

UNITED STATES OF AMERICA  
BEFORE THE  
NATIONAL LABOR RELATIONS BOARD REGION 5

THESIS PAINTING, INC.

and

INTERNATIONAL UNION OF PAINTERS AND  
ALLIED TRADES, AFL-CIO, DISTRICT  
COUNCIL 51

CASE NOS. 5-CA-167137

**RESPONDENT THESIS PAINTING'S  
REPLY BRIEF IN SUPPORT OF EXCEPTIONS**

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## **I. ARGUMENT**

### **A. The Fourth Circuit Having Upheld The Board's Certification Of The Union, The Respondent Hereby Withdraws Its Claim That The Board Lacks Jurisdiction In This Case.**

In a *per curiam* opinion issued on April 7, 2017, the U.S. Court of Appeals enforced the Board's Order requiring Respondent Thesis to recognize the Union as the certified bargaining agent of Respondent's employees. *Thesis Painting, Inc. v. NLRB*, No. 16-1871 (4th Cir. Apr. 7, 2017). Accordingly, Respondent is withdrawing its claim that the Board lacks jurisdiction in this case. However, the Court was not presented with and did not address the question whether Respondent was required to engage in collective bargaining with the Union prior to laying off employees in December 2015, when Respondent was "certainly faced with an economic emergency requiring prompt action." (ALJD 4:4). As further explained below, the General Counsel has failed to justify the ALJ's finding of an independent violation of Section 8(a)(5) in this case, and the Complaint should be dismissed.

### **B. Contrary To The General Counsel's Answering Brief, The Economic Circumstances that Confronted Respondent in December 2015 Were Plainly "Compelling" Enough To Relieve Respondent of Any Duty To Bargain..**

The General Counsel's Answering Brief improperly attempts throughout to minimize the compelling nature of the economic catastrophe that befell Respondent in December 2015. The General Counsel substitutes speculation and uninformed statements about Respondent's business for the undisputed testimony of Respondent's owner and financial advisor, to reach the wrong result.

At the outset, the General Counsel ignores the context in which separate events took place over the preceding year, creating a false equivalence between manageable work

fluctuations that occurred early in the year, on the one hand, and the disastrous loss of work that threatened immediate bankruptcy of a much weakened company at the end of the year. Thus, the General Counsel cherry picks payroll data from GC Ex. 13, citing swings in work amounting to “hundreds of hours” (GC Br. at 13-14), while failing to observe that the Company was substantially larger early in the year, with more projects under contract and more resources available to it to weather the fluctuations in work. As demonstrated by the “bucket reports” from throughout 2015, the number of jobs available to assign to workers early in the year was significantly greater than in December 2015. (GX 12). As a result, earlier in the year Respondent had a reasonable expectation that new work on the horizon would allow it to keep employees occupied (though there was employee attrition then as well) (GC Ex. 14). But in December 2015 that was no longer the case. The economic circumstances became so much more dire in December, as Respondents’ witnesses testified, because there was nothing new coming into the pipeline, unlike in previous months, and the sudden loss of work was greater as a percentage of total work flow than could possibly sustain the number of employees working at that time.<sup>1</sup>

In addition, the General Counsel’s Brief ignores the impact of the Company’s weakened condition in December 2015, when confronted with the dire economic emergency, as compared to the substantially greater financial resources available to the Company to manage the work fluctuations earlier in the year. When the temporary work slowdowns occurred earlier in the

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<sup>1</sup> For these reasons, the General Counsel’s brief, like the ALJ, is wrong to declare that the Respondent could have met its financial crisis in December 2015 by simply reducing employee work hours. (GC Br. at 12). To the extent that the General Counsel claims such work reductions were an established practice based on a single reported incident in September, the claim overlooks the General Counsel’s own exhibit 14, which reports 14 layoffs during the previous two years, including three that took place in the spring of 2015. Contrary to the General Counsel’s brief (at 16, n.11), Respondent is entitled to rely on GC Ex. 14 as evidence of the past practice of layoffs, notwithstanding Respondent’s objection to the admission of this exhibit, because the ALJ chose to admit and rely on the document. ALJD at 3, n.2. Neither the ALJ nor the General Counsel is free to rely on one (disputed) entry in a document as evidence supporting a violation of the Act while ignoring the 14 entries that refute such a violation.

year, the Company had not yet exhausted its line of credit; its owners had not yet mortgaged their residence in favor of the bank; the Company had not yet cut management salaries; the Company had not yet accepted a high interest loan from a lender of last resort; the Company had not yet suffered net losses of hundreds of thousands of dollars; and the Company had not yet been informed that one missed bank payment would lead to bankruptcy. All of these things happened only during the months leading up to December 2015. (Tr. 107-08, 1122, 131-132).

