

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

EXCEPTIONS TO THE ADMINISTRATIVE LAW
JUDGE'S DECISION FILED BY RESPONDENT
EMPIRE JANITORIAL SALES & SERVICE, LLC

NOW COMES, Respondent Empire Janitorial Sales & Service, LLC who, pursuant to Section 102.46 of the Board's Rules and Regulations files the following list of exceptions to the administrative law judge's decision:

1. **Whether Respondent was denied due process by NLRB procedures and General Counsel's withholding certain documents until after the dismissal of relevant witnesses and whether the Administrative Law Judge erred in admitting these documents into evidence and in claiming Respondent waived its objection.**
 - (a) Part of Administrative Law Judge's decision to which objection is made: pages 12-14;
 - (b) Designation of pages in the record relied upon: TR pages 61-62, 108-114, 117-118;
 - (c) The grounds for the exception: As set forth in the brief this constituted a complete denial of procedural and substantive due process.

2. Whether the Administrative Law Judge erred in applying the successor bar doctrine and in finding, as a matter of fact and law, that Empire could not prove the Union no longer had majority support.

- (a) Part of Administrative Law Judge's decision to which objection is made: pages 19-20;
- (b) Designation of pages in the record relied upon: TR pages 63-74;
- (c) The grounds for the exception: There was no basis to bar Empire from proving the Union no longer had majority support and in fact Empire carried the burden of proving the Union no longer had majority support.

3. Whether the Administrative Law Judge erred in concluding that Empire met the substantial and representative complement rule as of February 2, 2015 and had the duty to bargain with the Union on that date.

- (a) Part of Administrative Law Judge's decision to which objection is made: pages 9-11, 18;
- (b) Designation of pages in the record relied upon: TR pages 30-34, 125, 129-133;
- (c) The grounds for the exception: The undisputed testimony established that it was mid April 2015 before Empire's staffing was substantially complete, and there is no basis in the record for concluding that it met the substantial and representative complement rule on February 2, 2015, the first day of work under the contract with OPSB.

4. **Whether the Administrative Law Judge erred in articulating the proper standard and in concluding that there was substantial continuity in the work performed by Empire that previously performed for OPSB by GCA Services.**

- (a) Part of Administrative Law Judge's decision to which objection is made: pages 16-17;
- (b) Designation of pages in the record relied upon: TR pages 15-20, 121-129, 142-150;
- (c) The grounds for the exception: The evidence, some of it undisputed, showed that General Counsel failed to carry its burden of showing substantial continuity in the work and the Administrative Law Judge ignored the factual differences with *Fall River* and *Burns*.

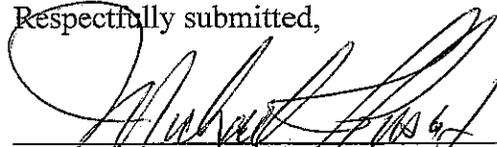
5. **Whether the Administrative Law Judge erred in concluding the bargaining unit was essentially the same.**

- (a) Part of Administrative Law Judge's decision to which objection is made: page 18 N 20;
- (b) Designation of pages in the record relied upon: TR pages 21-22, 29, 48-50, 63-77, 78-81, 124;
- (c) The grounds for the exception: The undisputed evidence revealed significant differences in the purported bargaining units. The GCA bargaining unit covered all of GCA's work in Orleans Parish. Empire's purported bargaining unit only covered OPSB schools/buildings. GCA's bargaining unit covered landscaping work and employees throughout the parish. Empire employees perform no landscaping work. Most Empire employees working under OPSB contract were part-time. GCA employees were mostly full-time.

6. **Whether the Administrative Law Judge erred in ignoring the substantial change in the composition of the members of the alleged bargaining unit.**

- (a) Part of Administrative Law Judge's decision to which objection is made: pages 10-11, 18;
- (b) Designation of pages in the record relied upon: TR pages 131-132;
- (c) The grounds for the exception: As of the hearing, only 5 of 25 Empire employees were former GCA employees.

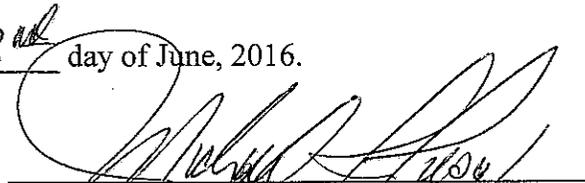
Respectfully submitted,



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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 3rd day of June, 2016.



