UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

DESERT CAB, INC. d/b/a ODS
CHAUFFEURED TRANSPORTATION

and **Case 28-CA-199576**

PAUL LYONS, an Individual

COUNSEL FOR THE GENERAL COUNSEL'S OPPOSITION TO RESPONDENT'S MOTION TO REOPEN RECORD, AND ANSWERING BRIEF TO AND MOTION TO STRIKE RESPONDENT'S EXCEPTIONS

Counsel for the General Counsel (CGC) opposes Respondent's Motion to Reopen the Record filed on July 20, 2018, with its Exceptions to the Administrative Law Judge's decision JD(SF)-13-18 that issued on June 22, 2018. In his decision, Administrative Law Judge Gerald M. Etchingham (the ALJ) found that Charging Party Paul Lyons (Lyons) "…made two private Facebook postings…to his friends-only group criticizing Respondent's client and Respondent's management due to Respondent's recent change in the terms and conditions of employment which included many employees at Respondent and one manager friend." The ALJ recognized that Respondent disputed that the postings were private: "Among other things, the Respondent denies that Lyons' Facebook comments about the Respondent and its client were private and seen only by a small group of Lyons' friends and acquaintances." (ALJD 1).[1]

Realizing that it had failed to establish that these Facebook postings were public and seeking to undo the ALJ's credibility determinations that the postings were private, Respondent now seeks to reopen the record to establish that the postings were not private, notwithstanding two opportunities to do so: first at the hearing on September 26, 2017, and

[1] References to the ALJ's decision are ALJD followed by page number and line or lines, if available. There are no lines on page 1 of the decision. References to Respondent's Exceptions are RX followed by page number and line or lines. References to the transcript are Tr. Followed by page number and line or lines.

second, when the ALJ issued an Order Directing Parties to File Position Statements Regarding the Need to Re-Open the Record to Submit Additional Evidence, dated April 24, 2018.[2] Respondent filed nothing in response to the ALJ's Order permitting the parties to argue that the record should be reopened.

In its exceptions, Respondent argues that the Facebook postings were public because a "globe image" appears at the top of the postings, and that the globe image "is Facebook's demonstrations that this goes out to everyone and anyone, publicly." (RX 3:10-11). There is no record evidence concerning this "globe image," and the Board should strike this description throughout Respondent's Exceptions. Similarly, Respondent's attachment to its post-hearing brief should not be considered evidence as it was not offered during the hearing and was not made part of the formal record. See. e.g, *Mademoiselle Knitwear*, 297 NLRB 272 fn. 1 (1989). The record contains neither testimony nor documentary evidence pertaining to a globe image, even though Respondent had, not one, but two opportunities to present such evidence on the record. Finally, Respondent has failed to establish a basis for reopening the record where the ALJ credited Lyons's testimony that his Facebook postings were private (ALJD 14: 13-16) and rejected the opinion of Respondent's General Manager and Chief Operating Officer that the Facebook postings were public because he was allegedly able to access them while preparing for hearing (which alone does not prove that they were public prior to, or on the day Lyons was discharged). (ALJD 16:15-18). The Board should affirm the ALJ's decision, strike any reference to a "globe image," and deny Respondent's motion to reopen the record.

A. Statement of Case

Lyons worked as a fleet chauffeur driver for Respondent from August 1, 2005, until May 24, 2017. (ALJD 4:9-10). In late 2016 or early 2017, Respondent reduced the work

[2] In consideration of the Board's decision in *Boeing Company*, 365 NLRB No. 154 (2017).

hours of its fleet drivers, including Lyons, whose schedule was reduced to four days per week. (ALJD 6:34-38). In April 2017, Respondent changed its policy regarding coverage for its customer Sundance Helicopters. (ALJD 4:1; 7:5-14). Lyons, like many other drivers, did not like doing pick-ups at Sundance because its passengers tipped less than pick-ups at hotels. (ALJD 6:11-12). Prior to April, a driver could earn more money for both the driver and Respondent by dropping off passengers at Sundance and then going and "staging" at hotels, with which Respondent has contracts, before returning to Sundance to pick up the helicopter tour passengers. "Staging" refers to displaying the luxury vehicle or limo in front of the hotel and being available for walk-ups or for reservations. (ALJD 7:18-21). Drivers, including Lyons, complained among themselves about being sent to Sundance three hours early to wait for passengers to return from their helicopter tours with no opportunity to stage at the hotels in the interim. (ALJD 7:22-27). Respondent's General Manager admitted that almost all the drivers complained to him about this assignment "because they would make less money there." (ALJD 7:29-31).

