

UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
REGION 15

EMPIRE JANITORIAL SALES &  
SERVICE, LLC

and

UNITED LABOR UNIONS, LOCAL 100

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CASE NO.: 15-CA-146938

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POST HEARING BRIEF OF RESPONDENT,  
EMPIRE JANITORIAL SALES & SERVICE, LLC

NOW COMES, Respondent, Empire Janitorial Sales & Service, LLC (hereinafter "Empire"), through undersigned counsel who submits the following Post Hearing Brief:

- 1. The Union did not have majority support at the time Empire entered into its contract with the Orleans Parish School Board and, therefore, Empire had no duty to recognize or bargain with the Union.**

One of the principal underlying premises of the successor corporation doctrine is the presumption that the Union maintained majority support in the bargaining unit at the time the new corporation hires its members.<sup>1</sup> Indeed the Courts have held that "the bargaining representative is entitled to a conclusive presumption of majority status for one year following its certification." *Straight Creek Mining, Inc. v. NLRB*, 164 F<sup>3d</sup> 292, 297 (6<sup>th</sup> Cir. 1998) citing *NLRB v. Burns Int'l Sec. Services, Inc.*, 406 U.S. 272, 279 n3 92 S. Ct. 1571, 32 L. Ed. 2d 61 (1972).

As the Court noted in *Straight Creek*, supra, "After that period [1 year from certification] the Union is entitled to a *rebuttable presumption* of majority support" p. 297 [emphasis added]. In order to rebut that presumption, the employer can show "(1) an actual loss of majority support, or (2) objective considerations sufficient to support a reasonable good faith doubt of the Union's

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<sup>1</sup> As the Court noted in *Resilient Floor Covering Pension Trust Fund Board of Trustees v. Michael's Floor Covering, Inc.*, 801 F<sup>3d</sup> 1079, 1091-1092 (9<sup>th</sup> Cir. Sept. 11, 2015): "The reason for this emphasis is that a successor's 8(a)(5) duty to bargain in good faith derives from the rebuttable presumption of majority support a Union obtains once it has been certified as the units bargaining representative."

continued majority.” *Asseo v. Centro Medico Del Turabo, Inc.*, 1989 WL 130007, \*7 (D.P.R. 1989). See also *NLRB v. Carmichael Construction Co.*, 728 F<sup>2d</sup> 1137 (6<sup>th</sup> Cir. 1984); *Lee Lumber and Bldg. Material Corp. v. NLRB*, 117 F<sup>3d</sup> 1454, 1458 (D.C. Cir. 1997); *Allentown Mack Sales and Services, Inc. v. NLRB*, 522 US 539 118 S ct 818 (1998); and *NLRB v. Koenig Iron Works*, 681 F<sup>2d</sup> 130 (2<sup>nd</sup> Cir. 1982). The burden to rebut that presumption is on the employer. In this case Empire carried that burden.

**A. The facts supporting the conclusion that the Union lacked majority support.**

The evidence revealed that the Union in this case, Local 100, was certified as the bargaining representative over certain GCA Services employees (janitorial, maintenance and landscaping) in the summer of 2012 (Transcript pp. 45, 63; GC Exhibit 3).<sup>2</sup> The issue, as raised by the NLRB, of whether respondent, Empire Janitorial Services, had a duty to recognize and bargain with the Union did not arise until February 2015. As a result, the Union is not entitled to the conclusive presumption continued of majority support as the issue did not arise within one year of the Union's 2012 certification.

The evidence rebutting the rebuttable presumption of continued majority support for the Union was undisputed. Rosa Hines, the Union's state representative, acknowledged that the bargaining unit represented by Local 100 covered GCA employees other than those working under the Orleans Parish School Board (“OPSB”) contract with GCA Services.<sup>3</sup> Remarkably, she was unable to recall the total number of employees in the bargaining unit or even provide an estimate of the total number of employees<sup>4</sup> (Transcript pp. 63-64). She was also obtuse on simple

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<sup>2</sup> The underlying CBA between GCA and Local 100 was in effect from October 2012 through October 15, 2015 (Transcript p. 50). Although Ms. Hines testified it was extended, no other evidence of this was produced.

<sup>3</sup> She testified that the bargaining unit covered GCA workers working at various schools run by the Recovery School District, and at several Charter schools. None of these facilities/schools are run by the OPSB (Transcript pp. 66-67).