Michael T. Tusa, Jr.

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

EMPIRE JANITORIAL SALES &
SERVICE, LLC

and

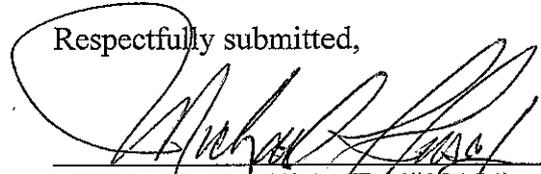
UNITED LABOR UNIONS, LOCAL 100

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CASE NO.: 15-CA-146938

**BRIEF OF RESPONDENT EMPIRE JANITORIAL
SALES & SERVICE, LLC IN SUPPORT OF EXCEPTIONS TO THE
ADMINISTRATIVE LAW JUDGE'S DECISION**

Respectfully submitted,



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ARGUMENT

NOW COMES, Respondent Empire Janitorial Sales & Service, LLC, who, pursuant to Section 102.46 of the Board's Rules and Regulations files this brief in support of its Exceptions to the Administrative Law Judge's Decision.

- 1. Whether Respondent was denied due process by NLRB procedures and General Counsel withholding certain documents until after the dismissal of a relevant witness and whether the Administrative Law Judge erred in admitting these documents into evidence and in claiming Respondent waived its objection.**

As the Court wrote in *Hancock v. Greystar Management Services, L.P.*, 2016 WL 2889084, *1 (W.D. Oklahoma May 17, 2016):

. . . the goal of the federal discovery rules is to prevent trial by ambush.

The sentiment has been repeatedly echoed by the Federal Courts. See *McKinney v. Reassure American Life Ins. Co.*, 2006 WL 3228791, *2 (E.D. Okla. Nov. 2, 2006) and *King v. City of Waycross, Georgia*, 2015 WL 5468646, *3 (S.D. Ga. Sept. 17, 2015).¹

In contrast to such safeguards the NLRB's Case Handling Manual, 10292.4, holds that the Federal Rules of Civil Procedure concerning pre-trial discovery are not applicable.² This unfairness to employers has not gone unnoticed. Member Cowan of the Board in a well written dissent in *Offshore Mariners United*, 338 NLRB No. 88, pp. 745-748 (Nov. 22, 2002) noted that:

The Board's failure to provide discovery rights for all parties has resulted in what has been described as "trial by ambush" for parties accused of violating the Act. *New England Medical Center Hospital v. NLRB*, 548 F^{2d} 377, 387 (1st Cir. 1977); *Capital Cities Communications Inc. v. NLRB*, 409 F. Supp 971, 977 (N.D. 1976). Courts have criticized the unfairness of the Board's restrictive discovery rules. *NLRB v. Hareman Garment Corp.*, 557 F^{2d} 559, 563

¹ State Courts have also recognized the need to avoid trial by ambush. See as examples *Perkins v. Wierster Oil Corp.*, 886 So 2d 1229 (La App 3rd Cir. Nov. 10, 2004) and *Wender v. United States Services Auto Assn*, 434 A^{2d} 1372 (D.C. Aug. 27, 1981).

² Empire timely objected to the NLRB rules restricting pre-trial discovery at the outset of the Administrative Hearing (TR p. 7).

(6th Cir. 1977); *Pepsi Cola Bottling Co. v. NLRB*, 92 LRRM 3527 (D. Kan. 1976) p. 747.

Member Cowan concluded, in part, by noting that:

The Board's current discovery procedures do not allow a party charged with an unfair labor practice to obtain information it may need to prepare or develop its defense. p. 748

And while there is no statutory requirement to allow discovery in administrative proceedings there is a requirement that the administrative proceedings must comply with due process. See *Swift v. U.S.*, 308 F^{2d} 849, 851 (7th Cir. 1962) and *Easley v. Arkansas Department of Human Services*, 645 F. Supp 1535 (E.D. Ark. 1986). The due process requirement applies with equal force to NLRB hearings. See *Alaska Roughnecks and Drillers Ass'n v. NLRB*, 555 F^{2d} 732, 735 (9th Cir. 1977) ("The conceptual basis for our decision is due process. Its application to NLRB proceedings, like other administrative proceedings, is not novel."); *NLRB v. Welcome-American Fertilizer Company*, 443 F^{2d} 19, 20 (9th Cir. 1971); *Russell-Newman Mfg v. NLRB*, 370 F^{2d} 980, 984 (5th Cir. 1966); and *NLRB v. Complas Industries, Inc.*, 714 F^{2d} 729, 734-735 (7th Cir. 1983).

