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UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

REGION 20, SUBREGION 37

OPERATING ENGINEERS LOCAL UNION  
NO. 3,

Charging Party,

v.

KAUAI VETERANS EXPRESS CO.,

Respondent.

CASE NOS. 20-CA-193339  
20-CA-203829  
20-CA-204839  
20-CA-209177

RESPONDENT KAUAI VETERANS  
EXPRESS CO.'S REPLY BRIEF TO  
CHARGING PARTY'S BRIEF IN  
SUPPORT OF THE HONORABLE  
DICKIE MONTEMAYOR'S DECISION  
AND ANSWERING BRIEF OPPOSING  
RESPONDENT'S EXCEPTIONS;  
CERTIFICATE OF SERVICE

**RESPONDENT KAUAI VETERANS EXPRESS CO.'S  
REPLY BRIEF TO CHARGING PARTY'S BRIEF IN SUPPORT OF THE  
HONORABLE DICKIE MONTEMAYOR'S DECISION AND ANSWERING BRIEF  
OPPOSING RESPONDENT'S EXCEPTIONS**

## I. INTRODUCTION

The Counsel for the Charging Party (“CCP”) seems to have attended a different hearing with a different transcript and exhibits because many of the facts upon which she relies are not in this record. Accordingly, her legal analysis is flawed.

## II. THE CCP CREATES HER OWN FACTS.

The CCP apparently believes the Administrative Law Judge’s (“ALJ”) statement of facts (Decision at 3-8) is faulty, or at least inadequate. Otherwise, there would have been no need for the CCP to submit a six-page statement of facts. CCP Answering Brief (“AB) at 2-7. The CCP’s characterization of the facts is incorrect. She disingenuously creates the impression that as of December 26, 2016, Respondent made no effort to provide the Union with the requested information and that Respondent’s attorney Jeffrey Harris (“Harris”) simply would not appear at the scheduled arbitration. CCP Answering Brief (“AB”) at 3. Rather, on December 26, 2016, Harris asked the Union’s attorney Sean Kim (“Kim”) for an opportunity to “discuss what information you are requesting” and to reschedule the hearing due to Harris’ medical recovery, which Kim offered to do in an email earlier that morning. GC 12. On April 13, 2017, Harris told Kim he was “still trying to follow up” on the information requests. GC 23.

The CCP adds to the confusion regarding who created the September document (GC 26)<sup>1</sup>. RB at 35. The CCP states, “According to [Respondent’s President Stanley] Morinaka [“Morinaka”], it was his **Office Manager Haku Rivera** [“Rivera”] who **created** the [September document] **and presented** it to the drivers at a regular meeting in Morinaka’s office.” CCP at 4

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<sup>1</sup> The CCP suggests the fact that the September document appears to have been created on September 1, 2016 is meaningful because that is the day of the layoff at issue in the pending grievance. CCP at 4. However, there is no testimony or other evidence tying this document to the layoff, and the Union did not fax the grievance to Respondent until September 6, 2016. GC 7.

(emphasis added). Rivera is not Respondent's Office Manager, and Morinaka did not say that he is. Tr. 175:14-15. While Morinaka testified about the September document, he mistakenly believed it was a monthly safety meeting document. Tr. 214:2-7 ("See, on this document here the law states that we have to do class drivers and machine – this is our monthly meeting that Haku [Rivera] holds...."). Morinaka later testified he does not know who created the September document. Tr. 246:4-12. Morinaka also testified he does not know what meeting the September document was presented at or how the September document was presented to the workers. Tr. 238:11-13, 239:5-7.

The CCP also mischaracterizes Respondent's Office Manager Susan Taniguchi's ("Taniguchi") involvement with the January 2017 petition. Without any record evidence of the time frame, the CCP states "[s]ometime in the two weeks between [January 12, 2017] and January 26, 2017, Taniguchi provided instructions to James Kanei, 3<sup>rd</sup> ["Kanei"] about how to withdraw from the union, including advising him 'on holding a meeting...' with the other drivers." CCP AB at 5. While Taniguchi received a message from Harris on January 12, 2017 regarding withdrawal from the Union<sup>2</sup>, there is no evidence Taniguchi relayed the information from that message to Kanei. Further, the message does not contain any reference to a meeting. GC 1(z), Taniguchi Declaration. The CCP conveniently omits the key fact that Kanei asked Taniguchi, "what do we do, how can we get [out of the Union]." Tr. at 257:13-15.