<sup>4</sup> But as the Complaint reflects, the Local's Bargaining Unit covered all GCA employees in janitorial, maintenance or landscaping positions in the entire Parish of Orleans. (See Formal Documents and Transcript pp. 8-9).

questions requiring Your Honor and Counsel to repeatedly rephrase questions (Transcript pp. 64-65).

In specific reference to the total number of bargaining unit members working under the OPSB contract with GCA Services as of January 2015, Ms. Hines testified that there were “I guess 30.” (Transcript pp. 67-68). However, a document prepared by GCA and produced at the hearing by General Counsel, reflecting only the GCA janitorial workers on the OPSB contract as of January 28, 2015, showed 38 janitorial employees (Transcript p. 53; GC Exhibit 5).<sup>5</sup> If Mr. Brignac, another GCA witness, is to be believed, there were at least four (4) more individuals performing maintenance bringing the total GCA workers under the OPSB contract to 42 (Transcript p. 96).

Ms. Hines' initially testified that 20 or 25 of the 30 were Union employees, but her March 2015 affidavit submitted under oath to the NLRB indicated that as of February 2, 2015, when Empire commenced work on the OPSB contract, there were *only twelve (12) employees* working under the OPSB contract who were actually Local 100 members (Transcript p. 69). Simple math reflects that 12 out of 38 or 42 is significantly less than 50%.<sup>6</sup> And Ms. Hines conceded that “none of the former GCA employees at OPSB continue to pay their dues.” (Transcript p. 74). In *McDonald Partners Inc. v. NLRB*, 331 F<sup>3d</sup> 1002, 1009-1010 (D.C. Cir. June 20, 2003) the Court noted that the decline in Union membership and dues check off “reflected loss of Union support.” The Court instructed the Board, who had ignored such evidence, “to evaluate the evidence 'as a matter of logic and sound influence from all the circumstances.’”

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<sup>5</sup> This document, according to Ms. Hines, only included janitorial workers on the OPSB job and did not include GCA workers allegedly performing maintenance work.

<sup>6</sup> On cross examination, Ms. Hines tried to repudiate her affidavit (of 12) and her prior testimony (of 20-25) to claim the number might have been as high as 15 actual union members, but she offered no proof of this and its strains credibility to think her memory in March 2016 was somehow better than in March 2015 when she signed her affidavit under oath (Transcript pp. 70-71). She then claimed that GC Exhibit 5 refreshed her memory that it was more than 12 but failed to realize that she had attached GC Exhibit 5 to her March 2015 Affidavit when she indicated there were only 12 union members (Transcript p. 71).

So, Empire presented direct evidence of an “actual loss of majority support” and/or a “good faith doubt” of majority support for the Union under the OPSB contract, which rebuts the presumption of continued majority support and defeats the principal underlying premise for application of the successor corporation doctrine.<sup>7</sup> As a result, Empire had no duty to recognize or bargain with the Union.

## **2. The Factors for Application of the Successor Corporation Doctrine.**

Because the underlying premise of continued majority support for the Union has been rebutted, there is no need to examine the factors for application of the successor corporation doctrine. Nevertheless, any review shows that there was insufficient evidence presented by General Counsel, supporting those factors and the application of the successor corporation doctrine.

### **A. Empire Janitorial and GCA Services are completely unrelated companies.**

In *Fall River Dyeing & Finishing Corp. v. NLRB*, 107 S. Ct. 2225, 482 U.S. 27 (1987) the successor corporation (Fall River) was owned by former officers of the prior corporation (Sterlingwale Corp.) and the president of one of its customers. There was, therefore, a direct link between the prior and successor corporations through the shared officers and/or owners. Those facts are not present in this case.

The parties herein entered into Joint Stipulations which, among other things, included the following:

1. Empire Janitorial Sales & Services, LLC is a Louisiana Limited Liability Company with its principal place of business in Metairie, Louisiana;
2. Empire has been in business since 2000;
3. GCA Services Group Inc. is a Delaware corporation with its principal place of business in Cleveland, Ohio; and

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<sup>7</sup> As of the date of the hearing there were only five (5) employees working for Empire under the OPSB contract who previously worked for GCA (Transcript p. 132). None have been identified as Local 100 members.

