

UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
REGION TEN, SUBREGION ELEVEN

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JOHNSON CONTROLS, INC.

Employer

Case 10-CA-151843

and

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

Charging Party

and

BRENDA LYNCH and ANNA MARIE GRANT

Intervenors

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**REPLY BRIEF OF CHARGING PARTY INTERNATIONAL UNION, UNITED  
AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF  
AMERICA, AFL-CIO, AND ITS AFFILIATED LOCAL UNION NO. 3066 IN SUPPORT  
OF ITS EXCEPTIONS TO THE DECISION OF THE ADMINISTRATIVE LAW JUDGE**

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**REPLY BRIEF OF CHARGING PARTY INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, AFL-CIO, AND ITS AFFILIATED LOCAL UNION NO. 3066 IN SUPPORT OF ITS EXCEPTIONS TO THE DECISION OF THE ADMINISTRATIVE LAW JUDGE**

Pursuant to Section 102.46 of the Rules and Regulations of the National Labor Relations Board (“Board”), 29 C.F.R. § 102.46, Charging Party International Union, United Automobile, Aerospace and Agricultural Implement Workers of America and its affiliated Local Union No. 3066 (collectively, “UAW” or “Union”) submits the following reply brief in support of its exceptions to the February 16, 2016 Decision and Order (“Decision”) of Administrative Law Judge Keltner W. Locke (“ALJ” or “Judge Locke”) in the above-referenced case. For the reasons outlined below, and in its brief in support of its exceptions, the Union respectfully requests that the Board sustain the Union’s exceptions and overrule the ALJ’s finding that “Respondent lawfully withdrew recognition because the Union no longer enjoyed majority support.” (ALJ Decision at 1).

**I. THE EMPLOYER’S READING OF LEVITZ IS FLAWED.**

In its response to the Union’s exceptions, Respondent Johnson Controls, Inc. (“Employer”) argues that the ALJ correctly interpreted and applied Levitz Furniture Co. of the Pacific, 333 NLRB 717 (2001). The Employer relies solely upon language contained in footnote 49, and argues that, although Levitz overrules Celanese Corp., 95 NLRB 664 (1951) and its subjective inquiry into an employer’s good faith, Levitz goes on to overrule *itself* in footnote 49 by bringing back the good faith inquiry at the end of a burden shifting analysis.

Footnote 49 reads:

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 all the evidence.

Levitz, 333 NLRB, fn 49. Employer reads the phrase, “all the evidence,” to mean “all the evidence, even subjective evidence of the employer’s good faith.” This argument has been rejected post-Levitz and should be rejected here. See Scoma’s of Sausalito, 362 NLRB No. 174 (2015); Pacific Coast Supply, 360 NLRB No. 67 (2014).

## **II. THE ALJ SHOULD NOT HAVE CONSIDERED THE INTENT OF THOSE WHO SIGNED UNION AUTHORIZATION CARDS.**

The Employer argues that the ALJ’s consideration of employees’ intent when they signed union authorization cards was “consistent with the Act and Board precedent.” Employer Br. at 8. However, the Employer is unable to support its statement.

In support of its argument, the Employer cites two cases. One is Freemont-Rideout Health Group, 354 NLRB 453 (2009). The Employer argues that the “ALJ permitted testimony concerning employees’ understanding and motives in signing decertification petition and cards revoking their signature on petition.” Employer Br. at 8. The ALJ’s decision in Freemont refers to a wealth of testimony, all of which was elicited to determine the validity of union cards which were signed to reaffirm union support after an anti-union petition had been presented to the employer. A great majority of that testimony was from those who solicited the signatures on behalf of the union. A few of the witnesses testified as to their intent when they signed either the petition or, subsequently, the cards. Some of this testimony regarding intent was specifically discounted by the ALJ: “I do not find her testimony regarding whether she did or did not want the Union to detract from the validity of her card.” Freemont, 354 NLRB at 458. None of the testimony regarding intent was relied on by the ALJ in his holding. Instead, the ALJ found that

the cards were valid because they were signed and clearly expressed support for the union, and because there was no evidence of misrepresentation. Id. at 459.