Based upon these undisputed facts, there is no reason to doubt Respondent's uncontradicted testimony that its owners and financial advisor reasonably believed bankruptcy to be imminent in December 2015, absent immediate action, due to the combination of the unforeseeable magnitude of the loss of work that month, the absence of any new work to replace it, and the dramatically weakened financial condition of the Company. The General Counsel's brief provides no basis on which to conclude that Respondent's reasonably held belief that bankruptcy was imminent in December 2015, and that immediate layoffs were required to save the Company, was in any way not credible. (GC Br. at 26).

Under these circumstances, the law is clear, contrary to the General Counsel's brief, that Respondent was excused from bargaining with the Union because it was faced with "extraordinary events which are an unforeseen occurrence, having a major economic effect [requiring] the company to take immediate action." *RBE Electronics*, 320 NLRB 80 (2004), citing *Hankins Lumber Co.*, 316 NLRB 837, 838 (1995), quoting *Angelica Healthcare Services*, 284 NLRB 844, 852-53 (1987). See also *Sundstrand Heat Transfer, Inc. v. NLRB*, 538 F.2d 1257 (7th Cir. 1976), citing *Mike O'Connor Chevrolet-Buick-GMC Co., Inc.*, 209 NLRB 701, 703 (1974).

None of the cases relied on by the General Counsel dealt with a company facing sudden,

unforeseeable and imminent bankruptcy, a distinguishing feature which the General Counsel ignores. Thus, in the case of *Ardit Co.*, 364 NLRB No. 130 (2016), the employer's loss of a single contract was deemed merely to be "unfortunate" by the Board and there was no testimony that the Company faced bankruptcy as a result. The same was true of the case on which *Ardit* relied, *Farina Corp.*, 310 NLRB 318, 321 (1993), where the employer *turned a profit* at the end of the year in which it claimed compelling circumstances. *See also Becker Group, Inc.*, 329 NLRB 103, 111 (1999) (no imminent bankruptcy at issue). The circumstances in the present case were dramatically worse than in any of the foregoing cases on which the General Counsel relies.

Equally mistaken is the General Counsel's argument that the few days between Respondent's discovery of the loss and delay of its major projects and the December 8 layoffs was somehow sufficient time for Respondent to engage in the futile act of negotiating with the Union about the inevitable layoffs. (GC Br. at 17-18). In this regard, the General Counsel incorrectly claims that Respondent's owners made the final decision to lay off employees on December 3, the same day they found out about the cancellation of the Hensel Phelps project. *Id.* To the contrary, Ms. Spyridakis testified that the final layoff decision took into account the postponement of the Latitude project which she did not learn about until December 4. (Tr. 121). Even then the layoff decision required some time to plan and schedule, so the earliest the decision could have been reached was December 5, a mere three days before the layoff occurred on December 8.

While the Board has never established a "magic number" of days short enough to constitute "immediate" action, surely three days meets any reasonable standard of immediacy, particularly where a credible threat of bankruptcy is imminent. Even without the threat of bankruptcy, the timing of the post-election layoffs in *Sundstrand Heat Transfer, Inc.*, 221 NLRB

544, 547 (1975), *enf'd.*, 538 F.2d 1257 (7th Cir. 1976) is instructive and supports Respondent's defense here. In that case, a major customer unforeseeably cancelled its business on April 9, leading to layoffs that began on April 19 and were expanded on April 26 and April 30 – a span of 10 days to three weeks in which the recently-elected Union was neither notified nor consulted. Neither the Board nor the court found any duty to bargain over the layoff decision, finding instead that the economic circumstances were sufficiently compelling to fall within the recognized exception to the “peril” doctrine of *Mike O'Connor*. *Id.*, 538 F.2d at 1259.<sup>2</sup> Clearly the present facts even more strongly support application of the compelling circumstances exception, because Respondent was confronted with imminent bankruptcy and suffered more catastrophic economic loss, relative to its size, than Sundstram (or any other employer claiming the exception) did.

The General Counsel's brief speculates that the Union could have offered alternatives to the layoffs that would have avoided bankruptcy. (GC Br. at 25-26). Such speculation cannot substitute for evidence, however. It remains significant that the General Counsel did not ask either of the union witnesses what alternatives they would actually have proposed, and the Union never offered or even suggested that it would have offered any alternative to the layoffs that occurred. In reality, as Respondent's owner testified, none of the alternatives suggested by the General Counsel would have accomplished anything to help Respondent survive its financial crisis. Instead, the time wasted in meeting with the Union in December 2015 would only have distracted the Company's owners from their primary mission of saving Respondent from