In the present case Respondent was ambushed most egregiously by General Counsel withholding documents which only one witness could testify about until after that witness (Stafford Brignac) was dismissed and made unavailable for examination by Empire's counsel. (TR pp. 108-110).

To place this due process violation in context, the Board must realize that Empire was performing janitorial, custodial *and maintenance* work under a single contract with Orleans Parish School Board ("OPSB") (Joint Exhibit 7). At all times the only RFP or contract which Empire was aware of by the prior contractor, GCA, was for janitorial and custodial work (Joint Exhibit 1). On

this basis it clearly appeared that while Empire was performing maintenance work under the successor contract, GCA had not provided this service to OPSB.³

This understanding is reflected in the Joint Exhibits which were prepared and submitted by the parties in the proceeding. Nowhere in the Joint Exhibits did General Counsel reveal the existence of a second contract purportedly between GCA and OPSB for maintenance work. (See TR pp. 6-7) Rather, General Counsel withheld the second maintenance contract and various e-mails, invoices, and other documents related to that maintenance contract.⁴

As the transcript reflects General Counsel had, prior to the hearing, pre-marked his exhibits with exhibit stickers. At the outset of his case, General Counsel introduced the pre-marked formal papers as General Counsel Exhibits 1(a) through 1(n) (TR p. 10). General Counsel then proceeded to call witnesses and present his case.

During General Counsel's examination of the Union's State Director, Rose Hines, the following occurred:

Mr. Miragliotta: Your honor, I'm going to be showing Respondent counsel as well as the witness and Your honor what is being marked as General Counsel's Exhibit 3. We're actually skipping General Counsel's Exhibit 2 for the time being.⁵ (emphasis added). TR p. 45

General Counsel also then proceeded to show and question Ms. Hines about General Counsel Exhibit 4 (TR p. 47). Next, General Counsel examined Ms. Hines about General Counsel

³ This distinction is clearly relevant in any discussion of "substantial continuity" under the Board's Successor Corporation doctrine.

⁴ General Counsel withheld these documents throughout the pre-trial preparation and discussion of Joint Exhibits, Stipulations and despite Empire's objection at the outset of the hearing to the pre-trial discovery rules which barred it from knowing General Counsel's witnesses or exhibits (TR p. 7).

⁵ Exhibit 2(a) - 2(j) are the maintenance contract exhibits in dispute. The statements make it clear all documents were pre-marked by General Counsel.

Exhibit 5 (TR p. 53). At no time during Ms. Hines' testimony did General Counsel reveal to Empire, or provide to Empire, Exhibits 2(a) - (m).⁶

Next General Counsel called a witness names Stafford Brignac. Due to NLRB rules, Empire had no knowledge of this witness, or who he was, prior to him being called as a witness. General Counsel examined Mr. Brignac, who had worked for GCA, very briefly (TR pp. 90-93). The only purpose of Brignac's testimony was to try to prove that GCA did maintenance work for OPSB. General Counsel did not show Brignac any documents but asked him, in general terms, to confirm that GCA performed various types of maintenance work for the OPSB.⁷ At no time in the brief examination by General Counsel did he mention the existence of a second contract for some maintenance work. Mr. Brignac was the only witness called by General Counsel who testified about alleged maintenance work by GCA under the OPSB contract.

On cross-examination (unaware of the content of Exhibits 2(a)-2(m)) Empire elicited that Mr. Brignac had lost his job due to the loss of contracts by GCA, including losing the OPSB contract to Empire (TR p. 94). Unaware of the existence of the second maintenance contract, which General Counsel had withheld, Empire then presented Mr. Brignac with the GCA employee roster that General Counsel had previously produced as General Counsel Exhibit 5 during Ms. Hine's testimony (and represented as a roster of GCA employees immediately prior to Empire commencing work for OPSB) and asked him to name the GCA employees on it who he claimed had performed the alleged maintenance work to which he had just testified (TR pp. 94-95). He stated that the list provided by General Counsel as GC#5 only contained the names of individuals

⁶ As noted by the Administrative Law Judge, Ms. Hines was excused as a witness claiming that she had to be hospitalized that very afternoon. See Administrative Law Judge's opinion p. 13; TR pp. 107-108. As of her dismissal Exhibit 2 had not been produced. There was also no humane way, based on her claim of imminent hospitalization, to force her to go to her office to obtain documents that had been requested by Empire in its subpoena.

