

**UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
REGION 01**

**RHODE ISLAND PBS FOUNDATION**

**and**

**INTERNATIONAL BROTHERHOOD OF  
ELECTRICAL WORKERS, LOCAL 1228**

**Case 01-CA-204520**

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

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## INTRODUCTION

Pursuant to Section 102.46(b) of the Rules and Regulations of the National Labor Relations Board, Counsel for the General Counsel hereby files her Answering Brief to Respondent's Exceptions to the Decision of the Administrative Law Judge (ALJ) in the above-captioned matter.

Respondent filed 60 Exceptions to the ALJ's decision.<sup>1</sup> Those Exceptions fall into three broad categories reflected in the Questions Presented in Respondent's Brief in Support of Exceptions.<sup>2</sup>

1. Did the ALJ err by refusing to employ the good faith doubt of majority support standard enunciated in *Celanese*, 95 NLRB 664 (1951), for testing the propriety of [Respondent's] withdrawal of recognition, and instead using the rule in *Levitz*, 333 NLRB 717 (2001), that an employer cannot withdraw recognition unless it can demonstrate by "objective evidence" that the union has actually lost majority support?
2. Did the ALJ err by concluding that [Respondent] violated Section 8(a)(5) and (1) of the Act by withdrawing recognition, refusing to bargain, not furnishing information, granting wage increases, and "coercively interrogating" employees?
3. Did the ALJ err by imposing a bargaining order as a remedy?

Respondent's Exceptions lack merit and should be rejected. As fully discussed below, Judge Goldman correctly concluded that Respondent unlawfully refused to

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<sup>1</sup> In its Exceptions, Respondent requests oral argument before the Board, citing "the voluminous record in this matter and the significant factual issues in dispute" The hearing lasted less than a day and a-half and had only six witnesses. There is nothing novel or complex about the issues presented. Therefore, Respondent's request should be denied.

<sup>2</sup> In its Brief in Support of Exceptions, Respondent listed the Exceptions related to each of its Questions Presented. However, more than half of its numbered Exceptions were not specifically referenced in Respondent's Brief: # 2-11, 13, 15, 16, 22-25, 27, 28, 31, 35-50, 58, 60. To the extent that these unsupported Exceptions are not specifically referenced in Respondent's Brief, they should be deemed waived under the Board's Rules and Regulations, Section 102.46(a)(1)(ii) and (a)(2)(iii). The Board should dismiss these Exceptions, which are not properly before it. *Tri-Tech Services, Inc.*, 340 NLRB 894, 896 and fn. 11 (2003).

bargain with – and then unlawfully withdrew its recognition of – the International Brotherhood of Electrical Workers, Local 1228 (Union), which represents its engineering employees.<sup>3</sup> The ALJ's conclusions rationally flowed from his findings that Respondent lacked objective evidence that its employees no longer wanted to be represented by the Union, and that any evidence Respondent did possess was tainted by its unlawful interrogation of unit employees. In concluding that Respondent lacked the objective evidence required to lawfully withdraw recognition from an incumbent union, the ALJ followed nearly two decades of Board jurisprudence, first articulated in *Levitz Furniture of the Pacific*, 333 NLRB 717 (2001). He thus applied the correct legal standard, rejecting Respondent's entreaties to abandon the *Levitz* standard and return to the standard it overruled. Having found that the withdrawal of recognition was unlawful, Judge Goldman properly concluded that Respondent's duty to bargain with the Union has continued unabated, and that Respondent's refusal to furnish the Union with relevant information and its grant of unilateral wage increases were also unlawful. The remedy recommended by the ALJ – an affirmative bargaining order with a one-year decertification bar – is both justified by Respondent's conduct and consistent with Board precedent. His findings of fact, conclusions of law, and proposed remedy should be upheld by the Board.

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<sup>3</sup> The facts presented at trial, which were largely undisputed, are fully set forth in Counsel for the General Counsel's post-hearing brief and will not be repeated herein.

## THE EXCEPTIONS

- 1. Respondent's Exceptions # 1, 12, and 14 should be denied because the ALJ applied the correct legal standard and because Respondent has articulated no legitimate reason for adopting a different standard.**

Respondent takes the position, as it did at the hearing and in its post-hearing brief, that the appropriate standard for determining the lawfulness of an employer's withdrawal of recognition should be the one articulated *Celanese Corp.*, 95 NLRB 664 (1951). The ALJ correctly rejected that argument, affirming the last 17 years of Board precedent holding that the proper standard for evaluating the lawfulness of a withdrawal of recognition is the one enunciated in *Levitz*: an employer may lawfully withdraw its recognition of an incumbent union only if it can prove "by a preponderance of the evidence that the union had, in fact, lost majority support..." *Id.* at 725.

Notwithstanding the ALJ's correct analysis, Respondent urges the Board to adopt the lower "good faith doubt" standard set forth in *Celanese*, which was expressly overruled by *Levitz*.<sup>4</sup>

*Levitz* was a response to the Supreme Court's discussion in *Allentown Mack Sales & Services v. NLRB*, 522 U.S. 359 (1998), in which the Court clarified the "good faith doubt" standard in a polling case. The Court opined that the Board could "impose[ ] a more stringent requirement than the reasonable-doubt test",<sup>5</sup> a challenge the Board took up in *Levitz* by raising the bar for employers who withdraw recognition from an incumbent union. The *Levitz* standard has received judicial approval from various Board

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<sup>4</sup> Respondent argues that the ALJ erred when he applied the test set forth in *Levitz*, rather than the one set forth in *Celanese*, which was explicitly overruled by *Levitz*. It is axiomatic that an ALJ is required to follow Board precedent. *Ingram Barge Co.*, 336 NLRB 1259 (2001); *Hillhaven Rehabilitation Center*, 325 NLRB 202 (1997), reversed on other grounds, *Hillhaven v. NLRB*, 178 F.3d 1296 (6<sup>th</sup> Cir. March 26, 1999). Nevertheless, Respondent urges the Board to abandon the precedent set forth in *Levitz*, and to return instead to the test it rejected in *Celanese*.