4. Empire and GCA do not have shared officers, directors or owners (Joint Exhibit 13).

In addition, Empire's owner, Charlie Lusco, testified that there is no relationship between GCA Services and Empire (Transcript pp. 22-23). The two companies are, in fact, competitors who both bid on the underlying OPSB request for proposals. This factor weighs against finding that Empire was a successor corporation.

**B. Empire did not purchase any assets or equipment from GCA Services.**

In *Fall River*, supra, the Court indicated that one area of focus under the successor corporation doctrine is “whether the new company has acquired substantial assets of its predecessor” p \*43, \*2236. In fact, in *Fall River*, the successor corporation purchased “Sterlingwale's plant, real property, equipment and some of its inventory.” p 2227

In contrast, Empire did not purchase any GCA assets or equipment. Charlie Lusco testified to this as did Dayle Hernandez (Transcript pp. 23, 124, 127). Indeed, the Joint Stipulations contain the following stipulation:

14. Empire did not purchase any equipment or supplies from GCA (Joint Exhibit 13). Similarly, it was undisputed that Empire did not assume any contracts of GCA or any contracts GCA had with any of its vendors (Joint Exhibit 13, Stipulation #5).

This factor weighs against finding that Empire was a successor corporation.

**C. Empire was unaware of Local 100's representation of GCA workers until after it commenced work under the OPSB contract.**

In *Burns*, supra, the Court noted, as a relevant factor in its decision, that:

At a prebid conference attended by Burns on May 15, a representative of Lockheed informed the bidders that Wackenhut's guards were represented by the Union, that the Union had recently won a Board election and been certified and that there was in existence a collective bargaining contract between Wackenhut and the Union.<sup>8</sup> p. 275

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<sup>8</sup> As noted, the new company in *Fall River*, infra, was also aware of the existence of the Union's representation prior to hiring bargaining unit members.

In the present case it was undisputed that Empire was never advised of the existence of the Union, or its representation of GCA workers, until some time after February 5, 2015.<sup>9</sup> The Joint Stipulation between the parties contains the following undisputed facts:

13. No where in the OPSB request for proposal or bid documents did it indicate that there was a Collective Bargaining Agreement between GCA and Local 100.

This was buttressed by the testimony of Charlie Lusco who testified Empire was not advised of the Union's representation of the GCA workers.<sup>10</sup> (Transcript pp. 24-25, 28). This is another factor militating against finding that Empire was a successor corporation.

**D. Empire did not hire GCA supervisors or managers.**

Many of the cases discussing the successor corporation doctrine indicate that one of the factors to consider is whether the employees of the prior company that are hired by the new company are “under the same supervisors.” *Fall River*, supra, p. \*43.

In the present case it was undisputed that no GCA supervisors were hired by Empire and that none of the Empire supervisors: Dayle Hernandez, Joseph King or Betty Carter, have ever been employed by GCA Services (Transcript pp. 21-22, 30, 129, 142). Indeed to Mr. Lusco's knowledge Empire has never hired a former supervisor or manager of GCA under any of its contracts (Transcript p. 23). Once again, this factor weighs against finding that Empire was a successor corporation.

**E. There was not “substantial continuity” in the work.**

In *Fall River*, supra, the Court indicated that “the focus is on whether there is 'substantial continuity' between the enterprises” (p. 43). In order to determine this, the Court is to look at “whether the business of both employers is essentially the same; whether the employees of the

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<sup>9</sup> February 5, 2015 is the date of the letter Ms. Rosa Hines mailed to Empire announcing Local 100's representation of GCA workers.

<sup>10</sup> Mr. Lusco testified that on other jobs he has routinely been advised when existing workers were represented by a union (Transcript p. 26).

new company are doing the same jobs in the same working conditions under the same supervisors, and whether the new entity has the same production process, produces the same products, and basically the same body of customers” (p. 43).