On May 5, 2017, Lyons sent text messages to Respondent's General Manager and its Operations Manager, complaining about the new staging policy and asking for a reply. Neither manager responded directly to Lyons. (ALJD 8:25-36). On May 21, Lyons made two Facebook posts. As found by the ALJ:

> …out of frustration after not receiving any response from Respondent's managers to his May 5 texts, and once again at Sundance with other drivers sitting idle due to Respondent's No Staging at Sundance Policy, Lyons again complained for all drivers about the No Staging at Sundance Policy by making two private posts on his personal Facebook page to his friends-only group under his Facebook handle of Paul Lyons. (Tr. 206.) Consequently, only Lyons' friends on Facebook could see his postings rather than the general public, as his Facebook account has always been a private friends-only account. (Tr. 206–207.) Lyons' Facebook friends include 3–4 Respondent employee drivers, a couple of dispatchers, and

> other non-management employees, some former employees and Lyons' friend—[Communications, Dispatcher and Call Center] Manager Monteiro.

(ALJD 9:7-15).

Lyons' first post, which the ALJ found to have been "private," showed a photo he took of the Sundance Lobby and said, "Hanging out at the Morgue. We are sent here to sit around for three hours for no reason." (ALJD 9:17-35).

Lyons second post, again "on his friends-only private Facebook page account" showed the front of Sundance with its lighted sign and the comment: "When its [siq.] truly a crappy day at work and there is nothing you can do about it." (ALJD 9:36-39).

Manager Monteiro discussed Lyons' two posts at a management meeting on May 22 or 23 and passed on two screenshots to Respondent, resulting in the discharge of Lyons. (ALJD 11:3-5). On May 24, Respondent discharged Lyons. In its discharge notice, Respondent stated:

> Gross misconduct violating standards of professionalism by posting Derogatory and demeaning comments specifically targeting [Respondent] clientele and [Respondent] on Social media (Facebook). Grounds for immediate dismissal. **Not ok to rehire.**

(ALJD 12:16-19).

B. ALJ Analysis

1. No Basis Exists to Overrule the ALJ's Credibility Findings

By its exceptions, including reference to a "globe image" and its motion to reopen the record, Respondent seeks to undo the well-reasoned credibility determinations of the ALJ that credited Lyons when he testified that his May 21 postings were private. As the ALJ explained:

> I found Lyons to be quite believable in his demeanor that his May 21 Facebook postings were sent using his private Facebook settings so that only his small group of friends actually viewed these posts including other current and former Respondent drivers and other employees, including Monteiro.

(ALJD 14:13-16).

Conversely, the ALJ rejected the testimony of Respondent's General Manager that Lyons' postings were public:

> I also reject Gehres' opinion that Lyons' two May 21 Facebook postings were "public" as, instead, I find that these were private Facebook postings to Lyons' friends-only group and they were not made to the general public. (See Tr. 30, 73, 98–99, 105, 128, 183, 188, 261–262, 288.)

ALJD 16:15-18).

Respondent should prevail on its exception only if the Board chooses to ignore or overrule its established policy of not overruling an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces the Board that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951).

While Respondent faults the ALJ for discrediting Respondents' witnesses' testimony based, in part, on Respondent's Counsel's repeated use of leading questions (RX 4:1-25), it is well-established that the Board will give "minimal weight" to testimony elicited from a party's own witnesses with leading questions because they amount to "little more than Respondent attorney's testimony in favor of his client's position." *H.C. Thomson*, 230 NLRB 808, 809 n. 2 (1977. Although Respondent questions how its Counsel's leading questions affected witnesses' testimony at all, the tendency of the questions to direct witnesses' testimony is clear. (Tr. 49-50, 64-65, 79-80, 109, 127-128, 178, 191-192). While Respondent characterizes its questions as intended to "clean up testimony or ask foundational questions to move the

hearing along," the questions, in fact, went to central issues. The ALJ's decision to discredit Respondent's witnesses based in part on the nature of its Counsel's questioning should therefore be upheld.