Like the ALJ, the CCP erroneously states the January 2017 petition mentions only union

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<sup>2</sup> The message was: (1) the key date for withdrawing from the Union is July 1, 2017; (2) at that time, KVE employees may give Mr. Morinaka a petition signed by a majority of the employees in the bargaining unit saying they want to get out of the Union; and (3) KVE can respond to requests for information on how to word the petition to decertify the Union, but should not initiate, promote, or substantially assist the circulation or signing of the petition. GC 1(z), Taniguchi Declaration.

membership status. CCP AB at 5; RB at 31.

Finally, the CCP claims Respondent changed its dues deductions and trust fund contributions practices without any prior notice to the Union or an opportunity for the Union to bargain over them. CCP AB at 7. Respondent gave notice on February 1, 2017. GC 24.

**III. THE ALJ FAILED TO PROVIDE ANY CREDIBILITY DETERMINATIONS IN VIOLATION OF THE ADMINISTRATIVE PROCEDURES ACT.**

The CCP incorrectly contends there is “no rejected testimony at issue in this situation,” and thus credibility determinations are not necessary. CCP at 8 n5. The ALJ obviously rejected much of Morinaka and Kanei’s testimony yet failed to explain why. The ALJ’s failure to provide credibility determinations violates the Administrative Procedures Act and necessitates remand. Respondent’s Reply to Counsel for the General Counsel’s Answering Brief (“RR-CGC”) at 3.

**IV. THE PETITION’S LANGUAGE COUPLED WITH JAMES KANEI’S TESTIMONY ESTABLISH THE PETITION IS LEGALLY SUFFICIENT.**

The CCP creatively yet incorrectly argues the introductory language on the January 2017 petition, which states the employees “no longer desired to be a part of the ... Union” is not actually part of the petition<sup>3</sup> and should not be considered by the Board.<sup>4</sup> CCP AB at 13. There is zero evidence the employees who signed the petition did not also see the introductory paragraph to Harris. Kanei provided undisputed testimony<sup>5</sup> that he showed the entire contents of the petition (the second page of GC 24) to all the employees who signed. Tr. 248:16-24, 251:6-21; GC 1(z), August 17 Kanei Declaration.

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<sup>3</sup> The CCP seems to have concocted this argument based on the ALJ’s pure speculation about the authenticity of the petition document. Decision at 9 n.2.

<sup>4</sup> The CCP admits “no longer desired to be a part of the ... Union” may show that the employees no longer desired to be represented by the Union under *Pacific Coast Supply LLC v. NLRB*, 801 F.3d 321 (D.C. Cir. 2015). CCP AB at 13.

<sup>5</sup> Again, the ALJ provided no credibility determination regarding Kanei’s testimony.

The CCP focuses on the clerical error in the last paragraph (CCP AB at 14) without mentioning each of the nine bargaining unit<sup>6</sup> employees who signed the petition also proactively checked the box marked “Leave,” located directly above the paragraph with the clerical error. GC 24 at p. 2. There is nothing ambiguous about that. *See Sofco Inc.*, 268 NLRB 159, 159-60 (1983)<sup>7</sup> (employees expressing desire to “do away with the union, get away from the union and be on our own” constituted sufficient objective evidence to support a good-faith and reasonably grounded doubt of the union’s continued majority support). *See also* RR – CGC at 5.

#### V. RESPONDENT’S WITHDRAWAL OF RECOGNITION WAS NOT TAINTED.

The September 1, 2016 document did not taint the entire withdrawal process. CCP AB at 15. The ALJ could not even determine who drafted the document, there is undisputed evidence the *employees* initiated the idea of dissatisfaction with the Union (Tr. 256:13-16)<sup>8</sup>, and the document is not a petition relied upon for decertification or withdrawal of recognition. RB at 35-36.

The CCP claims Taniguchi is an agent because she received a declaration from Respondent’s counsel Christine Belcaid (“Belcaid”) for Respondent’s employee Carlito Pigao (“Pigao”) and then emailed Belcaid back the signed declaration<sup>9</sup>. CCP AB at 9. Besides the fact

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<sup>6</sup> The CCP incorrectly argues the ALJ failing to consider whether freight truck drivers are properly included in the bargaining unit is irrelevant and was already settled by stipulation. CCP AB at 16 n.9. The stipulation simply named the employees who worked in the job classifications of truck driver, tractor trailer driver, tandem dump truck driver, freight truck driver, and/or mechanic – not whether the bargaining unit consists of all those classifications. Tr. 29-35. **Whether freight truck drivers are properly included in the bargaining unit does have a determinative impact on back-dues and trust fund contribution calculations.**

<sup>7</sup> Although this is a pre-*Levitz* decision, it is instructive regarding objective evidence.

<sup>8</sup> Kanei testified that the employees had been dissatisfied with the Union for at least one year prior to the January 26, 2017 meeting – thus at least since January 26, 2016, which his long before September 2016.