⁷ In fact, undersigned counsel objected to Mr. Brignac testifying about alleged maintenance work on the basis of a lack of foundation. (TR pp. 91-92) General Counsel said nothing about an alleged second maintenance contract and the Administrative Law Judge overruled the objection (TR p. 92).

who had worked as custodians, and there was no one on it who performed maintenance work for GCA (TR pp. 94-95). Both lines of question cast doubt on Brignac's credibility.

General Counsel asked no follow-up questions to Mr. Brignac. As a result, the following occurred:

Judge Carter: Alright, Mr. Brignac, you're finished with your testimony, so at this point you are free to go. (TR p. 98)

General Counsel then called another witness, a custodian names Ms. Bartholemew (TR pp. 99-107). Ms Bartholemew testified about her job duties as a custodian.

It was only at that point, after Ms. Bartholemew's testimony, that General Counsel sought to introduce Exhibits 2(a) through 2(m) into the record (TR p. 108).

The *in globo* type exhibit is approximately 200 pages in length with print on the front and back of each page and it purports to include a 32 page set of specifications for "routine maintenance" by GCA for OPSB (GC#2k), invoices labeled GC#2(l) to 2(m) for maintenance work, a 29 page Agreement between GCA and OPSB for "Routine Maintenance Services" (GC#2f) and a separate 32 page RFP from 2011 for "Routine Maintenance" for OPSB (GC-2g) with various addendums (GC-2h-j). In other words, these documents were clearly relevant for examining and cross examining Mr. Brignac concerning the alleged maintenance work performed by GCA for OPSB, a critical issue in this case that related directly to the issue of whether there was substantial continuity with the work performed by Empire.⁸

When General Counsel sought to introduce these documents into evidence, Empire objected (TR pp. 109-110). In particular, the following objection was placed on the record:

MR. TUSA: Yeah, Your Honor. Let me object to the introduction of these documents, which I'm guessing are approximately one inch

⁸ Pre-trial production of these documents might also have allowed for a narrowing of issues on maintenance work. The Board will note that Empire stipulated to the items which were similar in janitorial work after a side by side analysis of the two contracts covering janitorial work.

thick. The pages are not numbered, so I don't know how many pages there are, but they are front and back, so I'm assuming it's several hundred pages which we are receiving for the first time.

As indicated in our off the record discussion, we've already had one witness testify that General Counsel called, Mr. Brignac [sic] to talk about the maintenance work [and] . . . we had not been provided a copy of these documents which relate to the maintenance contract.

We would ask, pursuant to Your Honor's suggestion,⁹ that they call him and see if he would make himself available tomorrow. I do not know whether I will need to question him or not since I just got these documents.

I object to the inclusion of these documents in evidence because we were not provided a copy prior to today. We're being provided a copy right now. It's fundamentally unfair. I think it's due process issue, both substantive and procedurally. And it's trial by ambush and I object to it. (TR pp. 109-110)

There were also more strenuous objections in off the record discussions (see reference on TR p. 109 Line 14). In the on the record objection, Empire specifically cited due process concerns and also the duplicity of waiting until after Mr. Brignac had been dismissed to introduce the exhibits (TR pp. 109-110).¹⁰

The Administrative Law Judge was clearly bothered, at the time, by General Counsel's actions as indicated in the transcript:

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 give 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

⁹ This was a suggestion by the Administrative Law Judge to General Counsel made off the record prior to the on the record objection. The transcriber failed to record the initial objection and exchange.

¹⁰ The objection was never waived and preserved Empire's objection to this *in globo* set of documents.

decide how to proceed, but it's [your] responsible to make sure he's available¹¹ (Transcript p. 111).

