

UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
REGION 10, SUBREGION 11

JOHNSON CONTROLS, INC.

and

Case 10-CA-151843

INTERNATIONAL UNION, UNITED  
AUTOMOBILE, AEROSPACE AND  
AGRICULTURAL IMPLEMENT WORKERS OF  
AMERICA, AFL-CIO, AND ITS AFFILIATED  
LOCAL UNION NO. 3066

and

BRENDA LYNCH AND  
ANNA MARIE GRANT

Intervenors

GENERAL COUNSEL'S  
REPLY BRIEF IN SUPPORT OF ITS EXCEPTIONS TO THE DECISION OF THE  
ADMINISTRATIVE LAW JUDGE AND IN OPPOSITION TO RESPONDENT'S  
ANSWERING BRIEF

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## I. INTRODUCTION

Pursuant to Section 102.46(d) of the Rules and Regulations of the National Labor Relations Board, on April 12, 2016, Respondent filed an answering brief to Counsel for the General Counsel's exceptions and supporting brief to the February 16, 2016, Decision and recommended Order of Administrative Law Judge Keltner W. Locke. Counsel for the General Counsel now files its reply brief to Respondent's answering brief.<sup>1</sup> On the same date, General Counsel is filing a brief in answer to Respondent's cross-exceptions. To avoid repetition, this reply brief addresses only those issues that General Counsel has not responded to in another of its filings.

For the reasons set forth in its exceptions and brief, this reply brief, and its answering brief to Respondent's cross-exceptions, Counsel for the General Counsel respectfully requests that the Board find that General Counsel established that Respondent violated Section 8(a)(1) and 8(a)(5) as alleged.

## II. ARGUMENT

### **A. The General Counsel's exceptions and supporting brief properly comply with the Board's rules.**

Respondent contends that the General Counsel's exceptions and supporting brief fail to comply with the Board's Rules and Regulations and should thus be dismissed. (R. Br. 6-8).

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<sup>1</sup> References to the Judge's decision are cited as [ALJD page(s):line(s)]. References to the record are cited as follows: Transcript [Tr. ], General Counsel exhibits: [GCX ], Respondent exhibits [RX ], and Union exhibits [UX ]. References to General Counsel's brief supporting exceptions are cited as: [GC Br. ]. References to Respondent's answering brief are cited as: [R. Br. ]. Each of the latter four is followed by, respectively, page of the transcript or the number of the General Counsel or Respondent exhibit.

The Board's Rules and Regulations state the following:

Each exception (i) shall set forth specifically the questions of procedure, fact, law, or policy to which exception is taken; (ii) shall identify that part of the administrative law judge's decision to which objection is made; (iii) shall designate by precise citation of page the portions of the record relied on; and (iv) shall concisely state the grounds for the exception.

Sec. 102.46(b). Here, the General Counsel's exceptions unequivocally set forth the questions of procedure, fact, law, or policy to which each exception is taken. Respondent's assertion that the General Counsel's exceptions must "specifically state whether any of the exceptions are based on 'questions of procedure, fact, law, or policy,' misinterprets the rule as obligating General Counsel to specifically categorize its exceptions into "procedure," "fact," "law," or "policy." Each of the General Counsel's exceptions must specifically relate to a question of procedure, law, or policy and they clearly do. The General Counsel's exceptions clearly identify for the Board the portions of the Judge's decision to which Counsel for the General Counsel excepts and the basis for their exceptions, and the exceptions give fair notice to other parties for their response. Neither Respondent nor the Intervenors had problems responding to General Counsel's objections to Judge Locke's decision. Thus, the Board should reject Respondent's contention that General Counsel's exceptions failed to comply with the Board's Rules and Regulations.

**B. The relevant question before the Judge was whether Respondent, at the time of withdrawal, had in its possession objective evidence demonstrating an actual loss of majority support for the Union, not whether a majority of employees supported the Union.**

Respondent argues in its answering brief that "the relevant question here is, at the time of withdrawal, did a majority of employees support the Union?" (R. Br. 10). Respondent's characterization of the relevant question before the Judge is inaccurate. Rather, the *Levitz* Board held that an employer may unilaterally withdraw recognition only on a showing that the union has, in fact, lost the support of a majority of the employees in the bargaining unit. *Levitz*,