<sup>9</sup> Belcaid’s testimony does not specifically state that Taniguchi emailed her back Pigao’s September 8, 2017 declaration (GC 1(z), Pigao’s Declaration). Because the CGC’s question was vague, Belcaid may have been referring only to the August declarations. Tr. at 161:18 – 162:10.

that this does not show that Taniguchi was a conduit between management and employees (but possibly rather just a conduit between counsel and employees), there is no evidence that Taniguchi asked Pigao to sign the declaration. Plainly, there is no evidence showing Taniguchi is Respondent's agent. RB at 21-24; RR-CGC at 6-7.

Even if Taniguchi were an agent, the ALJ and the CCP misstate the record regarding the petition drafting process and misapply the law regarding ministerial assistance. RB at 24-31. Despite Kanei's clear and extensive testimony on his initial petition drafting process (RB at 24-25), the CCP exclaims Taniguchi "actually drafted the language of the petition!". CCP AB at 11. The CCP ironically suggests Kanei's testimony is not credible, yet she states no credibility determinations are necessary. She also seems fixated on the fact that Taniguchi created a table for Kanei to contain the signatures of the employees who already told him they no longer desired to be represented by the Union. CCP at 11, 12. Contrary to the CCP, Taniguchi did not tell Kanei "to get *all* of the signatures!". CCP AB at 12. Rather, when Taniguchi reviewed Kanei's first draft petition that contained a list of all the names of employees who had met the previous day and who verbally agreed they no longer wanted to be represented by the Union (Tr. at 250:4-6), Taniguchi added the "boxes" and said, "well, we need a signature to follow that name." Tr. at 258:19-25. Taniguchi did not tell Kanei he needed to get *all* of the signatures; she merely was informing him that, in her opinion, he would need to get a signature from all of the employees who had already verbally agreed they no longer wished to be represented by the Union.

## **VI. RESPONDENT DID NOT ENGAGE IN UNLAWFUL POLLING.**

The CCP claims Respondent did not comply with the *Johnnie's Poultry* safeguards. CCP AB at 18-19. The CCP claims Belcaid testified that "she has no idea how the declarations were actually presented to the drivers, other than Kanei." CCP AB at 19. However, Belcaid testified, "I do have some understanding based on the conversation with Mr. Kanei about how he

presented it to [them]. And I also had instructions in my email [about how to present it to the other workers].” Tr. 165:17-20. Belcaid complied with the *Johnnie’s Poultry* safeguards, and even if she did not, the declarations were not a poll and were constitutionally protected petitioning. RB at 38-40.

**VII. RESPONDENT DID NOT UNLAWFULLY CEASE MAKING TRUST FUND CONTRIBUTIONS AND DEDUCTING/REMITTING UNION DUES.**

Respondent does not concede it ceased making trust fund contributions and deducting dues without notice to the Union or an opportunity to bargain. CCP AB at 19. Respondent gave notice on February 1, 2017. GC 24. The Union had five months to request bargaining over the changes, yet it did not. Perhaps the CCP states Respondent’s defenses regarding a grievance and the favored nations provision “do not even deserve a response” because she could not give a truthful response that would not injure the Union.

**VIII. RESPONDENT PROVIDED THE UNION WITH ALL THE INFORMATION IT REQUESTED REGARDING BARGAINING UNIT EMPLOYEES RELEVANT TO THE GRIEVANCE AT ISSUE.**

The CCP erroneously states Respondent never expressed its position that much of the information requested is not relevant to the grievance at issue. CCP AB at 16, 17 Respondent expressed this in a March 2, 2017 letter to Kim. GC 19. Likely because the information is not relevant, the CCP has yet to demonstrate the information regarding non-bargaining unit employees is relevant, supported by objective evidence, and that it would be of use to the Union in carrying out its statutory duties and responsibilities. Any outstanding information requests are either not relevant to the grievance, are regarding non-bargaining unit employees for which the Union failed to meet its relevance burden, or relate only to the Union’s general bargaining representative duties, which ended July 1, 2017. RB at 41-47.

**IX. CONCLUSION**

For the reasons stated above and those in Respondent's Brief in Support of Exceptions, the Board should remand the withdrawal of recognition issue and render a decision concluding Respondent did not violate the Act regarding the other three issues.

DATED: Honolulu, Hawaii, July 23, 2018.

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**CERTIFICATE OF SERVICE**

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I HEREBY CERTIFY that on this date a copy of *Respondent Kauai Veterans Express Co.'s Reply Brief to Charging Party's Brief In Support of the Honorable Dickie Montemayor's Decision and Answering Brief Opposing Respondent's Exceptions* was electronically filed with the National Labor Relations Board Office of Executive Secretary and served via e-mail upon:

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