2. Lyons Engaged in Protected Concerted Activities

The ALJ found that "…with the two May 21 private Facebook postings, Lyons and his fellow driver employees were engaged in concerted activity when voicing their disagreement with Respondent's new No Staging at Sundance Policy." (ALJD 19:27-29). The ALJ continued by finding that wage discussions are "inherently concerted" and that Lyons and the other drivers raised the issue to Respondent of earning less by waiting at Sundance without the opportunity to earn money for them and Respondent by staging at nearby hotels. (ALJD 20:1-14). As to the May 21 private Facebook postings the ALJ found that they were concerted, as other employees among Lyons' Facebook friends, "liked" his sarcasm toward the No Staging at Sundance Policy. (ALJD 20:14-35). The ALJ also found that the postings were for "mutual aid or protection" under the Act. As the ALJ explained:

> Lyons' two May 21 private Facebook friends-only postings critical of Respondent's new No Staging at Sundance Policy amongst 8–9 friends including some Respondent employees, drivers, and Manager Monteiro was part of the ongoing complaints of the new No Staging at Sundance Policy that started with Lyons' May 5 group texts which had gone unanswered. In addition, Lyons' private group Facebook discussion with some of his fellow drivers on May 21 was aimed at improving the terms and conditions for all drivers and it clearly constituted concerted activity.

(ALJD 21: 13-22).

It is undisputed by the parties that Lyons's Facebook posts were a motivating factor in his discharge.

3. Lyons' Activities Did Not Lose the Protection of the Act

In assessing whether the May 21 postings exceeded the bounds of the protected activities, so that they lost the protection of the Act, the ALJ noted that employees are "permitted some leeway for impulsive behavior when engaged in concerted activity, as the language of the shop is not the language of polite society." (ALJD 22:33-39). The ALJ rejected Respondent's claim that the posts were publicly made and were not meant to be taken as true in addressing Respondent's claim that they were malicious. (ALJD 23:1-9). The ALJ summarized his findings:

> …I find that both Lyons' two May 21 private Facebook postings to his fellow drivers and other employees were not so egregious as to cause them to lose the protection of the Act. I find that they were a continuation of the drivers' ongoing complaints to improve work wage conditions to change the new No Staging at Sundance Policy that began in early May when Lyons, for the group of drivers, texted Respondent's management with no response. Furthermore, I find that these two May 21 private Facebook postings are *protected* concerted activities. I also find that Monteiro and other Respondent managers had knowledge of these protected concerted activities before Lyons was terminated on May 24, 2017. Consequently, the two posts were nonpublic, contained no profanity, and did not cause a loss of reputation or business for the Respondent; and there was no disruption of Respondent's business. (Tr. 99, 289.) See *Mexican Radio Corp*., 366 NLRB No. 65, slip op. at 1 (2018) (Same).

Moreover, the ALJ did not rely only on the fact that the postings were private in finding that they did not lose the protection of the Act. The AL applied the standards established in *NLRB v. Electrical Workers Local 1229 (Jefferson Standard)*, 346 U.S. 464 (1953), and *Linn v. Plant Guards Local 114*, 383 U.S. 53 (1966), in determining that the postings did not lose protection. (ALJD 23:32-25:32). Under those standards, communications to third parties related to an ongoing dispute between employees and employer—including public ones—do not lose protection unless they are so "disloyal, reckless, or maliciously untrue as to lose the Act's protection." *MasTec Advanced Technologies*, 357 NLRB 103, 107 (2011), enfd. sub nom.

DIRECTV, Inc. v. NLRB, 837 F.3d 25 (D.C. Cir. 2016), cert. denied 138 S.Ct. 92 (mem.) (2017) (satellite technicians did not lose protection when they appeared on a local television news program and, displaying their employer's only client's logo on their vans and shirts, publicly criticized a policy affecting their compensation and requiring them to make statements they viewed as deceptive to their employer's client's customers).

Applying these standards, the ALJ found that there was no question that Lyons' postings related to an ongoing labor dispute concerning Respondent's No Staging at Sundance Policy. (ALJD 24:15-19). The ALJ then found that Lyons' postings "were not 'so disloyal and reckless as to lose the Act's protection.'" (ALJD 24:21-23). Specifically, the ALJ, citing *Sierra Publishing Company v. NLRB*, 889 F.2d 210, 220 (9th Cir. 1989), found that the statements were not reckless or disloyal because they "did not involve any product disparagement unconnected to a labor dispute, breach of important confidences, or threats of violence as ways to pursue a labor dispute;" "did not cause any economic harm" "had no negative effect on Respondent or Sundance;" and did not result in any complaints about Sundance. (ALJD 24:44-25:32). In fact, Respondent's General Manager testified that Sundance was not even aware of the Facebook posts, and that the posts did not result in any economic harm to Respondent or to Sundance. (Tr. 289:8-19). The ALJ also found that the statements were not maliciously untrue because there was no showing that they were made with "knowledge of their falsity or reckless disregard of their truth or falsity. (ALJD 24:21-42). Indeed, it is abundantly clear that Lyons believed in good faith that employees were being made to sit around for no reason (which affected their earnings) and that being assigned to Sundance made for a "crappy day" for that reason. Further, it is clear that his reference to "[h]anging out at the Morgue" was meant to invoke an image to

emphasize these good-faith views. The fact that Lyons' postings were private is of little consequence in this overall analysis.