333 NLRB 717, 725 (2001). The Board explicitly “place[s] the burden of proof on employers to show actual loss of majority support” *Levitz*, 333 NLRB at 725. Neither the Union nor the General Counsel has a burden to show that “a majority of employees supported the union.” See *id.* *Highlands Regional Medical Center*, 347 NLRB 1404 (2006), further clarifies that Respondent must have the objective evidence in its possession as of the date it withdraws recognition and it cannot rely on any postwithdrawal objective evidence. See *id.* at 1413. Thus, the proper question is whether Respondent, at the time of withdrawal, had in its possession objective evidence demonstrating an actual loss of majority support for the union. See *Levitz*, 333 NLRB at 725; *Highlands Regional Medical Center*, 347 NLRB at 1413. As explained in the General Counsel’s brief supporting its exceptions, Respondent has not met its burden to show that it lawfully withdrew recognition of the Union on May 8, 2015.

**C. The *Levitz* test is not a two-part test.**

In its answering brief, Respondent erroneously explains that “[i]n the first part of the *Levitz* test, once it has been established that the employer withdrew recognition based on objective evidence, there is no longer a legitimate reason to artificially restrict the scope of evidence which may be considered.” (R. Br. 11). This assertion is inaccurate. As the General Counsel explains in its brief supporting its exceptions, *Levitz* does not establish a two-part test. (GC Br. 17). Respondent thus echoes the Judge’s creation of a two-part test in an attempt to include the “good-faith” requirement, the very requirement the *Levitz* Board discards, in an attempt to legitimize its withdrawal of recognition of the Union. The *Levitz* standard is purely objective, so any good-faith intention on Respondent’s part is irrelevant. See *Levitz*, 333 NLRB at 717.

**D. Respondent erroneously accused the General Counsel of attacking the Judge's credibility resolutions.**

General Counsel does not question the validity of the Judge's credibility resolution. Rather, General Counsel contends that the Judge should not have made the credibility determinations in the first place. (GC Br. 18) ("In assessing whether a union authorization card negated each crossover signer's earlier disaffection signature, Judge Locke erroneously admitted into evidence, and considered, the subjective intent of each crossover signer. Caselaw is clear that an employee's signature on either a disaffection petition or a union authorization card speaks for itself.").

**E. General Counsel does not contend that Respondent lacked the right to cross-examine its witnesses.**

In no part of General Counsel's brief in support of its exceptions does it deny that Respondent had the right to cross-examine General Counsel's witnesses. Rather, General Counsel's exceptions relate to the admission and consideration of evidence indicating subjective intent, which General Counsel contends is irrelevant to the issue presented. No one denied Respondent the chance to cross-examine General Counsel's witnesses on the authentication of their cards, which was the only proper issue before the Judge as to these witnesses.

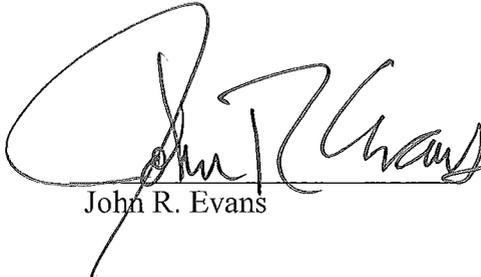
**III. CONCLUSION**

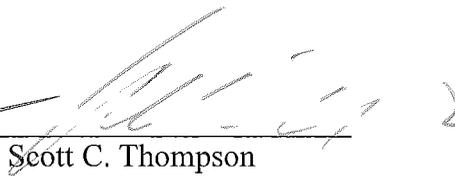
Based on the foregoing, Counsel for the General Counsel respectfully request that the Board find that Judge Locke erred in concluding that Respondent did not violate Section 8(a)(1) and (5) of the Act as alleged. General Counsel further requests that the Board conclude, based on the Judge's findings and uncontroverted evidence, that Respondent violated Section 8(a)(1) and (5) of the Act by withdrawing recognition of the Union on May 8, 2015, at a time when the

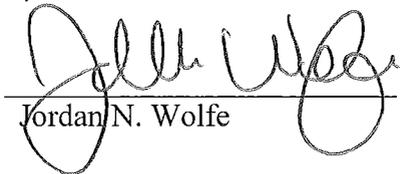
Union enjoyed the support of a majority of Respondent's employees, and by refusing to bargain for a successor collective-bargaining agreement.

Counsel for the General Counsel further requests that the Board issue an Order requiring Respondent to recognize and bargain with the Union for a successor collective-bargaining agreement, to post a notice to employees, and for any further relief that the Board may find necessary.

Respectfully submitted,

  
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