<sup>5</sup> *Id.* at 374.

panels for the past 17 years. In dozens of post-*Levitz* withdrawal of recognition cases, the Board has never wavered from this more stringent standard, under which an employer may lawfully withdraw recognition from an incumbent union only where it possessed evidence, at the time it withdrew recognition, that the union had actually lost majority support.<sup>6</sup> Respondent has articulated no legitimate reason to lower the standard now.

Respondent argues that the *Levitz* standard “creates a labyrinth of roadblocks that make it virtually impossible for an employer to determine if a union enjoys majority support.”<sup>7</sup> If this were true, no post-*Levitz* withdrawal of recognition would have passed Board muster. Since deciding *Levitz*, however, the Board has found in a number of cases that the employer met its burden and lawfully withdrew recognition.<sup>8</sup> *Levitz* may have set the bar higher, but it did not create insurmountable obstacles for employers whose employees actually seek to rid themselves of union representation.

Moreover, Respondent’s argument is disingenuous because it could have availed itself of the Board’s processes based on a mere good-faith doubt of the Union’s majority status. *Levitz* specifically held that an employer could file an RM petition for an election, based only on a good-faith doubt, in order to determine whether employees still wanted union representation. *Levitz*, supra, 333 NLRB at 724; *Comau*, supra, 358

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<sup>6</sup> Indeed, the Board affirmed the viability of *Levitz* as recently as July 2018, when it found that an employer’s withdrawal of recognition was lawful because the employee petition on which it based its withdrawal met the *Levitz* standard. *Colorado Symphony Association*, 366 NLRB No. 122 (July 3, 2018).

<sup>7</sup> Respondent’s Brief at 16.

<sup>8</sup> See, e.g., *Diversicare Leasing Corp. d/b/a Wurtland Nursing and Rehabilitation Center*, 351 NLRB 817 (2007); *Shaws Supermarkets*, 350 NLRB 585 (2007); *Renal Care of Buffalo, Inc.*, 347 NLRB 1284 (2006); *Champion Enterprises, Inc. d/b/a Champion Home Builders Co.*, 350 NLRB 788 (2007); *Comau, Inc.*, 358 NLRB 593 fn 33 (2012);

NLRB at fn 33.<sup>9</sup> Thus, although Respondent may have been able to file an RM petition with the information it possessed in May 2017, it failed to do so. As a result, Respondent's contention that it could not have lawfully met its burden under *Levitz* must be rejected.

Respondent asserts in its Brief in Support of Exceptions<sup>10</sup> that "the availability of a RM petition is a mirage,"<sup>11</sup> arguing that the Board's blocking-charge rule makes it impossible for employers to obtain an election to determine whether its employees still wish to be represented. In this regard, Respondent grossly overstates the blocking-charge policy. Contrary to Respondent's assertion, ULP charges filed while a representation petition is pending do *not* automatically forestall an election.<sup>12</sup>

Under the NLRB's Case Handling Manual for Representation Cases ("CHM"), a regional director will "process a RM petition based on a *prima facie* showing of objective

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<sup>9</sup> See also *In re Easton Hospital*, 335 NLRB 1091 (2001)(evidence sufficient to establish good-faith uncertainty about union's majority status may be sufficient to support RM petition, but is insufficient to justify withdrawal of recognition).

<sup>10</sup> Hereafter, the following abbreviations shall be used: Respondent's Brief in Support of Exceptions will be called "Brief"; Transcript references will be designated T-(page number); General Counsel Exhibits will be designated GC-(number); and the Decision of the Administrative Law Judge will be called "ALJD"

<sup>11</sup> Brief at 17.

<sup>12</sup>CHM, Section 11730 states that:

The filing of a charge does not automatically cause a petition to be held in abeyance. When a party to a representation proceeding files an unfair labor practice charge and desires to block the processing of the petition, the party must file a request that the petition be blocked and must simultaneously file a written offer of proof in support of the charge that contains the names of the witnesses and a summary of each witness's anticipated testimony. Accordingly, the regional office will not block a representation case unless the party filing the unfair labor practice charge files a request that the petition be blocked and the required offer of proof. Form NLRB-5546 may be used to request to block a petition and to provide the offer of proof. The charging party requesting to block the processing of the petition must promptly make its witnesses available. If the regional director determines that the party's offer of proof does not describe evidence that, if proven, would interfere with employees free choice in an election or would be inherently inconsistent with the petition itself, and thus would require that the processing of the petition be held in abeyance absent special circumstances, the regional director shall continue to process the petition and conduct the election where appropriate. Sec. 103.20, Rules and Regulations.

[I]t should be recognized that the policy is not intended to be misused by a party as a tactic to delay the resolution of a question concerning representation raised by a petition. Rather, the blocking charge policy is premised solely on the Agency's intention to protect the free choice of employees in the election process.

considerations that a union has lost its majority status, *provided that there have been no unfair labor practices committed that undermine the employees' support for the union.*"<sup>13</sup>

Not all charges – or even all meritorious charges – will block the processing of an RM petition, but only those that tend to undermine employee support for the union. Such charges “raise the issue of a causal relationship between the violations alleged and the subsequent expression of employee disaffection with an incumbent union,” and will result in the blocking and/or ultimate dismissal of an RM petition.<sup>14</sup>

Finally, Respondent's dissertation on the failures of the Board's RM petition and blocking charge policy is specious at best, since it made no attempt whatsoever to avail itself of the Board's processes. Without having tested whether the Regional Director would have processed its RM petition, Respondent should not be permitted to rely on its suspicion that the process is tainted or ineffective.<sup>15</sup>

The ALJ called this a “textbook reason” for applying the *Levitz* standard, noting:

Here, the employer ferretted out employee dissatisfaction, through interrogation, found what it considered (wrongly) to be enough, and on that basis unilaterally withdrew recognition. The employees did not seek to remove their Union. The Respondent did. An employer's unilateral withdrawal of recognition must be based on an employee effort to reject unionization that proves lack of majority support, not based on an employer's unilateral decision that it would be in the employees' interest to reject the Union.<sup>16</sup>

Based on the foregoing, there is no reason to apply a different standard than the one articulated in *Levitz*.

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<sup>13</sup> CHM, Section 11042.

<sup>14</sup> CHM, Section 11730.3(c).