**(1) Staffing was not the same.**

A comparison of Joint Exhibit 10 with GC Exhibit #5 reveals the striking difference in staffing patterns for janitorial work between Empire and GCA. For example, GCA had one (1) employee working at Ben Franklin Extension (GC #5). Empire had three (3) at Ben Franklin Extension. At Bethune Elementary GCA had a Lead and a PT Custodian. Empire, on the other hand, had a full-time Lead, a full-time Custodian and various part-time Custodians. At Timbers, GCA had a Day Porter, 5 part-time Custodians, a Lead and Floor Tech. On the other hand, Empire employed one Day Custodian. At McDonough 35 GCA employed Custodians, a Lead, a “Gym Attendant,” a “Restroom Attendant,” and a part-time Floor Tech. Empire only employed Custodians and a Day and Evening Lead (GC Exhibit #5/Joint Exhibit 10). Similar disparities existed in the staffing patterns at other schools.

In addition, wage rates were often higher at Empire than the Union had negotiated under its contract with GCA (Transcript pp. 75-76). Finally, Ms. Hines testified that landscaping work was done by Bargaining Unit members at the OPSB schools (Transcript pp. 80-81). But it was undisputed that Empire did not perform landscaping work at the schools (Transcript p. 29). GCA also did not perform work at all of the locations where Empire worked for OPSB. In particular, GCA did not perform work at Franklin Elementary or Carrollton Court (Transcript p. 97). These facts show that staffing was not the same, nor were jobs identical.

**(2) The Maintenance and Repair aspect of the Empire OPSB contract.**

Although General Counsel produced a witness, Mr. Brignac,<sup>11</sup> to testify very briefly about alleged maintenance and repair work performed by GCA, this alleged work was not reflected in the RFP GCA was awarded in 2010<sup>12</sup> (Joint Exhibit 1). Mr. Brignac's testimony was very general. Further, he conceded that very little of the maintenance and repair work for GCA was subcontracted out<sup>13</sup> (Transcript p. 95).

Mr. Joseph King, at Empire, oversaw the hiring of maintenance and repair employees. As Joint Exhibit 10 reflects, none of those hired by Empire to perform maintenance and repair work ever worked for GCA (Transcript p. 149). Mr. King also testified at length about the specific types of maintenance and repair work performed by Empire employees under the OPSB contract (Transcript pp. 145-149). While Mr. Brignac testified in very broad generalities, Mr. King under direct and cross examination provided a detailed description of the maintenance and repair work performed by Empire under its OPSB contract (Transcript pp. 150-153). General Counsel, therefore, did not produce sufficient evidence to show substantial continuity between GCA and Empire concerning maintenance and repair work.

**(3) Empire did not use GCA equipment or supplies.**

As previously noted, Empire did not purchase any GCA equipment or supplies. In addition it did not use any GCA equipment or supplies, which is relevant for determining if there was substantial continuity. Indeed, the Joint Stipulation submitted by the parties contained the following:

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<sup>11</sup> Mr. Brignac's credibility was called into question because he admitted he lost his job at GCA Services because of the work it lost, including the OPSB contract to Empire (Transcript p. 94).

<sup>12</sup> Empire timely objected to General Counsel's attempt to introduce Exhibits near the close of its case, after Mr. Brignac was excused as a witness, concerning a second GCA-OPSB contract allegedly involving some maintenance and repair work. These documents labeled GC -2(a) -2(n) should not be admitted into evidence. These were withheld, and the transcript will reflect that while General Counsel introduced Exhibits 1, 3, 4 and 5, he skipped over exhibit 2, thereby barring Empire from using the documents to cross examine Mr. Brignac or Ms. Hines.

<sup>13</sup> Under the Empire/OPSB contract Empire was responsible for all maintenance and repairs under \$5,000 (Transcript pp. 149-150). Everything over \$5,000 had to be put on bid and contracted out.

14. Empire did not purchase any equipment or supplies from GCA (Joint Exhibit 13).

Mr. Hernandez confirmed this in the following colloquy:

Q. You had to go out and buy new custodial equipment for the contract with Orleans Parish School Board, is that right?

A. Yes, we did.

Q. Other than brooms, what sort of equipments did you have to buy?

A. Auto scrubbers, high speed scrub machines, mop buckets, mop handles, mop heads, chemicals. Paper and plastic. (Transcript p. 127)

This factor, along with the others cited, weighs against finding substantial continuity between the work of Empire and GCA Services.

**F. The Substantial and Representative Complement Rule.**

In *Fall River*, supra, the Court discussed when to determine if the new company's work force composition is composed of a majority of the prior company's work force. In particular, the Court wrote:

In other situations, as in the present case, there is a start up period by the new employer while it gradually builds its operations and hires employees. In these situations, the Board, with the approval of the Courts of Appeals, has adopted the substantial and representative complement rule for fixing the moment when the determination as to the composition of the successor's work force is to be made. p. 47, 2238.