4. Lyons Was Discharged for His Protected Concerted Activities

The ALJ found that Lyons' discharge was unlawful under the framework of *NLRB v. Burnup & Sims, Inc*., 379 U.S. 21, 23 (1964), and, in the alternative, under the framework of *Wright Line,* 251 NLRB 1083 (1980), enfd. on other grounds, 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982). (ALJD 25:34-29:17). That is, the ALJ found that Lyons' discharge was unlawful both because Respondent discharged Lyons because Respondent mistakenly believed Lyons engaged in "misconduct" in the course of making his protected concerted postings (i.e., posting them publicly), and because Respondent failed to establish that it discharged Lyons for legitimate reasons other than his protected Facebook postings. *Id.* Respondent argues that the ALJ erred in that regard, stating that Lyons was not discharged for concertedly complaining about working conditions when assigned to Sundance, but for "publicly insulting a client on Facebook." (RX 5:7-6:8). However, the ALJ's finding that the discharge was unlawful based on an application of *Burnup & Sims* should be upheld because, for the reasons explained above, the ALJ's credibility-based finding that Lyons' postings were private and therefore that he did not engage in the "misconduct" alleged by Respondent (i.e., posting publicly) must be upheld. Moreover, that finding should be upheld because, for the reasons explained above, the postings would remain protected under the *Jefferson Standard* and *Linn* standards even had they been public. The ALJ's alternative finding that the discharge was unlawful based on an application of *Wright Line* should also be upheld because, although Respondent asserts that it discharged Lyons not for protected activities, but for "publicly insulting a client on Facebook," the conduct for which Respondent admits it discharged Lyons—

his Facebook postings—were protected, for the reasons explained above, and, indeed, they criticized Respondent and contained no criticism of Sundance, its services, or its clients.

5. The ALJ Appropriately Recommended Issuance of an Order Applying to Respondent

The ALJ concluded that Desert Cab, Inc., doing business as ODS Chauffeured Transportation (Respondent Desert Cab) and On Demand Sedans, Inc. (Respondent ODS) are a single employer, and, as such, are jointly and severally liable for the unfair labor practices at issue in this case. (ALJD 17:1-18:20). Respondent takes issue with this finding. Respondent's exception on this point is somewhat cryptic, as it does not identify what precise finding or conclusion of the ALJ it is disputing. However, in the course of the exception, Respondent states that Lyons was an employee of Respondent ODS, that Lyons was not an employee of Respondent Desert Cab, and that the allegations of the Complaint did not mention Respondent ODS (though the caption did). (RX 4:26-5:6). Thus, Respondent appears to dispute the substantive conclusion concerning single-employer status and the procedure by this the issue was raised and decided.

On the substantive issue of whether Respondent Desert Cab and Respondent ODS, Respondent does not object to any specific factual findings made by the ALJ concerning the entities' single-employer status or even to his conclusion, at least explicitly; does not provide any citations to record evidence it asserts is inconsistent with the ALJ's findings and conclusions concerning single-employer status; and does not cite any legal authority in support of its exception. Section 102.46(b)(1) of the Board's Rules and Regulations provides that, when a party files exceptions to an ALD's decision, "[e]ach exception…shall designate by precise citation of page the portions of the record relied on," and that "argument or citation of authority in support of the exceptions, shall be set forth in any supporting brief, or, if no such brief is filed,

in the exceptions themselves." Section 102.46(b)(2) of the Board's Rules and Regulations provides that, "[a]ny exception which fails to comply with the foregoing requirements may be disregarded." Respondent's entirely unsupported argument that Respondent Desert Cab was not Lyons' employer and the related implicit exception to the finding of single-employer status should therefore be disregarded.