<sup>15</sup>Significantly, an RM petition filed in May 2017 likely would not have been blocked. At the time, the Union was completely unaware that Respondent's president, David Piccerelli, had been interrogating employees to obtain their views regarding the Union. That evidence did not come to light until the ALJ hearing in April 2018, when the General Counsel and the Union learned for the first time about Piccerelli's questioning. There were no other ULP's committed at that time.

<sup>16</sup> ALJD at 14, citing *Levitz*, supra, 333 NLRB at 724 fn 45.

- 2. Exceptions # 1, 12, 17, 18, 19, 20, 21, 26, 29, 30, 32, 33, 34, and 51-57 should be denied because the ALJ correctly concluded that the Employer violated Section 8(a)(5) and (1) by refusing to bargain, withdrawing recognition, refusing to furnish information, and unilaterally granting a wage increase; and independently violated 8(a)(1) by coercively interrogating employees.**

The ALJ properly concluded, based on largely uncontroverted evidence presented at trial, that Respondent refused to bargain with the Union after about May 11, 2017; that it withdrew recognition from the Union on or about October 11, 2017; that it refused to provide information to the Union since about October 30, 2017; that it granted unilateral wage increases to two employees in December 2017; and that it coercively interrogated employees about their union sympathies in about May 2017. All these findings are fully supported by the record and form the basis of the ALJ's conclusions that Respondent violated Sections 8(a)(5) and (1) of the Act.

It is undisputed that Respondent refused to bargain for a collective bargaining agreement after the Union requested bargaining in March 2017 and made its written proposal two months later.<sup>17</sup> Union Business Manager Fletcher Fischer made several e-mail and voicemail inquiries about Respondent's response to its proposal, but Respondent repeatedly put him off.<sup>18</sup> The parties never met or engaged in bargaining after May 11, 2017, despite the Union's requests. Therefore, assuming the Union was the legitimate bargaining representative of the unit, Respondent undisputedly violated the Act by refusing to meet.

Similarly, it is undisputed that Respondent withdrew recognition from the Union.<sup>19</sup> Although Respondent never informed the Union that it was withdrawing recognition, it

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<sup>17</sup> GC-1(m), Respondent's Answer to Amended Complaint at paragraph 13.

<sup>18</sup> GC-22.

<sup>19</sup> GC-1(m) at paragraph 14.

became clear in October 2017, when Respondent submitted its position statement to the Region, that there was a *de facto* withdrawal of recognition.<sup>20</sup> There can be no dispute regarding the ALJ's factual findings regarding Respondent's withdrawal of recognition.

Nor is there a factual dispute regarding Respondent's failure to furnish information<sup>21</sup> or its unilateral grant of wage increases.<sup>22</sup>

The lawfulness of each of these acts turns on whether Respondent had an obligation to bargain with the Union when it refused to bargain, withdrew recognition, failed to furnish information, and unilaterally granted wage increases. In its Brief, Respondent argues that, even if the Board continues to apply the *Levitz* standard, it possessed objective evidence, at the time it withdrew recognition, that the Union no longer had the support of a majority of the Union. In addition to arguing that the ALJ applied the wrong legal standard, Respondent claims that its actions clear the higher bar set by *Levitz*. The ALJ properly rejected this argument.

Even if every one of Respondent's witnesses were credited, their statements do not constitute objective evidence that they no longer wished to be represented by the Union. What the Employer learned through its questioning of employees falls far short of the objective evidence required by *Levitz*. At best, Respondent relied upon the following employee statements, assertedly made to Piccerelli and/or Engineering Director Richard Dunn:

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<sup>20</sup> T-196.

<sup>21</sup> GC-1(m) at paragraph 16 (a) and (c).

<sup>22</sup> T-43.

Mark Smith<sup>23</sup>

The Union does not represent me.  
I don't need the Union to represent me.  
The Union is not fairly representing me.  
The Union is doing nothing for me financially.

Joseph Brathwaite<sup>24</sup>

I don't feel it's necessary for the Union to represent me.  
There is no union.  
This is why I can't be in the Union because I do so many things at that Company that I can't have my hands tied.  
The Union has its own agenda and steward Gannon was not elected but was "foisted" upon the unit.  
Not interested.

John Sousa<sup>25</sup>

The Union hasn't communicated with me about anything in a long time.  
The Union selected Gannon as steward without giving me and others an opportunity to select our own steward.  
I don't like the Union.  
The Union doesn't represent me.

Patrick O'Brien<sup>26</sup>

I don't feel I need to have Union representation, but I don't want to go against my friends at the station. I'll think about it.  
I'm against the Union.  
I don't know how I'll vote.

Even when viewed in the light most favorable to Respondent, none of these statements meets the *Levitz* standard requiring an employer to possess objective evidence that a majority of its employees did not support the Union at the time it withdrew recognition. Indeed, many of the statements were undated and ambiguous, making them even less reliable indicators of employee support for the Union.<sup>27</sup>

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<sup>23</sup> T-122-123; T-202-205; T-169.

<sup>24</sup> T-126, T-143, T-216, T-218-219, T-162, T-169.

<sup>25</sup> T-162, T-180, T-182.

<sup>26</sup> T-131-132.

<sup>27</sup> Additionally, as the ALJ noted, the statements were made at various times in April and May 2017, and in the years before that time. On this fact alone, they do not meet the *Levitz* requirement that an employer must possess objective evidence *at the time it withdraws recognition* that employees do not want to be represented. *Levitz*, supra, 333 NLRB at 717; accord *Scomas of Sausalito, LLC*, 362 NLRB No. 174, slip op. at 7 (2015); *Liberty Bakery Kitchen, Inc.*, 366 NLRB No. 19 (February 16, 2018).

When an employer relies on an employee petition or employee statements to withdraw recognition, it carries the burden of demonstrating that the language is sufficiently unambiguous to establish that a majority of employees no longer support the Union. *Liberty Bakery*, supra, 366 NLRB No. 19, citing *Anderson Lumber Co.*, 360 NLRB 538 (2014), enfd. 801 F.3d 321 (D.C. Cir. 2015); *Wurtland Nursing & Rehabilitation Center*, supra, 351 NLRB at 818-819. If the language is ambiguous, reliance on that language must be based on a reasonable interpretation in light of all the objective evidence.<sup>28</sup> So, for example, an employee petition entitled “Showing of Interest for Decertification” failed to establish that employees no longer supported the union, as it was more reasonably interpreted to mean that employees sought an election. *Highlands Regional Medical Center*, 347 NLRB 1404, 1404-1406 (2006). In *Liberty Bakery*, the Board found that an employee “petition” was defective because it failed to convey the intent of those signing it. In *Anderson Lumber*, the Board carefully examined the written statements of eight employees and determined that half did not support a withdrawal of recognition because they more reasonably could be interpreted to mean the employees wanted to terminate their union membership. On the other hand, the Board found that the remaining four statements, though ambiguous, reasonably indicated that the employees no longer desired to be represented by the union.