The Employer also cites Highlands Hospital Corp., 347 NLRB 1404 (2006). The Employer's reliance on this case is also misplaced. The issue in Highlands Hospital was to determine the permissible use of a petition circulated for the purpose of obtaining a decertification election. More specifically, the Board needed to determine whether the Employer could use the decertification petition as a basis for withdrawing recognition. Testimony was elicited to determine what employees were told by the people who were gathering signature. Employees were told that the petition was for the purpose of obtaining an election, and the language of the petition supported that purpose. As such, the employer could not use the petition for other purposes such as withdrawing recognition. Highlands Hospital Corp., 347 NLRB at 1406. Testimony was not elicited as to the individuals' intent when they signed the petition. Here, the ALJ allowed testimony into card signers' intent when they signed a union support card, which is not a permissible or relevant inquiry, and cannot be relied on by the ALJ.

The Union's argument as to why the underlying intent of card signers is not admissible is outlined in its brief in support of its exceptions and relies largely on NLRB v. Gissel Packing Co., 395 US 575 (1969). The Employer claims that the Union's reliance on Gissel and its progeny is misplaced, because Gissel involved serious underlying unfair labor practices committed by the employer. Employer Br. at 18. Incredibly, the Employer is implying that, absent serious underlying unfair labor practices, card signers should be open to inquiry into their intent, even when the cards are clear and unambiguous on their face. Gissel did warn against such inquiries "*particularly* where company officials have previously threatened reprisals . . . ." Gissel, 395 US at 608 (emphasis added). However, the Court went on to reject "*any* rule that

requires a probe of an employee's subjective motivations as involving an endless and unreliable inquiry.” Id. (emphasis added). See Scoma’s of Sausalito, 362 NLRB No. 174 (2015);

### III. THE UNION AUTHORIZATION CARDS ARE CLEAR ON THEIR FACE.

The Employer next argues that the UAW authorization cards which read, “I [NAME] authorize the United Auto Workers to represent me in collective bargaining,” are “inherently vague and misleading.” Employer Br. at 10. The Employer then argues that ambiguously worded documents are insufficient to ascertain employee intent when majority status is in question. In support of this argument, the Employer relies on three cases: Pic-Way Shoe Mart, 308 NLRB 84 (1992), Laidlaw Waste Systems, 307 NLRB 121 (1992), and Highlands Hospital Corp., 347 NLRB 1404 (2006). Interestingly, all three of these cases follow the same pattern: (1) anti-union forces at a workplace circulate cards or petitions reading some iteration of “I [NAME] support having a decertification election; (2) the employer uses this petition as a basis for withdrawing recognition; (3) the Board holds (or upholds the ALJ’s findings) that the petition unambiguously supports holding an election, but it is ambiguous as to whether the signers want to get rid of the union or merely support having an election; and (4) the employer is held to have violated the act by withdrawing recognition.

The UAW authorization cards are not a request for an election. The intent is clear on its face, “I authorize the United Auto Workers to represent me in collective bargaining.”

The Employer then cites HQM of Bayside, 348 NLRB 758 (2006), Parkwood Development Center, 347 NLRB 975 (2006), and Freemont-Rideout to support its argument that the UAW cards are not “unequivocal support” for the Union. In this argument, the Employer implores the Board to adopt a stricter rule in cases like this one, which involve disaffection

petitions. The Employer advocates for a rule that requires employees, after they have signed a disaffection petition, to both show renewed unequivocal support for the union (the authorization card) AND an additional statement that revokes or disavows his or her signature on the disaffection petition. It is unclear as to why the Employer thinks employees need to go to these lengths to show their intent. Either signing a new card OR disavowing the disaffection signature should be enough, and is enough under current case law.

**IV. AN ADVERSE INFERENCE REGARDING THE AUTHORIZATION CARDS IS NOT APPROPRIATE.**

The Employer argues that the Union's alleged delay in producing the authorization cards during the investigatory phase of the underlying unfair labor practice charge should result in a negative inference regarding the reliability of the cards. Employer Br. at 15-16. The Employer first relies on the NLRB Casehandling Manual which states that charges may be dismissed for lack of cooperation if the charging party does not submit its evidence. Employer Br. at 15-16. That is not what happened in this case. The Union submitted its evidence to the Board investigator, the investigation was completed, and a complaint was issued on the charges. Needless to say, the charges were not, in fact, dismissed for lack of cooperation.

