

**COUNSEL FOR THE GENERAL COUNSEL'S
ANSWERING BRIEF TO RESPONDENT'S EXCEPTIONS TO THE
ADMINISTRATIVE LAW JUDGE'S DECISION**

Andrew T. Miragliotta, Counsel for the General Counsel (General Counsel) in the above case, submits this Answering Brief to the National Labor Relations Board (Board).

STATEMENT OF THE CASE

On March 16, 2016, the Honorable Administrative Law Judge Geoffrey Carter (ALJ) presided over a hearing in this matter in New Orleans, Louisiana. On May 16, 2016, the ALJ issued his Decision and Order (ALJD) in which he concluded Empire Janitorial Sales & Service, LLC (Respondent), violated Section 8(a)(5) and (1) of the Act by failing and refusing to recognize and bargain with Local 100 United Labor Unions (the Union) as the exclusive collective-bargaining representative of the bargaining unit since February 5, 2015. On June 3, 2016, Respondent filed Exceptions to the ALJD excepting to the ALJ's conclusions of law. General Counsel submits this Answering Brief to Respondent's Exceptions within fourteen days of the last date on which exceptions and any supporting briefs were due pursuant to the Board's Rules and Regulations §102.46(d)(1).

RESPONSE TO RESPONDENT'S EXCEPTIONS

Respondent Exception 1: Whether Respondent was denied due process by NLRB procedures and General Counsel 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.

Answer 1: The Administrative Law Judge properly determined respondent was not denied due process.

In Respondent's first exception, Respondent argues the ALJ denied Respondent due process by utilizing standard Board procedure and by admitting GC-2¹ into evidence over Respondent's objections at the hearing. Respondent has repeatedly argued the Board's Rules violate Respondent's due process rights because Respondent did not have access to a list of General Counsel's witnesses or exhibits in advance of a hearing. Here, the ALJ, consistent with long-established precedent, appropriately held the Board's Rules do not violate the due process clause of the Fifth Amendment to the United States Constitution because the rules do not impose a duty upon the General Counsel to provide trial information to a respondent. *Finley Hospital*, 362 NLRB No. 102, slip op. at 1 fn. 2 (2015).

Respondent further excepts to the ALJD admitting GC-2 into the evidentiary record as an exhibit. The documents comprising GC-2 were admitted at hearing, absent the testimony of a witness, pursuant to Rule 901(1) and 902(4) of the Federal Rules of Evidence as self-authenticating certified copies of public records. Notably, Respondent fails to cite any legal precedent whatsoever that would support disqualifying the exhibit. To the contrary, the Board has held that "the responsibility of 'making a record' supporting one's position not only devolves upon the parties, but particularly devolves upon them during the hearing and before the record is closed." *Otis Elevator*, 255 NLRB 235, 239-40 (1981). Here, tasked with the responsibility to make sure "the requisite evidence has already been placed in the record," General Counsel introduced GC-2 during its case in chief. *Id.* Respondent has manufactured this exception because GC-2 proves definitively that Respondent's legal predecessor, just like Respondent,

¹ References to the Exhibits of the General Counsel and Joint Exhibits will be designated as "GC- #" and "J- #" respectively, with the appropriate number or numbers for those exhibits. References to the transcript in this matter are designated as "Tr. at." References to the ALJD are designated as "ALJD at." Arabic numerals after "Tr. at" or "ALJD at" are references to a specific page of the transcript or decision, and Arabic numerals following page citations reference specific lines of the page cited.

performed maintenance services for the same customer as Respondent. Respondent did not and could not introduce any evidence during its case in chief to refute this, and failed to support its position that the work of Respondent and its predecessor differed “before the record is closed.” *Otis*, 255 NLRB at 239-40.