Judge Goldman appropriately distinguished *Wurtland*, supra, 351 NLRB at 817-819, where a majority of employees had signed a petition saying they wanted “a vote to remove the Union.” The Board found that this language was ambiguous: it could be read to mean that the employees merely wanted a vote on decertification, or, more reasonably, it could be read that to mean that the employees wanted a vote in order to

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<sup>28</sup> *Id.*

and so that they could “remove the Union.” The Board went on to reason that it was “more probable than not that the employees rejected union representation.”<sup>29</sup> In contrast, as Judge Goldman concluded, “the credited evidence of what employees told Dunn and Piccerelli cannot be read as stating a desire to not have the Union as the bargaining representative. The credited testimony of Dunn and Piccerelli does not say that, even ambiguously.”<sup>30</sup> Under *Levitz*, even a plethora of employee complaints do not meet the *Levitz* standard unless they indicate “an intention to reject union representation and a desire to remove the union as representative.”<sup>31</sup> As Judge Goldman noted, “the evidence must, at least ambiguously, and then by a preponderance of the evidence, prove that the Respondent knew from objective evidence that the union lacked majority of support—i.e., that the employees wanted the union removed as the unit employees’ bargaining representative.”<sup>32</sup>

In the context of a withdrawal of recognition, words matter. Statements such as “there is no union” and “the Union does not represent me”, even if they were made at all, cannot reasonably be interpreted to mean the employee no longer supports the Union. Smith’s statement that he does not need the Union and Brathwaite’s statement that it is not “necessary” to have representation do not amount to statements that they no longer wish to be represented. Brathwaite’s statement that he “can’t be in the Union” is more reasonably interpreted to mean that he wants to resign his Union membership. Sousa’s statement that he was unhappy with the Union’s lack of communication and the

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<sup>29</sup> *Id.* at 819.

<sup>30</sup> ALJD at 18.

<sup>31</sup> ALJD at 18.

<sup>32</sup> ALJD at 17. Respondent points out that, long after the withdrawal of recognition, it received a “petition for decertification” signed by seven out of ten employees in the unit: T-210-211; Brief at 2; Exhibit A to Brief. As the ALJ noted, this evidence, received by Respondent in April 2018, is irrelevant to consideration of the Respondent’s 2017 withdrawal of recognition. *Anderson Lumber Co.*, supra, 360 NLRB at 544.

way it selected its steward is not objective evidence that he no longer wished to be represented by the Union. O'Brien's statements, "wishy-washy" as they were, are not objective evidence of anything. The statements of each of these employees were too vague, too remote in time, too unbelievable, or simply too inscrutable to constitute objective evidence that employees no longer wished to be represented by the Union.

The ALJ correctly determined that, "quite apart from the illegitimacy of the Respondent's method of assaying employee support for the Union, the evidence relied upon by the Respondent does not prove that the Union did not have majority support."<sup>33</sup> Judge Goldman keenly observed that Respondent relied not on objective evidence, but on "the frustrated, intermittent, and random complaints of employees about the quality of union representation, or the lack of necessity of a union, or negative encounters with a shop steward related to or solicited by management, for its claim that employees are rejecting union representation."<sup>34</sup>

As a substitute for an election based on an RD or RM petition, employee statements of disaffection "must be sufficient to prove by a preponderance of evidence that a majority of them want to reject union representation, as they would if the matter were put to a vote."<sup>35</sup> As Judge Goldman noted:

This is more than an employee who individually wants nothing to do with the Union, while failing to objectively provide the employer with evidence that he or she wants the Union removed as the unit employees' bargaining representative. This is more than frustration or anger at the union, or feelings that the union is not doing the job that the employees want it to do. To permit an employer to unilaterally withdraw recognition on such a showing would be to allow the reintroduction of withdrawal of recognition based on a good-faith doubt standard that was rejected in *Levitz*.<sup>36</sup>

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<sup>33</sup> ALJD at 17.

<sup>34</sup> ALJD at 17.

<sup>35</sup> ALJD at 17.

<sup>36</sup> ALJD at 17.

Respondent has not demonstrated objective proof that employees no longer wanted to be represented. As the ALJ observed, “Piccerelli’s account of his discussion with Smith involved nothing that can be held out as objective proof that he did not want to be represented. Unhappy with the Union, yes. But proof that he wanted the union removed as the representative—it is not there.”<sup>37</sup> Piccerelli acknowledged that Smith’s complaint was that he was not being “fairly compensated” and that “he was not pleased with the representation that he was getting from the Union in terms of his compensation.” Similarly, Dunn testified about Smith’s frequent complaints regarding his compensation and the perceived lack of help from the Union. As the ALJ concluded, these statements do not prove that Smith did not want union representation.<sup>38</sup>

Brathwaite’s and Sousa’s statements to Piccerelli and Dunn are similarly inadequate to demonstrate that they did not want to be represented. Brathwaite told Piccerelli he did not feel union representation was necessary, and told Dunn that the Union had its own agenda and did not solicit his views on who should be the shop steward. Piccerelli testified that Dunn reported that Sousa was not interested in union representation, but Sousa denied Dunn had ever asked him. The ALJ correctly concluded that none of these statements, relied upon by Respondent in withdrawing recognition, “proved objectively that any one of the four wanted to reject union representation.”<sup>39</sup>

Respondent’s evidence falls far short of its burden under *Levitz* in other ways as well. In particular, Respondent cannot show that it had a majority *at any relevant time*.

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<sup>37</sup> ALJD at 18.

<sup>38</sup> ALJD at 18.

<sup>39</sup> ALJD at 20.