General Counsel had sought to defend his conduct by arguing as follows:

You Honor, in response to making Mr. Brignac available, the General Counsel had subpoenaed Mr. Brignac. He has fulfilled his subpoena at this point. It would be incumbent upon Respondent to subpoena him at this point.¹² (TR p. 111)

Thereafter, in several off the record¹³ and on the record discussions General Counsel advised that he tried several times but was unable to contact Mr. Brignac. This was pursuant to the Administrative Law Judge's instructions to General Counsel "to make sure he's available." (TR p. 111). So, for example, after the lunch break, General Counsel, reported:

Just to update on an earlier issue about the availability of the witness, Mr. Stafford Brignac . . . the General Counsel has attempted to contact him at this time and have been unable to leave a voicemail for him (TR p. 117).

The Administrative Law Judge again admonished General Counsel to "see if you're able to reach him and see what his availability is." (TR pp. 117-118) On at least one more occasion General Counsel advised they were unable to reach him and off the record claimed Brignac, who had been subpoenaed, was not happy about being subpoenaed, indicating he would probably be uncooperative.

In his written opinion the Administrative Law Judge ignores the on the record objection of Empire to the introduction of Exhibits 2(a)-2(m) (TR pp. 109-110). Instead, the Administrative

¹¹ Although poorly transcribed, the Administrative Law Judge told General Counsel "...it's your responsibility to make sure he is available."

¹² Recall that Empire was unaware of Mr. Brignac's existence prior to his testimony and that General Counsel's statement occurred more than half way through the hearing. The attempted justification is non sensical.

¹³ There are references to these off the record discussions. See TR p. 109 Line 14 "As indicated in our off the record discussion...."; TR p. 117, Line 17 "And off the record I gathered you...."

Law Judge disingenuously decides that Empire waived its objection by not recalling Hines and/or Brignac to discuss the exhibits.¹⁴ (page 14)

Considering that Empire was (a) unaware of the maintenance contract (Exhibit 2) until it was produced during the hearing; (b) unaware of the existence of Mr. Brignac prior to his appearing to testify; and (c) General Counsel's repeated statements that he was unable to reach Mr. Brignac, there is no conceivable way Empire could have "recalled" Mr. Brignac to the stand. The Administrative Law Judge imposes a futile act as the basis for preserving Empire's objections to the exhibit.¹⁵ There is no basis in law or equity for a judge to impose an additional burden on a party to preserve an objection which has been clearly stated on the record, much less the futile one of calling a witness who it is undisputed was unavailable!¹⁶

2. Whether the Administrative Law Judge erred in applying the successor bar doctrine and in finding, as a matter of fact and law, that Empire could not prove the Union no longer had majority support.

The Administrative Law Judge posed the question concerning the Union's loss of majority support in this way:

Can Respondent avoid its obligation to bargain with the Union as a successor employer by asserting that the Union lost the support of a majority of employees in the bargaining unit? (p. 19)

The Administrative Law Judge does not really answer its question but instead dodges it by misapplying the Board's decision in *UGL-UNICCO Service Co.*, 357 NLRB 801 (2011).

The Board decision in *UGL-UNICCO* reinstated the successor bar doctrine *solely* to instances where the successor corporation "acts in accordance with its legal obligation to

¹⁴ There is no indication that Ms. Hines knew anything about these exhibits so it is unclear why the Administrative Law Judge mentioned Ms. Hines. Regardless, Hines was in the hospital.

¹⁵ When an objection is futile but the substance was made known to the Court, a formal objection need not be made. See *Carter v. Chicago Police Officers*, 165 F^{3d} 1071 (7th Cir. 1998). Of course, in this case Empire did make a formal objection which the Administrative Law Judge claims was waived by not recalling a witness Empire had no ability to recall.

¹⁶ If the Board agrees with the Administrative Law Judge at the least the matter should be remanded for testimony of Mr. Brignac. See *NLRB v. Keystone Pretzel Bakery*, 696 F^{2d} 257 (3rd Cir. 1982).

recognize an incumbent representative of its employees.” (p. 801). This decision is premised, the Board noted, “on the principal that ‘a bargaining relationship once rightfully established must be permitted to exist and function for a reasonable period in which it can be given a fair chance to succeed.’” (p. 801). Its focus is on giving the parties the chance to negotiate once the employer has recognized the Union.

In this case, *UGL-UNICCO*, supra, is inapplicable. Empire *never recognized* Local 100 as the representative of its employees. Indeed, the Administrative Law Judge specifically recognized that the Board's decision in *UGL-UNICCO* was inapplicable writing:

Although the Board explained that successor bar rule applies when a successor employer has abided by its legal obligation to recognize an incumbent union, I find that the successor bar also applies in a case like this one, where Respondent did not abide by its legal obligation to recognize the Union. (p. 20).