Respondent relatedly also excepts to the admission of GC-2 after the ALJ’s dismissal of witness Stafford Brignac. While Respondent asserts it had “no ability” to recall any witnesses, as the ALJ notes in his decision, Respondent did not request the ALJ recall witnesses or continue the trial to recall witnesses at a later date if unavailable. Under the Board’s Rules and Regulations §102.31, Respondent also had the power to apply for subpoenas “requiring the attendance and testimony of witnesses and the production of any evidence.” Respondent did not exercise this right to issue subpoenas ad testificandum for any witnesses. Again, here, Respondent provides no legal support to suggest the introduction of this evidence after earlier testimony would result in a due process violation.² Here, Respondent does not deny it had adequate notice of a hearing and the power to apply for subpoenas to produce either witness testimony or documents³, and accordingly, Respondent’s due process rights have not been violated. *See Chang v. D.C. Dep’t of Regulatory & Consumer Affairs*, 604 F.Supp.2d 57, 64 n. 4 (D.D.C.2009) (“If an individual receives adequate notice and the opportunity to be heard in a

² Respondent, in a footnote, curiously cites *NLRB v. Keystone Pretzel Bakery*, 696 F.2d 257 (3rd Cir. 1982) to stand for the proposition that “if the Board agrees with the Administrative Law Judge” then the matter should at least “be remanded for testimony.” In *Keystone Pretzel*, after the Board petitioned for an enforcement order of its ruling, the United States Court of Appeals for the Third Circuit remanded on the employer’s request under Section 10(e) of the Act because membership in the bargaining unit in the matter had changed. *Id.* at 259. Not only is Section 10(e) of the Act inapplicable to this current proceeding, but in *Keystone Pretzel*, on remand, the Board did not hold an additional evidentiary hearing or remand to the Administrative Law Judge to take any further testimony.

³ Respondent attempted to issue a subpoena duces tecum to the Charging Party Union, but admitted at hearing that it may not have been properly served. Tr. at 58, 1-10.

meaningful manner, [his] procedural due process rights have not been violated, even though [he] believes the decision that results from that opportunity to be heard to be incorrect.”)

Respondent also fails to explain how the dismissal of Brignac and subsequent of entering GC-2 into evidence prejudiced Respondent in any way. “In an administrative proceeding, proof of a denial of due process requires a showing of substantial prejudice.” *United States v. Lober*, 630 F.2d 335, 337 (5th Cir. 1980). General Counsel called Brignac, a former supervisor of Respondent’s predecessor, to testify about the work his company performed. Respondent conducted a full and complete cross examination of Brignac following his testimony concerning the scope of work his employer performed. Tr. at 93-98. Respondent cannot show prejudice to its case in this exception simply because General Counsel offered GC-2, documents supplied by a neutral party and public entity, the Orleans Parish School Board, after Brignac was excused. Admission of GC-2 was not dependent on Brignac’s testimony. Rather, GC-2 consists of self-authenticating public documents. Respondent has failed to demonstrate, or even speculate, about what Brignac could testify about the exhibit that prejudiced Respondent by its omission, and failing to do so renders Respondent’s argument well short of demonstrating denial of due process. *See Adair v. Solis*, 742 F.Supp.2d 40, 67-68 (D.C. Cir. 2010) (finding no due process violation when the objecting party failed to demonstrate how the alleged procedural deficiencies prejudiced his right to be heard in a meaningful manner and present a case). Accordingly, because Respondent fails to cite any precedent that would disqualify GC-2 as inadmissible and fails to show substantial prejudice by admitting the exhibit into evidence, the Exception should be rejected in its entirety.

Respondent Exception 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.

Answer 2: Respondent cannot show the Union lost majority support.

The ALJ determined Respondent's argument that it did not bargain with the Union because the Union lacked majority support "fails as a matter of law," citing *UGL-UNICCO Service Co.*, 357 NLRB 801 (2011). ALJD at 20. The Board in *UGL-UNICCO* held when a new employer assumes an operation and conditions of successorship are satisfied, the new employer has a duty to bargain with a union that represented its predecessor's employees, and the Board will bar any challenge to the union's representative status for a reasonable period of time. 357 NLRB at 808. The Board added that a "reasonable period of time" was "no less than 6 months after the parties' first bargaining session and no more than 1 year." *Id.* at 809.