In late May 2017, there were seven employees in the bargaining unit. Patrick O'Brien -- one of the four employees relied on by Respondent -- told Piccerelli, in answer to the question of his interest in having a union, that he did not know "how he would vote" if the issue came to a vote. In this regard, O'Brien, whom Piccerelli characterized as "wishy-washy," clearly and affirmatively stated that he was undecided as to whether he wanted to reject the Union. Respondent cannot seriously argue that O'Brien's statements to Piccerelli constituted objective evidence that he did not want to be represented. Without O'Brien, Respondent's defense fails.

Even apart from the obvious lack of a majority, and even if the employee statements of disaffection with the Union were sufficient to demonstrate that they no longer wanted union representation, those statements cannot form the basis of a lawful withdrawal of recognition because they were tainted by Respondent's involvement in obtaining them.<sup>40</sup> An employer may lawfully withdraw recognition from an incumbent union only "if the expression of employee desire to decertify represents "the free and uncoerced act of the employees concerned.'" *SFO Good-Nite Inn*, 357 NLRB 79 (2011); *Eastern States Optical Co.*, 275 NLRB 371, 372 (1985). It is well settled that an employer may not lawfully withdraw recognition based on tainted evidence of a loss of majority support. *Hearst Corp.*, 281 NLRB 764 (1986), *enfd. mem.* 837 F.3rd 1088 (5th Cir. 1988) (employer may not withdraw recognition based on a petition that it unlawfully assisted, supported, or otherwise unlawfully encouraged, even absent specific proof of the misconduct's effect on employee choice). The Board presumes that the employer's

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<sup>40</sup> As discussed below, the ALJ correctly determined that the questioning of Smith, Brathwaite, and O'Brien violated 8(a)(1). Even if the questioning did not constitute independent violations, however, Respondent's involvement in obtaining the statements on which it based the withdrawal of recognition precludes a finding that the withdrawal was legitimate.

unlawful meddling tainted any resulting expression of employee disaffection, without specific proof of causation, and precludes the employer from relying on that expressed disaffection to overcome the union's continuing presumption of majority support. *Id.* at 80, citing *Tyson Foods, Inc.*, 311 NLRB 552, 556 (1993).<sup>41</sup> Thus, an employee petition indicating that employees no longer wish to be represented cannot form the basis of a withdrawal of recognition if the employer played a role in crafting or soliciting the petition. *SFO Good-Nite Inn*, supra, 357 NLRB at 79 (unlawful for employer to instigate or propel decertification campaign, and then invoke the results of that campaign to justify withdrawal of recognition). Likewise, employee statements that result from unlawful or coercive interrogations cannot then be used to support a withdrawal of recognition. An employer who "engages in efforts to have its employees repudiate their union must be held responsible for the foreseeable consequence of its conduct." *Hearst Corp.*, supra, 281 NLRB at 765.<sup>42</sup>

It is undisputed that the evidence on which Respondent based its withdrawal of recognition was the result of questioning by Piccerelli. The statements elicited from employees are no different from signatures on a petition: an employer cannot lawfully initiate such a petition or solicit employees to sign it. By Piccerelli's own admission, Respondent based its withdrawal of recognition solely on the oral statements obtained in the conversations that took place in his office. With the exception of Smith, who

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<sup>41</sup> Additional citations omitted.

<sup>42</sup> The absence in this case of a decertification petition or other written indicia of employee disaffection is irrelevant to the issue of employer interference. While Respondent did not solicit or otherwise assist with a decertification petition, as is the case in most of the *Hearst*-type withdrawal of recognition cases, it nevertheless instigated the expression of employee disaffection. Thus, the cases involving decertification petitions are on point.

volunteered his antipathy toward the Union,<sup>43</sup> employees reported their views to Respondent only because Piccerelli asked them how they felt about union representation. Piccerelli acknowledged that he asked Smith if other employees felt as he did about the Union; that he paged Brathwaite to his office over the station's PA system in order to ask him how he felt about the Union; and that he called O'Brien into his office shortly after he became a full-time employee for the express purpose of questioning him about his Union support. Each of these acts constitutes an independent violation of Section 8(a)(1) and precludes a finding that the withdrawal of recognition was lawful.

Having properly found that Respondent lacked objective evidence of a loss of majority support and that the withdrawal of recognition was unlawful, the ALJ reasoned that the remaining 8(a)(5) allegations were also meritorious. Surely, even Respondent would acknowledge that, if it had an obligation to recognize and bargain with the Union, the refusal to bargain, the refusal to furnish information, and the unilateral wage increases were unlawful. The lawfulness of these actions is predicated on the duty to recognize and bargain. Respondent has never argued otherwise.

Finally, Respondent excepts to the ALJ's finding that Piccerelli's interrogations of Smith, Brathwaite, and O'Brien were coercive and violated Section 8(a)(1). The ALJ correctly decided that "the unlawful nature of [Piccerelli's] questioning is not open to serious question," noting that it was "patently unlawful"<sup>44</sup> for Respondent's top official to

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<sup>43</sup> Even so, Respondent coercively interrogated Smith by asking him whether any other employees felt the same way. It is axiomatic that interrogating employees about the union sympathies of other employees violates 8(a)(1). *Hearst Corp.*, supra, 281 NLRB at 764.

<sup>44</sup> ALJD at 14.

hold “official” meetings with three employees for the express purpose of ascertaining their views, or the views of other employees, regarding union representation.<sup>45</sup>

As the ALJ noted, interrogation is not a per se violation of the Act. *Rossmore House*, 269 NLRB 1176, 1178 (1984), enfd. 760 F.2d 1006 (9th Cir. 1985); *Westwood Health Care Center*, 330 NLRB 935, 939 (2000). In determining whether questions asked of an employee constitute unlawful interrogation, the Board considers whether under all the circumstances the interrogation of an employee reasonably tends to restrain, coerce or interfere with rights guaranteed by the Act. *Bloomfield Health Care Center*, 352 NLRB 252 (2008), quoting *Rossmore House*; supra, 269 NLRB at 1178 fn 20. The test is an objective one that does not rely on the subjective aspect of whether the employee was, in fact, intimidated. *Multi-Ad Services, Inc.*, 331 NLRB 1226, 1227–1228 (2000), enfd. 255 F.3d 363 (7th Cir. 2001). An unlawful motive is not required: an employer violates Section 8(a)(1) by interrogating employees about their union sympathies even where the interrogations were not *designed* to undermine union support. See, e.g., *Matthews Readymix, Inc.*, 324 NLRB 1005, 1007-1008 (1997).

