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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
COUNSEL FOR THE GENERAL
COUNSEL'S ANSWERING BRIEF TO
RESPONDENT'S EXCEPTIONS;
CERTIFICATE OF SERVICE

**RESPONDENT KAUAI VETERANS EXPRESS CO.'S
REPLY BRIEF TO COUNSEL FOR THE GENERAL COUNSEL'S ANSWERING
BRIEF TO RESPONDENT'S EXCEPTIONS**

I. INTRODUCTION

The Counsel for the General Counsel's ("CGC") Answering Brief mainly regurgitates the Administrative Law Judge's ("ALJ") Decision without specifically addressing Respondent's arguments as to why the Decision is wrong.

II. RESPONDENT’S EXCEPTIONS SHOULD NOT BE DISREGARDED.

The CGC asserts Respondent’s exceptions include no record citations.¹ (CGC Answering Brief (“AB”) at 2-3). The only authority which the CGC cites in urging the Board to reject the exceptions is a 33 year old decision: *Bonanza Sirloin Pit*, 275 NLRB 310 (1985). In that decision, the Board rejects the exceptions because the respondent failed to submit *a brief* “alleging with any degree of particularity what error, mistake, or oversight the judge committed or on what grounds the findings should be overturned.” *Id.* Where a party files exceptions that do not contain record citations but also files a brief, the Board uses its discretion to determine whether the exceptions *and the brief, together*, “substantially comply with the applicable rules.” *Outokumpu Stainless USA, LLC*, 365 NLRB No. 127, 2017 NLRB LEXIS 442, at *1 n.1 (Sept. 7, 2017). Where the exceptions do not contain record citations but the brief does, the Board declines to strike the exceptions. *Id.* (citing *Zurn Nepco*, 316 NLRB 811, 811 n.1 (1995)).

Here, Respondent submitted a 48-page brief containing a multitude of record citations and explaining in detail the errors the ALJ committed and on what grounds the findings should be overturned. As such, the Board should not reject the exceptions. As to the CGC’s complaint that Respondent “generally objects to the ALJ’s Remedy, Order, and Appendix,” Respondent simply asserted those portions of the Decision are unwarranted based on the preceding exceptions. Even if the objection were technically an exception subject to Section 102.46(b)(1), the specific “questions of procedure, fact, law or policy” to which that objection is taken are set forth in the preceding exceptions and brief.

¹ The CGC does not ask the Board to reject Respondent’s Brief in Support of Exceptions, only the Exceptions.

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

The CGC attempts to rescue the ALJ from his credibility determination blunder by stating Respondent proves the ALJ actually made credibility determinations by pointing to two sentences in which the ALJ used the words “credibility determinations” and “credible testimony.” (CGC AB at 3). Obviously, just mentioning those words without providing any analysis does not make them credibility determinations.

Republican Board member Peter C. Schaumber explained why simply using a credibility boilerplate violates the Administrative Procedures Act and necessitates remand:

Section 557(c) of the Administrative Procedures Act, 5 U.S.C. § 557, specifies that “all decisions . . . shall include a statement of . . . (A) findings and conclusions, and the reasons or basis therefore, on all the material issues of fact, law or discretion presented on the record.” While the burdens on our administrative law judges are significant, and blanket introductory demeanor statements plainly more expedient, such statements simply do not allow for meaningful review because they do not articulate “the reasons or basis” for any specific credibility determination. Moreover, frequent use of such credibility “boilerplate,” which is effectively unreviewable, may undermine the perceived fairness and integrity of the Board’s hearing procedures.

Atlantic Veal & Lamb, Inc., 342 NLRB 418, 422 (2004).

Even if the lack of credibility determinations does not require the Board to reject the ALJ’s findings entirely, it does require the Board to assess the cold record. *Don Moe Motors, Inc.*, 237 NLRB 1525, 1525 n.1 (1978). In *Don Moe Motors, Inc.*, the Board did not remand the decision because of the faulty credibility determinations; however, the ALJ in that case, *unlike here*, at least explained he discredited certain witnesses because their testimony was either in conflict with the testimony of credible witnesses or because it was itself unworthy of belief. 237 NLRB at 1526 n.1. Although James Kanei (“Kanei”) was the only witness to regarding the January 2017 petition and provided *undisputed* testimony, the ALJ did not rely on much of his testimony in the Decision. However, the ALJ did not provide any explanation for this.

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

Although the ALJ chose to ignore the most important portion of the petition, it undisputedly states the signatory employees, who made up a majority of the bargaining unit², “no longer desired to be a part of the Operating Engineers Local Union #3.” GC Exh. 24 at p. 2. The CGC quibbles Respondent relies on an analysis by the ALJ, and not the Board, in *Anderson Lumber* that this language means “no longer desired to be represented by the Union.” CGC AB at 4-5. One does not need a Board analysis to see that “no longer desire to be part of the union” has a different meaning than “desire to cease membership.” Nevertheless, the *Anderson Lumber* ALJ based her analysis on a Board decision: *Green Oak Manor*, 215 NLRB 658 (1974), in which the Board found that employee statements that they “did not want any part of the union” meant that they employees “no longer desired the union to represent them.”³ *Anderson Lumber*, 360 NLRB 538, 543 (2014).