Respondent excepts to the ALJD's reliance on *UGL-UNICCO* by asserting that under the ALJ's logic, an employer would never be able to challenge majority support. However, the Board has recognized an employer's ability to challenge majority support, if, "*at the time of its withdrawal of recognition,*" it has "a good-faith uncertainty that the union had the support of a majority of unit employees." *Williams Energy Services*, 340 NLRB 764, 764-65 (2003) (emphasis added). Here, Respondent failed to recognize the Union whatsoever without any evidence to support a good-faith uncertainty that the Union lacks majority support. Respondent now argues, over a year and a half after its violation, that the Union lacked support simply because it believes a majority of bargaining unit members did not pay union dues. However, "[m]ajority union support, the Board has made clear, is not to be confused with majority union membership, as there is no necessary correlation between the number of employees who join a

union and pay dues and the number of employees who favor union representation.” *Virginia Sportswear*, 226 NLRB 1296, 1301 (1976). Based on this, Respondent did not have evidence to support a good-faith uncertainty that the Union lacked majority support when it committed the violation of failing and refusing to recognize the Union in February 2015.

Respondent’s argument that the ALJD lacks logic because an employer would be unable to challenge majority support is contradicted by Board law, spelling out the circumstances when a challenge to majority status could be sustained. There is no basis to fault the ALJ’s ruling that Respondent failed to meet its evidentiary burden that the Union did not have majority support by the employees; Respondent lacks the evidence to meet its burden to show the Union lost majority support. Accordingly, Respondent’s second Exception should be rejected in its entirety.

Respondent Exception 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.

Answer 3: Respondent had a substantial and representative complement of employees on February 2, 2015.

The ALJ properly determined Respondent employed a substantial and representative complement of employees, on February 2, 2015, as Respondent provided a full range of operations and services on that date. ALJD at 18. Respondent excepted to the ALJD and argued again, as it has earlier, that Respondent was not substantially staffed until April 2015. However, Respondent had hired enough GCA employees to ensure there was sufficient staff to complete its janitorial and maintenance services on day one of operations. Tr. at 123, 6-8. Respondent does not and cannot contend otherwise, as its Operations Manager admitted during the hearing there was “no break” in services to the customer. Tr. at 122-23. “In deciding when a ‘substantial and representative complement’ exists in a particular transition, the Board... studies ‘whether the job

classifications designated for the operation was in normal or substantially normal production.””
Sullivan Industries, Inc., 302 NLRB 144, 148 (1991) (citing *Premium Foods Inc. v. NLRB*, 709 F.2d 623, 628 (9th Cir. 1983)). Here, as Respondent admitted it was in normal or substantially normal production on its first date of operations, the ALJ appropriately found that Respondent employed a substantial and representative complement of employees on February 2, 2015.

In its exceptions, Respondent again cited as evidence that because its Operations Manager performed bargaining unit work in its first months of operations that it cannot have been sufficiently staffed. However, the same manager also testified that at present, over a year after Respondent began operations, he is *still* performing custodial duties at the schools. Tr. at 134, 5-7. Moreover, Respondent completes full services and operations with fewer non-managerial employees than when it started. Tr. at 134, 10-14. Accepting Respondent’s exception here would mean that Respondent would remain understaffed in perpetuity and would never reach a substantial and representative complement of employees. Instead, the Board, like the ALJ, should not be persuaded by Respondent’s argument that it was gradually building up operations until April 2015.

While Respondent further argues that a high rate of turnover means Respondent was not sufficiently staffed, this exception is neither supported by the facts nor the case law. Although there was a high rate of turnover at Respondent’s facilities, the record evidence shows whenever one employee separated from Respondent, Respondent immediately hired a replacement, keeping staffing levels stable. J-10. Staffing in Respondent’s first several months of operations increased only from about 34 to 38 custodians, an increase which the ALJ appropriately determined could “hardly be said to be substantial.” ALJD at 18, 24. Moreover, Respondent

again fails to provide any legal precedent which supports its argument that high turnover warrants pushing back the date of a finding of a substantial and representative complement of employees. Rather, the Board law only considers whether the job classifications required for operation “were filled or substantially filled,” whether the operation “was in normal or substantially normal production,” and whether there is an expected substantial expansion. *Fall River Dyeing & Finishing Corp. v. NLRB*, 482 U.S. 27, 49 (1987). Respondent does not address the controlling case law because Respondent’s arguments in no way refute the evidence that it was a successor: the operation was in substantially normal production, the job classifications were substantially filled, and Respondent had no expected substantial expansion.⁴ Accordingly, the Board should reject Respondent’s third exception and adopt the ALJ’s ruling that Respondent hired a substantial and representative complement of employees on February 2, 2015.