Although not all interrogations are unlawful, it is generally unlawful for an employer to inquire as to the union sentiments of employees. *President Riverboard Casinos of Missouri*, 329 NLRB 77 (1999). As the Board has explained, “In our view any attempt by an employer to ascertain employee views and sympathies regarding unionism generally tends to cause fear of reprisal in the mind of the employee if he replies in favor of unionism and, therefore, tends to impinge on his Section 7 rights.”

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<sup>45</sup> ALJD at 15.

*Struksnes Construction Co.*, 165 NLRB 1062, 1062 (1967).<sup>46</sup> The ALJ correctly concluded that Piccerelli's interrogations did not pass muster under 8(a)(1), noting that none of the employees were open union supporters or activists; the questioning was hardly casual, given Piccerelli's admitted purpose of questioning employees regarding their views of the Union; and, importantly, Piccerelli did not give the employees a legitimate reason for the inquiry or assure them that no reprisals would follow regardless of their answers.<sup>47</sup>

Based on the above considerations, the ALJ properly concluded that Piccerelli's interrogations of Smith, Brathwaite, and O'Brien constituted violations of 8(a)(1).

**3. Respondent's Exceptions #4, 5, 6, 7, 8, 9, 10, and 11 should be denied because they would require the Board to reverse the ALJ's credibility findings.**

Respondent excepts to the ALJ's credibility findings. First, the Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces it that they are incorrect.<sup>48</sup> Nevertheless, Respondent argues for three pages of its Brief that the ALJ's credibility findings should be overruled because he "disregard[ed] uncontradicted and clear evidence by broad, categorical statements on credibility."<sup>49</sup>

In making this specious argument, Respondent misconstrues the ALJ's refusal to credit the testimony of Engineering Director Dunn, stating in its Brief that the ALJ "literally discredited Dunn's testimony because it was consistent with the Foundation's

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<sup>46</sup> *Struksnes* requires that such inquiries must include certain procedural safeguards, which were undisputedly absent from Piccerelli's interrogations of Smith, Brathwaite, and O'Brien.

<sup>47</sup> See, e.g., *NLRB v. Champion Laboratories*, 99 F.3d 223, 230 (7th Cir. 1996) (calling such clarifications "important considerations" in determining whether an interrogation about union sentiments is coercive).

<sup>48</sup> *Standard Dry Wall Products*, 91 NLRB 544 (1950), enf. 188 F.2d 362 (3d Cir. 1951).

<sup>49</sup> Brief at 26.

case.”<sup>50</sup> Nothing could be further from the truth. The ALJ clearly stated that he was discrediting Dunn’s testimony because, although several witnesses testified about the same conversations, “not a single witness corroborated” Dunn’s portrayal of their words. Dunn testified repeatedly that employees told him there was no union, but no employee used language even remotely similar. For example, employees Mark Smith and Joe Brathwaite testified about a conversation with Dunn, sometime in April or May 2017, that took place in Studio A.<sup>51</sup> Both of them testified about specific statements they made, which followed logically from their earlier encounter with steward Andy Gannon concerning the moving of staging.<sup>52</sup> In Dunn’s account, both employees stated that “there is no union”, something neither of the employees mentioned in their testimony.<sup>53</sup> Similarly, Dunn testified that he told Piccerelli that four named employees did not feel there was a union.<sup>54</sup> This is not uncontested testimony – it is uncorroborated testimony.

As noted above, Dunn, Piccerelli, and three employee witnesses all testified about the same set of conversations. But only in Dunn’s version did employees say anything like “there is no union” Smith, Brathwaite, Sousa, and Piccerelli all testified regarding their conversations with Dunn, but not one of them used the words Dunn ascribed to each of them. The ALJ properly discredited Dunn’s testimony “to the extent he claimed that he was told by employees that (or some variant of) ‘they are not represented’ or ‘there is no union.’”<sup>55</sup> The judge specifically credited Dunn’s testimony

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<sup>50</sup> Brief at 26.

<sup>51</sup> T-158-160.

<sup>52</sup> T-180-182; T-214-216.

<sup>53</sup> T-169.

<sup>54</sup> T-157.

<sup>55</sup> ALJD at 10. In an apparent attempt to bolster Dunn’s credibility, Respondent characterizes him as “a proud member of the bargaining unit for 28 years,” as well as a shop steward. Brief at 29. There is nothing in the record, however, to indicate that Dunn was “proud” of his Union membership, or that he served as steward in any more than a perfunctory way.

regarding his discussions with Smith, but, as discussed in detail below, concluded that they fell short of establishing that Smith did not want union representation.<sup>56</sup>

Additionally, the ALJ discredited Dunn's testimony not because it was consistent with Respondent's legal theory, but because it was contorted in order to support that theory. The ALJ noted the odd construction of Dunn's repeated refrain that employees told him "there is no union," especially in view of the complete absence of any corroboration, and appropriately found Dunn to be an unreliable witness. Further, the ALJ found Dunn's testimony to be "rote and rehearsed," in contrast to the frank and honest testimony of Piccerelli<sup>57</sup> and the sometime confused but generally credible testimony of the employee witnesses.

Third, Respondent inaccurately and repeatedly asserts in its Brief that the ALJ "discredited all of the Foundation's testimony."<sup>58</sup> No matter how many times Respondent sounds this refrain, it is simply untrue. As noted above, the ALJ found Piccerelli to be forthright and candid, and generally credited his testimony.<sup>59</sup> The ALJ also credited Sousa, who testified that Dunn had never asked him how he felt about the Union.<sup>60</sup> The ALJ discredited Brathwaite only where his testimony conflicted with Piccerelli's. In particular, the judge found Piccerelli to be more credible on the matter of how the May 2017 conversation in Piccerelli's office came about.<sup>61</sup> Piccerelli testified that he used the station's PA system to call Brathwaite into his office to inquire about his views of the Union.<sup>62</sup> As the ALJ noted, Brathwaite testified inconsistently on this subject. When

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<sup>56</sup> ALJD at 18.

<sup>57</sup> ALJD at 8, fn 6.

<sup>58</sup> Brief at 30, 32, 33.