The Court further delineated that:

In deciding when a substantial and representative complement exists in a particular employer transition, the Board examines a number of factors. It studies whether the job classifications designated for the operation were filled or substantially filled and whether the operation was in normal or substantially normal production....In addition, it takes into consideration the size of the complement on that date and the time expected to elapse before a substantially larger component would be at work....as well as the relative certainty of the employer's expected expansion. p. 49

Citing *Premium Food's Inc. v. NLRB*, 709 F<sup>2d</sup> 623, 628 (9<sup>th</sup> Cir. 1983).

In the present case the parties submitted as Joint Exhibit 10 a print out of the employees hired by Empire during the first three (3) months of the OPSB contract. A review of that exhibit shows that 56 individuals were hired between February 2, 2015 and April 21, 2015.<sup>14</sup> Of this number, 20 quit or were fired between February 4, 2015 and April 28, 2015.<sup>15</sup> Of the 20 who were separated in those early months, eight (8) were former GCA employees and twelve (12) were non-GCA employees.

General Counsel tried to get Mr. Hernandez, who was in charge of hiring janitorial workers, to admit that he had hired sufficient employees as of February 2, 2015 to substantively staff the work. Mr. Hernandez disagreed and testified “We had enough to get started, but not what we needed.” (Transcript p. 125).

As a result of the aforementioned turnover (35.7%) in the first 11-12 weeks of the contract,<sup>16</sup> Empire managers like Dayle Hernandez, Betty Carter and other managers had to work various shifts performing janitorial work at the OPSB facilities (Transcript pp. 34, 130). As Mr. Hernandez noted in his testimony, this was done because “we were shorthanded” (Transcript p. 130) and because they “did not have the staff to cover it.” (Transcript p. 131). This was not part of the manager's normal job duties.

The only evidence in the record concerning the time period when the company was substantially and representatively staffed was from Dayle Hernandez<sup>17</sup> and Charlie Lusco. Both testified that it was the latter part of April before this point was met.<sup>18</sup> (Transcript pp. 33, 130). General Counsel produced no evidence, only argument, to support an earlier date even though General Counsel has the burden of proof on this issue.

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<sup>14</sup> Only one person was hired after April 7, 2015. So 55 people were hired between February 2 and April 7, 2015.

<sup>15</sup> Eight (8) were separated from employment in February 2015. Six (6) were separated from employment in March 2015, and another six (6) were separated from employment in April 2015.

<sup>16</sup> If the Court uses April 7, 2015 as a cut off, there were 19 separations within 9 weeks.

<sup>17</sup> Mr. Hernandez was the person who hired the janitorial workers on the OPSB job.

<sup>18</sup> The testimony also revealed that there was turnover after April 2015, but Empire believed it was substantially staffed by the latter part of April.

A review of the summary of hires (Joint Exhibit 10) reveals the following employee turnover over the first six (6) months of the contract:

February-8 employees

March-6 employees

April-6 employees

May- 0 employees

June-2 employees

July-1 employee

This supports the testimony of the Empire witnesses, which was undisputed, that because of significant turnover the staff was not substantially stable until the middle to end of April 2015. If that date is used to determine the composition of the workforce, it reveals that there were 33 non-GCA workers hired and 23 GCA workers hired during that time period.<sup>19</sup>

As a result, the NLRB did not carry the burden of proving that Empire hired a sufficient number of GCA employees to be considered a successor corporation.

**3. The NLRB Rules Violate Due Process and allowed General Counsel to withhold documents to the prejudice of Empire.**

As the Court noted in *J.C. Penny Co. v. NLRB*, 384 F<sup>2d</sup> 479, 483 (10<sup>th</sup> Cir. 1967):

Failure to clearly define the issues and advise an employer charged with a violation of the law of the specific Complaint he must meet and provide a full hearing upon the issue presented is, of course, to deny procedural due process.

See also *NLRB v. Pepsi Cola Bottling Company of Topeka, Inc.*, 613 F<sup>2d</sup> 267 (10<sup>th</sup> Cir. 1980).