The unilateral extension of *UGL-UNICCO* by the Administrative Law Judge to a situation that is completely inopposite, where the Employer *did not* recognize the Union, makes no legal sense. The Administrative Law Judge justifies the extension, which theoretically would now apply in every instance (e.g. when the employer recognizes the Union or when the Administrative Law Judge concludes the employer should have recognized the Union), eliminates the ability of an employer to ever challenge majority support, by ignoring the actual facts and relying upon mere conjecture and social policy. In particular, the Administrative Law Judge bases his extension of the successor bar doctrine on his supposition that this Union was in a “vulnerable position” and “Union members might be inclined to shun the Union because they have a new employer.” (p. 20)

In contrast to this theoretical construct, the evidence showed that the Union had in fact lost majority support *before Empire ever began work on the OPSB contract*. Indeed, the evidence

supporting the loss of majority support was contained in sworn affidavits General Counsel had obtained from the Union's representative, Rosa Hines.

Ms. Hines, the Union's state director, was purposely evasive throughout her testimony. She could not recall how many employees were in the bargaining unit when it was first certified (TR p. 63). She could not even give an approximation of how many were in the bargaining unit at any time (TR p. 64). She initially could not recall if the bargaining unit members she represented worked at locations other than the OPSB schools (TR p. 64). Then, she dodged and feigned not understanding the question, requiring the Administrative Law Judge to try to explain it (TR p. 65).

In specific reference to the total number of bargaining unit members working under the OPSB contract with GCA Services as of January 28, 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). If Mr. Brignac, another GCA witness, is to be believed, there were at least four (4) more individuals performing some type of maintenance, bringing the total GCA workers under the OPSB contract, in January 2015, to 42 (Transcript p. 96).

Ms. Hines' initially testified that 20 or 25 of her guesstimate of 30 were Union employees, but her March 2015 affidavit submitted under oath to the NLRB indicated that as of January 28, 2015, several days before Empire commenced work on the OPSB contract, there were *only twelve (12) employees* working under the OPSB contract who were actually Local 100 members¹⁷ (Transcript p. 69). Simple math reflects that 12 out of 38 or 42 is significantly less than 50%.¹⁸

¹⁷ There is nothing in the record showing that any of these twelve were actually hired by Empire. (TR p. 73)

¹⁸ 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 it strains credibility to think her memory in March 2016 was somehow better than in March 2015 when she signed her affidavit

And Ms. Hines conceded that “none of the former GCA employees at OPSB continue to pay their dues.”¹⁹ (Transcript p. 74). In *McDonald Partners Inc. v. NLRB*, 331 F^{3d} 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.’”

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.²⁰ 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^{3d} 292, 297 (6th 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 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^{2d} 1137 (6th Cir. 1984); *Lee Lumber and Bldg. Material Corp. v. NLRB*, 117 F^{3d} 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^{2d} 130 (2nd Cir. 1982). The burden to rebut that presumption is on the employer. The Union

under oath (Transcript pp. 70-71). She then claimed on the witness stand 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 that there were only 12 union members (Transcript p. 71).

¹⁹ She also did not know how many of the 12 union members were hired by Empire (TR p. 73).

²⁰ As the Court noted in *Resilient Floor Covering Pension Trust Fund Board of Trustees v. Michael’s Floor Covering, Inc.*, 801 F^{3d} 1079, 1091-1092 (9th 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.”

in this case was certified in 2012 (TR pp. 44, 63). As a result, it was permissible for Empire to rebut the presumption of majority support for the Union.

In this case Empire carried that burden by showing, through the documents produced and Ms. Hines' testimony, that there was an actual loss of majority support before Empire ever hired a single employee for the OPSB contract. The Administrative Law Judge ignored this evidence and erroneously applied the successor bar doctrine to try to achieve an end not supported by the evidence.

3. Whether the Administrative Law Judge erred in concluding that Empire met the substantial and representative complement rule as of February 2, 2015 and had the duty to bargain with the Union on that date.

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^{2d} 623, 628 (9th 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, 2015.²¹ Of this number, 20 quit or were fired between February 4, 2015 and April 28, 2015. 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,²² 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.