Respondent Exception 4: Whether the Administrative Law Judge erred in articulating the proper standard and in concluding that there was a substantial continuity in the work performed by Empire with that previously performed for [the customer] by [Respondent’s predecessor.]

Answer 4: The Administrative Law Judge articulated the proper standard and correctly applied it to determine there was substantial continuity between the work performed by Respondent and its legal predecessor.

The ALJ relied upon and quoted the seminal Board successorship case *Fall River Dyeing & Finishing Corp. v. NLRB*, 482 U.S. 27 (1987), to determine Respondent was a legal successor to its predecessor. The ALJ properly articulated the factors upon which the Board relies and applied them in finding: 1) the business of the employers is the same (*compare* GC-2(e) with tr. at 15-16); 2) the same employees were performing the same jobs (*compare* GC-7 and J-10) in custodial work (J-13 (¶ 19)) and maintenance work (*compare* J-7, at 7, and tr. at 92-93); and, 3)

⁴ In fact, Respondent has about nine to ten *fewer* employees now than it did when it was staffing in February 2015.

using the same production processes (tr. at 103-05) for the same customer. The Board has looked at other criteria such as whether “the new employer uses the same plant” and whether “the same or substantially the same workforce is employed.” *Border Steel Rolling Mills*, 204 NLRB 814, 815 (1973). Here, Respondent’s employees work in the same buildings where its predecessor’s bargaining unit employees worked, as well as several of the same vacant sites. Tr. at 48-49; 91; 123 at 9-23; J-2; GC-2(m). Twenty-one of Respondent’s thirty non-managerial employees worked for Respondent’s predecessor immediately prior to the transition between the companies. J-10. Based on the foregoing, the ALJ appropriately found the factors the Board assesses when determining if there is substantial continuity in the enterprises overwhelmingly demonstrate Respondent is a legal successor under Board law. General Counsel and Respondent’s Counsel both discussed at length in its Post-Hearing Briefs to the ALJ the *Fall River* factors and their application to the facts on the record. In its Exceptions, Respondent rehashes the same arguments the ALJ rejected, but a brief response is warranted here given Respondent’s repeat arguments.

Respondent’s fourth exception attempts to add weight to factors that differ between the companies, such as the employers having different equipment, different owners, and different supervisors. The ALJ noted these differences and *still* found substantial continuity between the enterprises. ALJD at 16-17. The Board has explicitly held “not all of these criteria need to be present to warrant a finding of continuation of the employment industry.” *Border Steel* 204 NLRB at 815. The Board has routinely found employers to be legal successors absent several criteria. For instance, while Respondent has argued that Respondent’s decision not to acquire the assets of its predecessor means it is not a successor, the Board and the courts have found assets need not be acquired to make an employer a legal successor. *Harter Tomato Products Co. v.*

NLRB, 133 F.3d 934 (D.C. Cir. 1998); *NLRB v. Houston Building Service*, 936 F.2d 178 (5th Cir. 1991). In *Harter Tomato*, the court explicitly stated it would be a mistake to rely upon one single factor, rather than the multi-faceted test used by the Supreme Court. 133 F.3d at 938.

General Counsel does not deny that Respondent is a different company than its predecessor, did not purchase assets from its predecessor, and hired different supervisors than its predecessor. However, these factors pale in comparison to the irrefutable facts that both Respondent and its predecessor provided the same custodial and maintenance⁵ services to the same customer, in the same facilities, utilizing a majority of the same employees who were performing the same job functions using the same production processes. Here, as argued previously and determined by the ALJ, the vast majority of factors upon which the Board relies to determine successorship weigh heavily towards finding that Respondent is a successor to its predecessor. Therefore, Respondent's fourth exception should be rejected.