As the CGC notes, another portion of the petition states the employees desire to cease membership. No longer desiring to be a part of, or to be represented by, the Union is not mutually exclusive of ceasing Union membership. Rather, no longer being represented by the

² The CGC 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. CGC AB 4 n.5. 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.**

³ The CGC points out that in *Liberty Bakery Kitchen, Inc.*, 366 NLRB No. 19, n.1 (Feb. 16, 2018), the Board emphasized “that the document the Respondent relied on in withdrawing recognition contained no statement of the employees’ desires concerning union representation.” CGC AB at 5 n.7. The CGC neglected to mention the “petition” was actually just a 2-page copy of *Description of Representation Case Procedures in Certification and Decertification Cases*, with no language of desire – regarding union membership or union representation. *Id.*, slip op. at 5.

Union means the employees will no longer be Union members.

Of course, the clerical error in the petition's last paragraph creates ambiguity. Given this, the ALJ was tasked with reasonably interpreting the petition in light of all objective evidence to determine whether Respondent could have reasonably interpreted the petition to establish that a majority of bargaining unit employees no longer supported the union. *Wurtland Nursing & Rehab. Cntr.*, 351 NLRB 817, 818-19 (2007).

Kanei's testimony regarding what he – as the person who solicited the signatures on the petition – discussed with the employees is admissible, *objective* evidence to prove the petition's purpose, given the language of the petition is ambiguous. *See Wurtland Nursing & Rehab. Cntr.*, 351 NLRB at 817-18 (explaining that the Board may rely on “extrinsic evidence about the petition solicitation process,” which includes the testimony of the employee who drafted the petition and of employees who signed the petition to determine the purpose of the petition and ultimately the meaning of any ambiguous language on the petition)⁴; *Highlands Reg'l Med. Cntr.*, 347 NLRB 1404, 1404 (2006), *enf'd*, 508 F.3d 28 (D.C. Cir. 2007)⁵ (To determine the purpose of the petition and ambiguous language on the employee petition, the Board considered evidence of what the soliciting employees told the other employees the purpose of the petition was.); *Pomptonian Food Svc.*, 22-CA-086029 et al., 2014 NLRB LEXIS 186, at *16 (ALJ Decision, Mar. 7, 2014) (considering testimony of employee who prepared the petition regarding its purpose and what she told the other employees when she asked them to sign it).

⁴ The CGC suggests that the Board should not apply *Wurtland* because it was decided before *Anderson Lumber*, which stands for the proposition that *subjective*, after-acquired evidence of loss of majority support is irrelevant. CGC AB at 6. However, *Anderson Lumber* does not overrule, analyze, or even cite to *Wurtland*, and testimony regarding the petition solicitation process is clearly *objective*, not subjective. Further, *Liberty Bakery Kitchen, Inc.*, 366 NLRB No. 19 (2018) relies on *Wurtland*.

⁵ The *Anderson Lumber* decision relies on this case. 360 NLRB at 544.

Kanei provided the following admissible, objective, **undisputed** testimony⁶ as follows regarding the petition solicitation process:

- On January 26, 2017, the day before most of the employees signed the petition, he and the employees who signed the petition met. Tr. 249:16-21.
- At the meeting, “**We talked about**, you know, Kauai – **we didn’t want to be represented by them,**” and he explained that by “them” he meant “The Local 3 union.” Tr. 249:22 – 250:3 (as corrected by the Jan. 23, 2018 eScribers, LLC Errata Sheet) (emphasis added).
- Everyone at the meeting agreed they no longer wished to be represented by the Union. Tr. 250:4-6, 251:2-5.
- “After we all came to an agreement [at the meeting] I had drawn up a paperwork at home and I brought it back and I had help putting it together with the office girls and I contacted all the members of it and they decided they wanted to get out.” Tr. 251:15-18.
- When Kanei presented the petition to the other employees for signature, he told them, “This is going to help us get together and to get out [of the Union] all as one.” Tr. at 251:19 – 252:2.
- “So we all agreed to sign the paperwork and we talked about it before.” Tr. 252:4-5.

The ALJ’s Order Granting General Counsel’s Motion in Limine Precluding Post-Withdrawal Evidence clearly states the ALJ’s admissibility ruling does **not** include “other testimony of pre-withdrawal actions.” GC 1 (qq). The CGC appears now to object to the admissibility of the above “other testimony of pre-withdrawal actions”; however, she did not object to it during the hearing or in her Limited Exceptions to the ALJ’s Decision and thus waived her right to object. Fed. R. Evid. 103(a)(1) (“A party may claim error in a ruling to admit ... evidence only if the error affects a substantial right of the party[;] ... timely objects or moves to strike; and states the specific ground....”; *Gant v. Vanderpool*, 350 Fed. App’x 181, 183-184

⁶ Again, if the ALJ did not believe this testimony was credible, he should have indicated why.