In his opinion, the Administrative Law Judge attempts to dismiss Mr. Hernandez's undisputed testimony by erroneously stating that “Hernandez and one other manager occasionally stepped in to handle custodial or janitorial assignments.” (page 11, emphasis added). But the claim that this was only done “occasionally” is complete conjecture. (TR pp. 130-131). In fact, Mr. Hernandez testified it occurred “quite a few times.” (TR p. 130).

²¹ Only one person was hired after April 7, 2015. So 55 people were hired between February 2 and April 7, 2015.

²² If the Court uses April 7, 2015 as a cut off, there were 19 separations within 9 weeks.

The only evidence in the record concerning the time period when the company was substantially and representatively staffed was from Dayle Hernandez and Charlie Lusco. Both testified that it was the latter part of April before this point was met.²³ (Transcript pp. 33, 130). In particular, Mr. Lusco testified that staffing up for a job “sometimes takes you two to three months....” (TR p. 33). Mr. Hernandez, who oversaw the hiring of janitorial and custodial workers, was more specific stating that he was “substantially staffed up”, “probably around late April.” (TR p. 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.²⁴

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 and is consistent with Mr. Hernandez's testimony that he and another manger had to fill in “quite a few times.” 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.

²³ Lending credibility to this testimony was the fact that there was turnover after April 2015, but Empire believed it was substantially staffed by the latter part of April.

²⁴ Recall that GCA staffed its janitorial staff with 38 janitors as of January 28, 2015 (GC#5). Empire only had 26 janitors on February 2, 2015 when the Administrative Law Judge claims it was substantially staffed. (p. 10).

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 and the Administrative Law Judge erred in selecting February 2, 2015, the first day of the contract, as the proper date.

4. Whether the Administrative Law Judge erred in articulating the proper standard and in concluding that there was substantial continuity in the work performed by Empire with that previously performed for OPSB by GCA Services.

In his opinion the Administrative Law Judge conceded that the services performed by Empire under its OPSB contract were not identical to those previously provided by GCA. In fact the Administrative Law Judge wrote:

To be sure, Respondent and GCA Services did not provide identical services to the OPSB. First, there are some minor differences in the contracts the Respondent and GCA Services had with the OPSB, such as: Respondent not performing any landscaping work (GCA Services did); Respondent performing work in two more OPSB facilities (Benjamin Franklin Elementary Extension – Lodge and Carrollton Court House) than GCA Services; and Respondent having slightly different guidelines than GCA Services to follow when proposing major maintenance work (work that would cost more than \$5,000). (Compare FOF, Section B, D (describing GCA Services' agreements with the OPSB) with FOF, Section E, G (describing Respondent's agreement with the OPSB).) Second, Respondent brought in its own supervisors and maintenance employees, and provided its new custodial employees with a different uniform to wear and some different cleaning products to use. (FOF, Section H). (p. 16)

The Administrative Law Judge also indicated in a footnote that:

There is no dispute that Respondent and GCA Services are separate entities. The companies do not have any officers, directors or owners, and Respondent did not purchase any equipment or supplies from GCA Services after the OPSB selected Respondent's proposal to provide custodial janitorial and maintenance services. (Jt. Exhibit 13 (pars. 4-6, 14); see also Tr 21-23.) (page 8).²⁵

²⁵ The Administrative Law Judge also engaged in conjecture when he wrote: "Indeed the GCA Service employees that Respondent hired understandably viewed their job situations as essentially unaltered." (p. 17). There is no transcript citation for this comment because there is nothing in the record to support such an *in globo* statement.

While the Administrative Law Judge considered these differences minor, the facts, fully considered, show otherwise. Further, the Administrative Law Judge ignored relevant aspects of the Successor Corporation case law to achieve a desired result.

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
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 weighed 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 weighed 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.²⁶ p. 275

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, 2015.²⁷ The Joint Stipulation between the parties contains the following undisputed facts:

13. Nowhere in the OPSB request for proposal or bid documents did it indicate that there was a Collective Bargaining Agreement between GCA and Local 100.

²⁶ 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.

²⁷ February 5, 2015 is the date of the letter Ms. Rosa Hines mailed to Empire announcing Local 100's representation of GCA workers.

This was buttressed by the testimony of Charlie Lusco who testified Empire was not advised of the Union's representation of the GCA workers.²⁸ (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 weighed against finding that Empire was a successor corporation.

E. 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

²⁸ Mr. Lusco testified that on other jobs he has routinely been advised when existing workers were represented by a union (Transcript p. 26).