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

Answer 5: The Administrative Law Judge appropriately found the bargaining unit to be an appropriate unit.

Respondent states twice in its exceptions that the "Administrative Law Judge erred in concluding the bargaining unit at issue was essentially the same." The ALJ never stated that the bargaining unit was "essentially the same," and here, Respondent erroneously misinterpreted and conflated language from the case law to create a new and unsupported successorship test. In *Fall River*, the United States Supreme Court stated that one factor in the Board's successorship test is "whether the business of both employers *is essentially the same.*" *Fall River*, 482 U.S. at 43

⁵ Respondent attempts to argue that the maintenance specifications for Respondent and its predecessor were not the same, but fails to point out any significant differences. The testimony of Stafford Brignac and GC-2 both show substantial continuity between the maintenance services provided to the same customer.

(emphasis added). In *Border Steel*, the Board stated that it may also consider whether “the same or substantially the same workforce is employed.” 204 NLRB at 815. Neither case requires a finding that “the bargaining unit is essentially the same,” as Respondent argues in its Exceptions.

To the contrary, the Board has explicitly held that “[i]t is well established that the bargaining obligations attendant to a finding of successorship are not defeated by the mere fact that only a portion of a former union-represented operation is subject to ... transfer to a new owner.” *Simon DeBartelo Group*, 325 NLRB 1154, 1155 (1998). In other words, the bargaining unit does not have to be “essentially the same,” as Respondent contends. The Board in *Simon DeBartelo* elaborated that the different bargaining units are immaterial “so long as the unit employees in the conveyed portion constitute a separate appropriate unit and comprise a majority of the unit under the new operation.” The ALJ appropriately determined that “all custodial and maintenance employees employed by Respondent at Orleans Parish School Board facilities in the New Orleans Metropolitan Area” is an appropriate bargaining unit, and Respondent did not offer any evidence or case law to suggest otherwise. The ALJ also found based on the evidence that the majority of the appropriate unit was comprised of employees of Respondent’s predecessor. Accordingly, because Respondent erred in its application of the case law and the precedent supports a finding of successorship, the Board is urged to reject Respondent’s fifth exception.

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

Answer 6: The substantial change in composition of the bargaining unit is immaterial.

Respondent argues in its Exceptions that because Respondent’s bargaining unit now only contains five employees previously employed by Respondent’s predecessor that it somehow means Respondent did not violate the Act by refusing to bargain with the Union in February

2015. Respondent notes General Counsel does not dispute this fact and the ALJ acknowledged this in his ALJD. Respondent fails, however, to provide any legal support whatsoever as to why this fact is relevant. As the ALJ found, Respondent violated the Act in February 2015 by failing and refusing to bargain with the Union. While Respondent argues the Union “no longer has majority support now,” Respondent fails to consider in its Exceptions that the passage of time and the absence of a Union (caused by Respondent’s blatant violations) erodes employee support. *See, e.g., Asseo v. Pan American Grain Co. Inc.*, 805 F.2d 23, 26-27 (1st Cir. 1986) (“[e]mployee interest in a union can wane quickly as working conditions remain apparently unaffected by the union or collective bargaining”). Here, the Board should reject Respondent’s sixth exception both because it is irrelevant as a matter of law and so that Respondent may not benefit from its violations of the Act.

CONCLUSION

Based on the forgoing, General Counsel submits the record evidence supports the ALJ’s findings and conclusions with regards to Respondent’s refusal to recognize and bargain with the Union. Therefore, General Counsel respectfully urges the Board to reject Respondent’s Exceptions in their entirety.

Dated at New Orleans, Louisiana, this 24th Day of June, 2016.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on June 24, 2016, I electronically filed a copy of the foregoing Counsel for General Counsel's Answering Brief to Respondent's Exceptions to the Administrative Law Judge's Decision with the National Labor Relations Board and forwarded a copy by electronic mail to the following:

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