<sup>59</sup> ALJD at 8, fn 6.

<sup>60</sup> ALJD at 19; T-185.

<sup>61</sup> ALJD at 7, fn 4.

<sup>62</sup> T-126-127.

asked on direct examination whether Piccerelli had called him into his office, Brathwaite responded, "Yes, I think so."<sup>63</sup> On cross, however, Brathwaite testified that Piccerelli questioned him when he went to Piccerelli's office to get keys to a van.<sup>64</sup> The ALJ appropriately credited Brathwaite's direct testimony on this subject, which was consistent with Piccerelli's "certain recollection."<sup>65</sup>

The ALJ disregarded the testimony of Smith and Brathwaite for an independent reason: their violation of the judge's sequestration order.<sup>66</sup> Under cross examination, Brathwaite acknowledged that he had met with Smith and Piccerelli on the morning of his testimony for the purpose of discussing their testimony.<sup>67</sup> Piccerelli had already testified, but Smith and Brathwaite had not. The ALJ correctly noted that this case turns on exactly what Respondent's employees and managers said to each other in the spring of 2017, when no one else was present.<sup>68</sup> Those same employees met with one of those managers on the morning of the second day of the hearing, just before they were to testify regarding those same conversations. Thus, as Judge Goldman noted, the violation of the sequestration rule "strikes at the heart of the credibility of the Respondent's case."<sup>69</sup> The ALJ properly disregarded their testimony, as it had been tainted by the violation of the sequestration order.<sup>70</sup>

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<sup>63</sup> T-217.

<sup>64</sup> T-221.

<sup>65</sup> ALJD at 7, fn 4.

<sup>66</sup> ALJD at 20.

<sup>67</sup> T-221-223.

<sup>68</sup> ALJD at 20.

<sup>69</sup> ALJD at 20.

<sup>70</sup> In its Brief, Respondent inaccurately states that the ALJ discredited all its witnesses based on the sequestration order violation. This is patently false. The ALJ specifically limited his ruling in this regard to Smith and Brathwaite, who were about to testify regarding their conversations with Piccerelli and Dunn. (ALJD at 20) Moreover, as discussed above, the ALJ found Piccerelli to be frank and honest, and credited his testimony.

Respondent first takes the position that there is no evidence “that a violation [of the sequestration order] even occurred.”<sup>71</sup> This is simply untrue. As discussed above, Brathwaite testified that he, Smith, and Piccerelli had discussed their testimony when they met at the station on the second day of trial. Respondent made no effort on redirect to clarify this response, leaving the ALJ to rationally conclude that Brathwaite and Smith discussed the substance of their testimony. In its Brief, Respondent offers the possibility that the morning discussion concerned only the witnesses’ “feelings” about their testimony. With nothing in the record to support such a claim, it is a mere fiction.

Without additional evidence, Brathwaite’s admission plainly establishes a violation of the ALJ’s order. Respondent could have recalled Piccerelli or Smith to rehabilitate Brathwaite by explaining what occurred at the meeting, but failed to do so. While Respondent argues that it had the right to prepare its witnesses for rebuttal of the General Counsel’s evidence,<sup>72</sup> it produced no testimony indicating that the morning meeting with Piccerelli was held for that purpose. Indeed, such a proposition would be wholly unbelievable for two reasons. First, neither Brathwaite nor Smith testified about anything raised in the testimony of the General Counsel’s sole witness. Second, since Respondent’s counsel was not present for the morning meeting, it is simply not believable that the meeting was held for the purpose of preparing to rebut the General Counsel’s evidence. Respondent further argues that excluding the testimony of Brathwaite and Smith “unnecessarily penalize[s] the innocent litigant,”<sup>73</sup> while failing to acknowledge that its highest ranking officer, David Piccerelli, participated in the

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<sup>71</sup> Brief at 31.

<sup>72</sup> Brief at 32.

<sup>73</sup> Brief at 31.

offending meeting. Respondent also takes the untenable position that the ALJ disregarded Brathwaite's and Smith's entire testimony based solely on their violation of the sequestration order.<sup>74</sup> This claim, too, is patently false. As discussed in detail above, the ALJ specifically discredited Brathwaite's testimony only where it conflicted with credible evidence offered by Respondent's other witnesses. As to Smith's testimony, the ALJ gave it little weight not because it was unreliable, but because it offered "*nothing* that can be held out as objective proof that he did not want to be represented. Unhappy with the Union, yes. But proof that he wanted the union removed as the representative—it is not there."<sup>75</sup>

Finally, in arguing that the ALJ's credibility determinations should be overruled, Respondent strongly implies that Judge Goldman has demonstrated judicial bias throughout his NLRB career. In support of this theory, Respondent offers a chart purporting to show all of the ALJ's reported decisions, except those involving disputes between employees and unions.<sup>76</sup> Respondent asserts that Judge Goldman has ruled in favor of unions in 62 out of 71 decisions, and frequently makes credibility rulings affecting those outcomes. However, Respondent makes no mention of the fact that Judge Goldman has dismissed numerous claims brought by various NLRB attorneys over the years, or that his findings have been routinely upheld by the Board. Where is the chart showing that Judge Goldman's credibility findings have routinely been rejected by the various Board panels?

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<sup>74</sup> Brief at 31.

<sup>75</sup> ALJD at 18. Emphasis in original.

<sup>76</sup> Brief Exhibit B.

As Respondent acknowledges, “a pattern of decision-making, by itself, is not sufficient to vacate an ALJ decision for improper bias.”<sup>77</sup> Nevertheless, Respondent goes on to assert that Judge Goldman’s “propensity to believe unions over employers on matters that affect the outcomes of his decisions” justifies overruling his credibility findings in this case.<sup>78</sup> The Board and Courts have consistently held that a judge’s “disproportionate ruling[s] for one side or the other are not indicative of judicial bias.” *Southwire Company*, 277 NLRB 377(1985), citing *NLRB v. Pittsburgh Steamship Co.*, 337 U.S. 656, 659 (1949); *Southern Pacific Communications v. A.T. & T.*, 740 F.2d 980, 995 (D.C. Cir. 1984). In *Southwire*, the Board quoted the Circuit Court’s holding: “We conclude that the statistical one-sidedness of the trial court’s evidentiary, factual and legal rulings simply cannot be used to support an inference of judicial bias.” *Southwire*, supra, 277 NLRB at 390, quoting *Southern Pacific*, supra, 740 F.2d at 995.