On the procedural issue of whether the issue of single-employer status was appropriately raised by CGC and decided by the ALJ, Respondent was on notice that CGC was seeking an order applying to both Respondent Desert Cab and Respondent ODS and failed to raise any objection to CGC's doing so in its answer, or in its brief to the ALJ.

The Complaint and Notice of Hearing (Complaint), dated August 8, 2017, reads in pertinent part:

> [This Complaint] is issued pursuant to Section 10(b) of the National Labor Relations Act (the Act), 29 U.S.C. § 151 et seq., and Section 102.15 of the Rules and Regulations of the National Labor Relations Board (the Board) and alleges that ODS Chauffeured Transportation **whose correct name is Desert Cab, Inc. d/b/a ODS Chauffeured Transportation (Respondent)** has violated the Act as described below. (**Emphasis added.**)
>
> 2. (a) At all material times, Respondent has been a corporation with an office and place of business in Las Vegas, Nevada (Respondent's facility), and has been engaged in providing ground transportation to individuals and businesses.
>
> (b) In conducting its operations during the 12-month period ending May 26, 2017, Respondent purchased and received at Respondent's facility goods valued in excess of $50,000 directly from points outside the State of Nevada.
>
> (c) In conducting its operations during the 12-month period ending May 26, 2017, Respondent derived gross revenues in excess of $500,000.
>
> (d) At all material times Respondent has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

In its Answer to the Complaint, dated August 24, 2017,[3] Respondent admits the correct legal name of "Respondent" and to paragraphs 2(a), (c), and (d). At hearing, Respondent moved to amend its Answer to admit paragraph 2(b) (and thus all of the jurisdiction/commerce paragraphs). (Tr. 10:1-6). Although Respondent attempted to orally argue at hearing that Desert Cab, Inc. and On Demand Sedan, Inc. are two separate legal entities, at no point did Respondent move to amend its Answer to deny that "Desert Cab, Inc. d/b/a ODS Chauffeured Transportation" was Respondent's correct legal name. Additionally, Respondent had opportunity during hearing to rebut this claim but failed to present any evidence to the contrary. (Tr. 6:1-21). Moreover, Respondent failed to raise this issue in its post-hearing brief to the ALJ. Respondent should therefore be precluded from arguing this in its Exceptions to the Board when Respondent has been on notice since well before trial. (Tr. 6:1-21; RX 5:4-5).[4]

C. No Basis Exists to Reopen Record

Respondent mistakenly cites Sec. 102.48(c) of the Board Rules and Regulations as its basis for seeking to reopen the hearing when the appropriate section is 102.48 (d)(1), which discusses reopening of the record "because of extraordinary circumstances." Sec. 102.48(d)(1) requires Respondent to:

> …state briefly the additional evidence sought to be adduced, why it was not presented previously, and that, if adduced and credited, it would require a different result. Only newly discovered evidence, evidence which has become available only since the close of the hearing, or evidence which the Board believes should have been taken at the hearing will be taken at any further hearing.

Respondent offers no extraordinary circumstances of seeking to reopen the hearing nor has it explained why its evidence was not presented previously. Further, Respondent has not shown, nor is it able to show, that the evidence it seeks to introduce is newly discovered or has become

[3] (which was filed late)

[4] Respondent admits that this issue was discussed during the pre-trial ALJ conference call.

available since the close of the hearing. Again, Respondent had not one, but two opportunities to introduce its evidence. In effect, Respondent seeks to undo the credibility determinations of the ALJ with which it disagrees. This is not a basis for reopening the record, and the Board should deny Respondent's motion. See, e.g., *Hagar Management Corp.*, 313 NLRB 438 fn. 1 (1993) (Board will not reopen the record to permit a party to attack the administrative law judge's credibility resolutions).

D. Conclusion

The Board should deny Respondent's motion to reopen the record, and should affirm the ALJ's decision. Furthermore, the Board should strike any reference to a "globe image" in Respondent's Exceptions, and deny the Exceptions in their entirety as they are inadequate and wholly without merit.

Dated at Las Vegas, Nevada this 27th day of July 2018.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that the **COUNSEL FOR THE GENERAL COUNSEL'S OPPOSITION TO RESPONDENT'S MOTION TO REOPEN RECORD, AND ANSWERING BRIEF TO AND MOTION TO STRIKE RESPONDENT'S EXCEPTIONS** in *Desert Cab, Inc. d/b/a ODS Chauffeured Transportation*, Case 28-CA-199576, was served via E-Gov, E-Filing, and E-Mail, on this 27th day of July 2018, on the following:

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