The Employer cites Filene's Basement Store, 299 NLRB 183 (1990) to support the proposition that negative inferences can be drawn against a party when they fail to produce material evidence. Employer Br. at 15-16. Of course, Filene's Basement Store addresses situations where a party refuses to comply with lawful subpoenas or where witnesses refuse to answer questions after being directed to do so by a hearing officer. In the present case, the ALJ did not conclude that the Union failed to comply with a subpoena or that the Union's witnesses

refused to answer proper questions. As such, no negative inferences should be drawn regarding the validity of the authorization cards.

**V. THE UNION WAS NOT REQUIRED TO PRESENT THE CARDS TO THE EMPLOYER PRIOR TO THE EMPLOYER'S WITHDRAWAL OF RECOGNITION.**

The Employer next argues that the Union “could have” presented its evidence to rebut the disaffection petition. In support, the Employer cites HQM where the union did, in fact, present the employer with rebuttal evidence. Employer Br. at 23, citing HQM, 348 NLRB 758. However, nowhere in HQM does the opinion state a union must, or even should, present such rebuttal evidence. On the contrary, HQM affirms that a union has no duty to demonstrate majority support prior to the employer’s withdrawal of recognition. 348 NLRB at 759.

The employer also cites footnote 2 of Scoma’s of Sausalito to support its argument. However, footnote 2 merely contains dicta about how Member Johnson would have ruled differently under different procedural circumstances, and would have amended the Levitz standard given the opportunity. To date, that standard has not been amended, and Scoma’s, in fact, affirmatively states that the union has no duty to disclose its evidence. Scoma’s, citing Fremon, 354 NLRB at 459-460, adopted 359 NLRB No. 51 (2013) (withdrawal of recognition unlawful although union did not inform employer of countervailing evidence of union support).

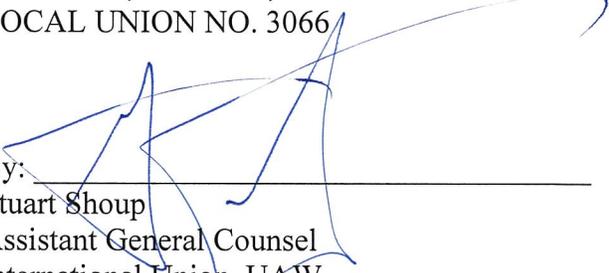
**VI. CONCLUSION**

For all the aforementioned reasons and the reasons contained in the Union’s brief in support of its exceptions, the Union respectfully requests that the Board sustain its exceptions and overrule the ALJ’s finding that “Respondent lawfully withdrew recognition because the Union no longer enjoyed majority support” and issue an order requiring the Employer to bargain,

upon request, in good faith with the Union as the recognized collective bargaining representative of the unit for the period of time required in Lee Lumber, 334 NLRB 399 (2001), enfd. 310 F.3d 209 (D.C. Cir. 2002) and awarding all other relief as may be appropriate to remedy the Employer's unfair labor practice.

Respectfully Submitted,

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

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Dated: April 26, 2106

## CERTIFICATE OF SERVICE

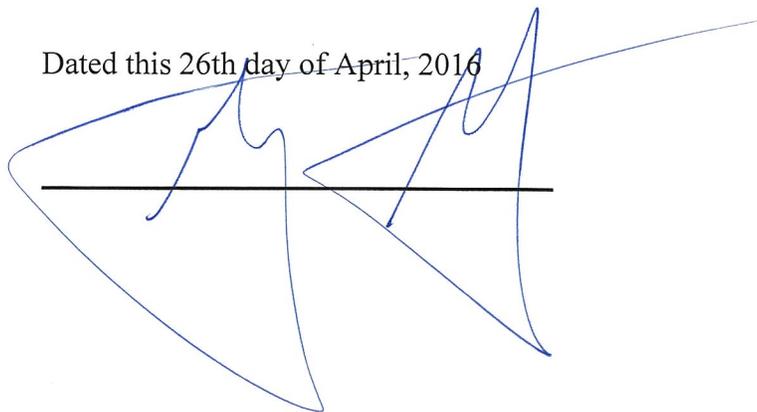
I hereby certify that a true and correct copy of the foregoing Reply Brief of Charging Party International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, AFL-CIO and its Affiliated Local Union No. 3066 in Support of its Exceptions to the Decision of the Administrative Law Judge has been served via email on the following parties on the date below:

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A large, stylized handwritten signature in blue ink is written over a solid black horizontal line. The signature is highly cursive and loops around the line, extending significantly above and below it.