In the present case, as noted at the outset of the hearing, the Complaint issued by General Counsel was cast in language, covering work done by Empire in the entire Parish of Orleans, which was broader than any of the Union's charges, which related only to work done under the

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<sup>19</sup> General counsel contests that Dewitt Perkins and David Johnson were non-GCA hires, but this does not affect the outcome. The Court will note, however, that Dewitt Perkins does not appear as a GCA employee on GC #5 which showed its janitorial workers under the OPSB contract as of January 28, 2015.

OPSB contract. Empire timely objected to this attempt to make the complaint broader than the underlying charge (Transcript pp. 7-9).

In addition, Empire objected to the NLRB rules which allowed the NLRB to withhold exhibits and witness names (Transcript p. 7). The unfairness of this process was in full display with General Counsel's withholding clearly relevant documents until near the close of his case (General Counsel's Exhibits 2(a)-2(j)) (Transcript pp. 108-110).

In particular, the transcript will reflect that General Counsel skipped over producing General Counsel's Exhibits 2(a)-2(j) while producing other exhibits.<sup>20</sup> General Counsel then called Rosa Hines (Union state representative) and Stafford Brignac (former GCA employee) and introduced General Counsel's Exhibits 1, 3-6 through their testimony or the testimony of others. *After both were dismissed as witnesses and allowed to leave*, General Counsel, near the close of his case, attempted to introduce Exhibit 2(a)-2(j). These *in globo* documents were approximately two (2) inches thick, double sided, and purportedly related to GCA's work under two separate OPSB contracts including work allegedly related to maintenance and repair work (Transcript p. 110). It is undisputed that General Counsel was in possession of these documents prior to the hearing.

These documents were purposely withheld until after the relevant witnesses' testimony, which barred Empire's counsel from questioning either adverse witness about the documents. These documents, therefore, should not be admitted into evidence.<sup>21</sup>

Your Honor was aware of the unfairness of the procedure specifically advising General Counsel as follows:

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<sup>20</sup> The transcript reflects that General Counsel introduced Exhibit GC-1 on page 10, GC-5 on page 54 but GC-2 on page 110.

<sup>21</sup> Your Honor admitted these documents provisionally, subject to General Counsel contacting Stafford Brignac to return to the hearing as of the close of the hearing (Transcript p. 110). General Counsel claimed it was unsuccessful reaching him, and, as a result, Empire rested without being able to question him on the documents (Transcript p. 117). Ms. Hines was earlier excused because of an alleged hospital appointment. There was no way for Empire to recall either witness.

JUDGE CARTER: Well, you can't have it both ways, counsel. You can't give them the documents after he testifies and then [say] oh well he's out of our hands. If you'd given them the documents earlier while he was still available, then that would be different, but you can't have it both ways. You waited until -- and I'm not saying this is intentional, but this is how it played out.

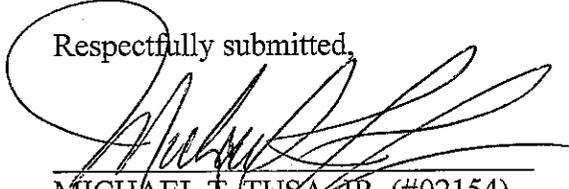
You waited until after he left the building and then you offered this exhibit which may impact or implicate his testimony. So I'm going to require you to check on his status and see if he's available. If there's some problem with that then you can advise us and we'll decide how to proceed, but it's responsible to make sure he's available. (Transcript p. 111)

More importantly, this clearly shows the unfairness of the NLRB process, an unfairness which deprived Empire of procedural and substantive due process.

### Conclusion

For the reasons assigned herein the Complaint should be dismissed and a determination made that Empire is not a successor corporation to GCA Services on the OPSB contract and, therefore, has no duty to bargain with the Union under that contract.

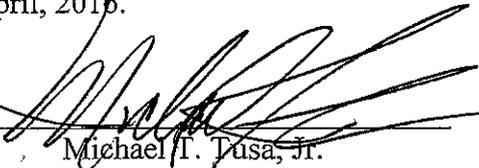
Respectfully submitted,



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**CERTIFICATE OF SERVICE**

I hereby certify that a copy of the above and foregoing pleading has been forwarded to all counsel of record by electronic mail, this 20<sup>th</sup> day of April, 2016.



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Michael I. Dusa, Jr.