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.

F. The Maintenance and Repair aspect of the Empire OPSB contract.

Although General Counsel produced a witness, Mr. Brignac,²⁹ 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 (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 out³⁰ (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

²⁹ 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).

³⁰ 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.

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.

G. 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:

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, weighed heavily against finding substantial continuity between the work of Empire and GCA Services and support the conclusion that the Administrative Law Judge was wrong in his application of the substantial continuity aspect of the successor corporation doctrine.

5. Whether the Administrative Law Judge erred in concluding the bargaining unit at issue was essentially the same.

In a footnote the Administrative Law Judge wrote as follows:

I find that the bargaining unit at issue here (all custodial and maintenance employees employed by Respondent at OPSB facilities in the New Orleans metropolitan area) is an appropriate bargaining unit. (See FOF, Section II(I).) In making this finding, I note that it does not matter in this context that the bargaining unit at issue here is smaller than GCA Services' bargaining unit (which included custodial, maintenance and landscaping employees who worked for GCA Services in both OPSB and non-OPSB school worksites in the New Orleans metropolitan area). (page 18 N 20).

In contrast to this quick dismissal of the issue the record reflected that the GCA bargaining unit contained employees who worked throughout the entire Parish of Orleans at numerous locations other than for the OPSB. (TR pp. 66-67). Indeed, General Counsel in its Complaint alleged the bargaining unit was the entire Parish of Orleans (GC #1). This led to an objection by undersigned counsel (TR pp. 7-8). General Counsel then conceded that "the scope of the remedy" sought only related to "employees at the Orleans Parish School Board contract" (TR p. 9).

Besides being a much larger bargaining unit encompassing job locations throughout Orleans Parish, the GCA bargaining unit also contained employees who performed landscaping work for OPSB and elsewhere (TR pp. 80-81). It was undisputed that Empire employees did not perform landscaping work (TR p. 29). GCA's bargaining unit also contained workers with job titles of "Gym Attendant" and "Restroom Attendant"(GC Exhibit #5). Empire did not have either of these job positions (Joint Exhibit 10).

While most of GCA janitorial workers were full-time employees (GC #5), most of Empire's janitorial workers were part-time (Joint Exhibit 10). Empire used "floaters" to fill in for missing or absent employees (TR p. 32). GCA did not employ any floaters (GC #5).

As a result, there were significant differences in the type of jobs, the work locations, and the terms and conditions in the GCA bargaining unit and the proposed Empire bargaining unit.

The Administrative Law Judge erred in dismissing these differences and concluding that the bargaining units were essentially the same.

6. Whether the Administrative Law Judge erred in ignoring the substantial change in the composition of the members of the alleged bargaining unit.

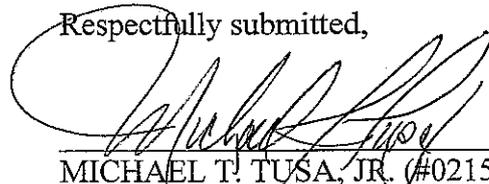
Mr. Hernandez testified that as of the date of the Administrative hearing only 5 former GCA employees remained employed by Empire. (TR pp. 131-132). The Administrative Law Judge acknowledged this fact (page 11, N 14). Nevertheless, the Administrative Law Judge ordered Empire to bargain with a Union over a bargaining unit which clearly does not currently have majority support.

While the lack of majority support clearly existed prior to Empire commencing work on the OPSB contract (See Section 2), it is obvious it no longer has majority support now. The change in the work force composition is so significant that it should defeat any attempt to impose union representation on the individuals in the putative bargaining unit. The Administrative Law Judge erred in dismissing this information as irrelevant.

CONCLUSION

For the reasons set forth herein, the Administrative Law Judge's decision should be reversed.

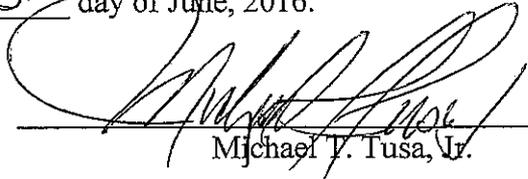
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CERTIFICATE OF SERVICE

I hereby certify that a copy of the above and foregoing pleading has been forwarded to all counsel of record by electronic mail, this 3rd day of June, 2016.



Michael T. Tusa, Jr.