(9th Cir. 2009) (“Gant never objected to admission of either exhibit and thus waived her argument here.”); *Montana v. 14.62 Acres*, No. 91-35317, 1992 U.S. App. LEXIS 2155, at *4 (9th Cir. Feb. 6, 1992) (“Under [the] ... Federal Rules of Evidence, the failure of a party to object to the trial court’s admission of evidence waives the right to claim error on appeal.”); NLRB Division of Judges Bench Book, § 16-103 (ed. Oct. 2015).

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

The facts surrounding the September 1, 2016 document do not establish the idea of decertification was prompted by the employer. CGC AB at 6. 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)⁷, and the document is not a petition relied upon for decertification or withdrawal of recognition. Respondent’s Brief in Support of Exceptions (“RB”) at 35-36.

Respondent’s Office Manager Susan Taniguchi (“Taniguchi”) is not an agent because there is no evidence she relayed information to employees from management or management gave her any authority to assist Kanei with the petition. RB at 22-23. Even if Taniguchi were an agent, the ALJ and the CGC misstate the record regarding the petition drafting process and misapply the law regarding ministerial assistance. RB at 24-31.

VI. RESPONDENT DID NOT ENGAGE IN UNLAWFUL POLLING.

Although the declarations at issue were prepared after Respondent withdrew recognition, they were necessary to prepare Respondent’s defense because, at the time Respondent drafted the declarations, it believed it could rely on both subjective and objective post-withdrawal evidence

⁷ 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 is long before September 2016.

to support its withdrawal of recognition, as evidenced by Respondent's Reply in Support of Motion for Partial Summary Judgment (No Representation After July 1, 2017). GC 1(z). The cases the CGC cites merely stand for the proposition that subjective, post-withdrawal evidence is inadmissible to support a withdrawal of recognition. None of the cited cases address whether post-withdrawal evidence, including objective evidence necessary to respond to the Charging Party's declaration and subjective evidence mistakenly (but in good faith) believed to be admissible, could be a "legitimate cause to inquire" under the *Allegheny Ludlum/Johnnie's Poultry* standard. CGC AB at 11; RB at 38; *Allegheny Ludlum Corp.*, 333 NLRB 734, 743 n. 65 (2001).

In addition, the declarations' practical effect was not to instill in the employees a reasonable belief that Respondent was trying to find out whether they support or oppose the Union because **all** the employees from whom Respondent's attorney sought declarations already submitted their petition. RB at 38-40. The purpose of the declarations was to support Respondent's Motion for Partial Summary Judgment in Case No. 20-CA-193339, adequately respond to the Charging Party's Opposition, and further petition the NLRB to grant Respondent's Motion.

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

If there still was an enforceable CBA in July 2017, the Union should have filed a grievance regarding the cessation of dues and trust fund contributions; yet, it did not. RB at 41. The CGC claims this is not a valid defense but does not explain why. CGC AB at 10.

At the hearing, Respondent was ready to offer subpoenaed evidence showing the Union allowed other Kauai trucking industry employers party to the same CBA as Respondent to fail to require dues, deduct dues, and remit them to the Union and to fail to submit trust fund

contributions. Tr. 20:13 – 21:4. This evidence would have been a defense to Case No. 20-CA-209177 (unilateral changes). Respondent properly excepted to the ALJ’s finding and conclusion regarding that Case in Exception 23. Respondent’s argument that the ALJ simultaneously, improperly revoked the subpoenas and ruled Respondent was not permitted to seek, offer, or present any evidence related to the favored nations defense (Tr. 21:5 – 23:6) is an **argument** in support of Exception 23, properly included in the Brief in Support of Exceptions. NLRB Rules and Regulations § 102.46; RB at 41.

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

Both the ALJ and the CGC focus on the liberal discovery standard for bargaining unit employees and completely disregard the more stringent discovery standard for non-bargaining unit employees. Decision at 12; CGC AB at 12. 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. SETTLEMENT OFFER

The CGC complains Respondent’s settlement offer does not remedy all the violations of the Act. CGC AB at 13 n. 24. The CGC appears to have missed the news that the Board overruled the *Postal Service* standard, requiring “a full remedy for all the violations alleged in the complaint.” *UPMC Shadyside Hosp.*, 365 NLRB No. 153, 2017 NLRB LEXIS 597, at **3-4 (Dec. 11, 2017). The Board returned to the *Independent Stave* “reasonableness” standard. *Id.*, 2017 NLRB LEXIS 597, at *4. Given Respondent’s settlement offer was reasonable and Respondent has not engaged in a history of violations of the Act or breached any previous

settlement agreements, the ALJ should have accepted the offer. *See id.*, 2017 NLRB LEXIS 597, at **14-15; RB at 47-48.

X. 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 a copy of *Respondent Kauai Veterans Express Co.'s Reply Brief to Counsel for the General Counsel's Answering Brief to 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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