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<sup>2</sup> As further noted by Acting Chair Miscimarra in *Ardit*. 364 NLRB No. 130, slip op. at 11, n.5, the compelling circumstances defense should take on greater force in the *Mike O'Connor* context because parties cannot be certain whether they are dealing with a union who is a properly certified majority representative.

bankruptcy.<sup>3</sup>

Respondent's opening brief asserted that no previous Board decision had rejected the compelling circumstances defense in a case such as this one, combining the sudden loss of such large contracts, combined with the small size and weakened condition of the Company, and the fact that the Company's owners reasonably believed they were facing imminent bankruptcy. The General Counsel's answering brief confirms that there is no such case, since he surely would have identified it if one existed. The General Counsel's and ALJ's rejection of the compelling circumstances defense here, if upheld, would eliminate the defense entirely as a practical matter, contrary to longstanding Board precedent.

To the extent that the General Counsel contends that no employer can claim the compelling circumstances defense unless they are already in bankruptcy, the Board cases cited in the General Counsel's brief create no such overbroad rule, and if they are so interpreted they must be overruled as unlawfully departing from the Board's own precedent. Such a contention is contrary to the case law discussed above and in Respondent's opening brief, and defies common sense as well. It can do little good to force employers into bankruptcy before relieving them of the duty to bargain, when what is needed for the good of both employers and employees is to allow businesses the freedom to take immediate action necessary to avoid imminent bankruptcy. Therefore, contrary to the General Counsel's brief, Respondent must be found to have properly asserted and proved the defense under the unique circumstances of this case.<sup>4</sup>

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<sup>3</sup> The General Counsel appears to fault Respondent's success in avoiding bankruptcy, asserting that the Company's ability to stay in business after December 2015 somehow belies the need for the layoffs. But the whole point of the compelling circumstances doctrine is to give employers the ability to react to dire economic news quickly enough to avoid bankruptcy and stay in business. The Company's fast action in temporarily laying off employees enabled it to survive the economic crisis, albeit on a reduced scale, and to subsequently recall the laid off employees when sufficient business returned to do so.

<sup>4</sup> The General Counsel's brief (at 21-22) also fails to justify his untimely amendment of the Complaint, or

**C. Contrary to the General Counsel, Respondent Properly Argued To The ALJ That The Union Waived Its Right To Bargain Over The Effects Of The Layoffs.**

Respondent properly excepted to the ALJ's finding that the Union did not waive its right to bargain over the layoff decision or its effects. The General Counsel's claim that Respondent failed to make this argument prior to the ALJ's decision is refuted by the ALJ decision itself, which responded to the Company's contention. (ALJD at 4). In any event, Respondent clearly made the waiver argument in its Post-Hearing Brief, which the General Counsel ignores. (Resp. Post-Hearing Br. at 6). It remains undisputed that the Union at no time requested bargaining over either the layoff decision or its effects. The General Counsel wrongly attempts to support the ALJ's finding that "the company had made it clear long before December that it would not bargain with the Union about anything." (ALJD 4, n.4). The General Counsel cites multiple Union demands for bargaining, but ignores the fact that only one such demand was sent before December 2015, and at no time did the Union request bargaining over the layoffs or their effects, even though the Union was fully aware of the layoffs when they occurred. Under such circumstances, contrary to the General Counsel's brief, the ALJ should have dismissed the effects bargaining claim for the reasons stated by the Board in *Berklee College of Music*, 362 NLRB No. 178 (2015).

Finally, the General Counsel does not even attempt to defend the ALJ's error in failing to specify that any remedy for the alleged effects bargaining violation should be limited in

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the ALJ's finding that Mr. Diaz was laid off based entirely on a disputed exhibit (GCX 14). The General Counsel's attempt to deny that the exhibit was acknowledged to be inaccurate rings hollow, where the hearing transcript shows that another worker, Freddy Robles-Flores was improperly included on the list even though he resigned. The General Counsel at that time withdrew his claim that Robles was laid off and the ALJ accepted that the list was not accurate as to Robles. (Tr. 96-97). The General Counsel also presented no testimony that Diaz was laid off as part of the reduction in force alleged in the Complaint.

accordance with the Board's decision in *Transmarine Navigation Corp.* 170 NLRB 389 (1968).

For this additional reason, the ALJ's decision should be reversed.

### **CONCLUSION**

For all of the foregoing reasons, Respondent Thesis is entitled to an Order dismissing the Amended Complaint with prejudice, and/or judgment in its favor, together with an award of attorneys' fees in such amounts as are authorized by the Equal Access to Justice Act.

Respectfully submitted,

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## **CERTIFICATE OF SERVICE**

I hereby certify that copies of the foregoing Reply Brief in Support of Exceptions are being served on the following by email and/or U.S. mail this 11th day of April, 2017:

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