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 ALJ: David Goldman

REPLY BRIEF OF RESPONDENT RHODE ISLAND PBS FOUNDATION TO COUNSEL FOR THE GENERAL COUNSEL'S ANSWERING BRIEF TO RESPONDENT'S EXCEPTIONS TO THE ADMINISTRATIVE LAW JUDGE'S DECISION

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I. INTRODUCTION

The Union received every advantage in this case. Notwithstanding uncontested testimony from three of the four employees who comprised a majority of the disputed bargaining unit and two members of management, all of which supported the obvious conclusions that the Union lacked majority support and had not been active at the Foundation for years, the ALJ held – based on an insurmountable standard that essentially would have required an actual decertification petition using specific magic words – that the Foundation failed to prove its case. In an attempt to protect that conclusion from reversal on appeal, the ALJ disregarded the Foundation's testimony by arguing – without actual evidence – that its witnesses violated a sequestration order; and by concluding that statements freely-given by employees to management were the result of illegal "interrogations." This all occurred within the context of a subsequent decertification petition that was signed by seven of the ten employees now in the disputed unit.

Ironically, the ALJ's Decision will lead to the opposite of its intended result. Instead of protecting employees' rights to choose whether or not they want union representation, the Decision will impose a union on employees who have not consented to representation. The General Counsel says that there is no systemic error because the Foundation could have filed an RM petition to test union support. But at the same time, the General Counsel takes legal positions that make it impossible for an employer – confronted by employees' clear statements opposing representation – to gather evidence to support its petition without inevitable exposure to an unfair labor practice charge and the corresponding blocking of an election. The ALJ's Decision should be reversed and the Union's unfair labor practice charge should be dismissed.

II. ARGUMENTS IN REPLY TO ANSWERING BRIEF

The General Counsel's argument in its Answering Brief that *Levitz Furniture*, 333 NLRB 717 (2001) "did not create insurmountable obstacles for employers" is belied by each of the five cases that the General Counsel cites in support.[1] In *Diversicare Leasing Corp.*, 351 NLRB 817 (2007), *Shaws Supermarkets*, 350 NLRB 585 (2007), *Renal Care of Buffalo, Inc.*, 347 NLRB 1284 (2006), and *Champion Enterprises, Inc.*, 350 NLRB 788 (2007) – all relied upon by the General Counsel for the proposition that employees can still withdraw recognition after *Levitz* – the Board upheld the employer's withdrawal only after employees filed RD decertification petitions.[2] The fifth and final case relied upon by the General Counsel, *Comau, Inc.*, 358 NLRB 593 (2012), involved an employee disaffection petition in which an employer recognized a new union over an old union.[3]

The General Counsel's cases reinforce the reality that *Levitz*, as it is interpreted by the ALJ and the General Counsel, has imposed a standard that is impossible for employers to meet. Ostensibly, under *Levitz* an employer can withdraw recognition if it can show any type of "objective evidence" that the union has actually lost majority support. But as demonstrated by the ALJ's Decision, and the cases in the General Counsel's Answering Brief, the only type of "objective evidence" that passes muster is an employee decertification petition. This puts an employer in an impossible situation that contravenes the principle in *Allentown Mack* against *sub silento* rulemaking that frustrates a party's reasonable expectations. *Allentown Mack Sales & Services v. NLRB*, 522 U.S. 367 (1998).

[1] General Counsel Answering Brief ("GC Answering Br.") at 6.
[2] GC Answering Br. at 6 n.8.
[3] GC Answering Br. at 6 n.8.

The end result of the General Counsel's argument, and the ALJ's application of the *Levitz* standard, is that an employer can take no steps to determine if a union has majority support even when it is nose-on-the-face plain that it does not. A union can stay dormant for years and do nothing on behalf of its alleged members. Under the ALJ's Decision and the General Counsel's argument, the long-term dormancy of a union is irrelevant. Nor does it matter that the Union did not have a contract with the Foundation, filed no grievances, failed to deliver promised checkoff forms, and took no concrete steps for the Foundation's employees. Under the General Counsel's rubric, if an employer conducts any investigation whatsoever to confirm the veracity of employees' repeated and unprompted anti-union statements, the employer is susceptible to an unfair labor practice and a blocking charge that will forestall an election.

