. Revell’s termination was based on factors unique to Rogan Brothers.¹⁴ The unlawful conducted was imputed to R & S via its “status” as a single employer with Rogan.

Furthermore, the affidavits of Vetrano and Liguori establish they were not supervisors for which any alleged statement could impose liability on R & S. (A. 18-19, 678, 806, 1304-1308.) Moreover, Spiezio testified he did not give any employee authority to make representations on behalf of R &S. (A.756, 757.)

In sum, the NLRB is not entitled to summary judgment and the petition for review must be granted and the cross-petition to enforce denied.

¹⁴ Revell testified he was never told to withdraw from the union in order to get a job. (A. 666.)

CONCLUSION

For the reasons set forth above, and in its opening brief, R & S respectfully requests that its petition for review be granted and the cross-petition for review be denied.

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