The Board has also held that a claim of judicial bias cannot be predicated on adverse credibility findings. *Silvercrest Industries, Inc.*, 220 NLRB 135, 142 fn 2 (1975). Here, like in *Silvercrest*, Respondent has charged the ALJ with bias based principally on his crediting the testimony of General Counsel’s witness, not crediting Respondent’s witnesses, and reaching conclusions adverse to Respondent. Here, no external evidence of bias has been presented. In its gratuitous and unsupported attack on Judge Goldman’s integrity, Respondent inaccurately portrays the ALJ as crediting the General Counsel’s witness over Respondent’s witnesses. In making this assertion, Respondent ignores that fact that, with one exception, there was virtually no overlap between the

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<sup>77</sup> Brief at 30, fn 112, citing *NLRB v. Joy Recovery Tech. Corp.*, 134 F.3d 1307, 1312 (7<sup>th</sup> Cir. 1998).

<sup>78</sup> Brief at 30, fn 112.

parties' testimony.<sup>79</sup> Most of the testimony Respondent presented concerned the discussions between and among its managers and employees, a subject on which Union Business Manager Fischer had no knowledge and offered no testimony. Thus, even on factual grounds alone, Respondent's judicial bias argument fails. Judge Goldman carefully analyzed the testimony of each of Respondent's witnesses, frequently finding that their testimony was inconsistent *with each other* on conversations material to the outcome of this case.<sup>80</sup> As Respondent knows, Judge Goldman made virtually no credibility rulings pitting its witnesses against the General Counsel's; his findings were based on the relative consistency, forthrightness, and demeanor of Respondent's witnesses, some of whom he credited and some of whom he credited only for limited purposes. Based on the foregoing, Judge Goldman's credibility findings should not be disturbed. Respondent's attack on the ALJ is entirely unwarranted and meritless.

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<sup>79</sup> The only matter on which Piccerelli's testimony conflicted with that of GC witness Fletcher Fischer was whether Fischer contacted Piccerelli by phone in March before sending him a contract proposal in May 2017. The ALJ appears to have credited Fischer on this issue; he testified with certainty that he had contacted Piccerelli by phone in about March 2017 (T-88), while Piccerelli testified that he did not recall a phone call from Fischer (T-35-36). Importantly, this credibility ruling had no material impact on the outcome of the case (ALJD at 4).

<sup>80</sup> For example, as discussed above, the ALJ credited Piccerelli's frank testimony over Brathwaite's inconsistent testimony on the genesis of the May conversation in Piccerelli's office. Likewise, the ALJ credited Sousa's testimony over Dunn's with respect to Sousa's statements about the Union because Dunn testified in a rote and rehearsed manner that Sousa, like the other employees, had told him that the Union didn't represent him and that "there's no Union, there's no contract,"<sup>80</sup> while Sousa's testimony contained no such words or phrases.

**4. Respondent's Exceptions #59 and 60 should be denied because a bargaining order and one-year decertification bar have long been the Board's preferred remedy for unlawful withdrawals of recognition.**

In virtually all post-*Levitz* cases finding unlawful withdrawals of recognition, the Board has imposed an affirmative bargaining order with a one-year decertification bar. In accordance with this approach, the ALJ recommended that Respondent be ordered to recognize and bargain with the Union for a reasonable period, as set forth in *Lee Lumber & Building Material Corp.*, 334 NLRB 399 (2001), *enfd.* 310 F.3d 209 (D.C. Cir. 2002). Nevertheless, Respondent argues that such relief is "draconian" and urges the Board to adopt a "more moderate" approach. Specifically, Respondent asserts that any unfair labor practices could be remedied by a cease and desist order.<sup>81</sup>

As the ALJ set forth fully in his recommended remedy, an affirmative bargaining order is warranted for Respondent's unlawful withdrawal of recognition. The Board has adhered to the view that an affirmative bargaining order is "the traditional, appropriate remedy for an 8(a)(5) refusal to bargain with the lawful collective-bargaining representative of an appropriate unit of employees." *Caterair International*, 322 NLRB 64, 68 (1996). In his proposed remedy, the ALJ meticulously set out the basis for his recommended order, justifying, as the Courts have required, the need for an affirmative

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<sup>81</sup> Brief at 36. Respondent takes the preposterous position that the ALJ imposed a bargaining order "based on his finding that the Foundation conducted brief interrogations." Brief at 39. The recommended bargaining order is based on the ALJ's finding that bargaining unit employees "were denied the benefits of collective bargaining through their designated representative by the Respondent's refusal to meet to bargain from and then by the Respondent's withdrawal of recognition." Moreover, the ALJ noted, "the Respondent's refusal to recognize and bargain with the Union occurred at a time when the Union was repeatedly requesting bargaining, during a time when the employer was providing unilateral wage increases to employees, but also during a time when there was no employee effort to decertify the Union." ALJD at 22.

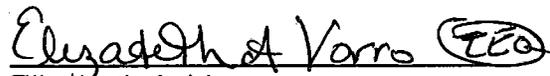
bargaining order in these circumstances.<sup>82</sup> His rationale, which has met with frequent Board approval, need not be repeated here.

### CONCLUSION

Based upon the foregoing, Counsel for the General Counsel has established that none of Respondent's Exceptions to the ALJ's decision are meritorious. Accordingly, Counsel for the General Counsel respectfully requests that the Board dismiss Respondent's Exceptions in their entirety and affirm the decision and order of the Administrative Law Judge.

Dated: September 26, 2018

Respectfully submitted,

  
Elizabeth A. Vorro  
Counsel for the General Counsel  
National Labor Relations Board  
Region 01

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<sup>82</sup> ALJD 22-24.

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UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
REGION 01

RHODE ISLAND PBS FOUNDATION

and

Case 01-CA-204520

INTERNATIONAL BROTHERHOOD OF ELECTRICAL  
WORKERS LOCAL 1228

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

I, the undersigned employee of the National Labor Relations Board, being duly sworn, say that on September 26, 2018, I served the above-entitled document(s) by email, on the following persons, addressed to them at the following addresses:

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