The General Counsel faults the Foundation for not testing whether the Regional Director would have processed a RM petition. Then, in the next breath, the General Counsel, like the ALJ's Decision, faults the Foundation for attempting to gauge whether the Union had majority support.[4] In the General Counsel's view, "it is generally unlawful for an employer to inquire as to the union sentiments of employees."[5] So, in the General Counsel's worldview, an employer can submit an RM petition, but it cannot do anything to support it with the requisite evidence so that it might actually go somewhere. *See* 29 C.F.R. § 102.61(b). The General Counsel's "heads I win, tails you lose" approach highlights the insurmountable obstacles that employers like the Foundation face in determining union support. Employers are caught in a Catch-22 that makes *Levitz* unworkable: if the employer tries to determine if the union has majority support, it will face an unfair labor practice charge, but if the employer does not gauge union support, it must

[4] GC Answering Br. at 8 & n.15.
[5] GC Answering Br. at 19.

recognize a defunct union that its employees want nothing to do with.[6] The Board should overturn *Levitz* and return to its longstanding, fair, and reasonable rule that an employer can withdraw recognition based on good faith doubt of majority support under *Celanese Corp.*, 95 NLRB 664 (1951).

The General Counsel, like the ALJ's Decision, attempts to camouflage the unworkability of the *Levitz* standard (as applied in this case) by arguing that employee statements such as "there is no union" and "the Union does not represent me" are not a sufficient evidentiary basis to withdraw recognition.[7] There are several problems with this line of reasoning. The Answering Brief purports to list all of the relevant statements from the Foundation's witnesses, and claims that "[e]ven if every one of Respondent's witnesses were credited, their statements do not constitute objective evidence" of lack of majority union support, but in reality the list is misleading and incomplete.[8] Case in point: For Mark Smith, the General Counsel's list omitted Rick Dunn's testimony that "[Mark Smith] goes there is no Union, they're not helping me,"[9] omitted Smith's testimony that "I didn't feel a representation from the Union and I let it be known,"[10] and omitted David Piccerelli's testimony that Smith "[d]idn't feel that he needed them [the Union] to represent him."[11] For Joe Brathwaite, the General Counsel omitted his testimony that when Piccerelli asked "What did I think about the Union?," Brathwaite responded, "No."[12] For John Sousa, the General Counsel omitted Dunn's testimony that Sousa had said "there's no

[6] For the reasons stated in the Foundation's main Brief, the Foundation did not interrogate its employees. The General Counsel claims that it is "preposterous" for the Foundation to argue that the ALJ imposed a bargaining order based on his finding that the Foundation conducted interrogations, GC Answering Br. at 28 n.8, but there is nothing "preposterous" about it at all. The genesis of this entire case is the Foundation's even-handed attempts to gauge support for a union that even its members said did not exist. *See, e.g.*, HT at 169 ("Mark Smith said the IBEW does not represent me. Joe Brathwaite had said there was no union.").
[7] GC Answering Br. at 13.
[8] GC Answering Br. at 8, 10 & n.15.
[9] Hearing Transcript ("HT") at 160.
[10] HT at 205.
[11] HT at 123.
[12] HT at 216.

Union, there's no contract."[13] And finally, for Patrick O'Brien, the General Counsel omitted Dunn's testimony that "Pat O'Brien told me he wasn't interested in the Union."[14] The General Counsel claims that O'Brien said, "I don't know how I'll vote," but that is not what the transcript says. Piccerelli testified that "O'Brien told me he was against [the Union], but he did not specifically say that, you know, he would necessarily -- how he would vote."[15] At most, O'Brien did not *disclose* how he would vote; he did not say he *did not know* how he would vote. And given O'Brien's stated concerns about whether a vote would be by open ballot, it was reasonable for the Foundation to infer that he did not want his pro-Union friends to know that he actually sided with Smith, Sousa, and Brathwaite.[16]

As a matter of law, Board precedent rejects the General Counsel's conclusory and nonsensical assertions that statements like "there is no union" and "the Union does not represent me" cannot provide a basis to withdraw union recognition. The Board has held that there is no obligation to bargain when there "is no union." *Storer Communs.*, 297 NLRB 296, 299 (1989). Thus, statements like "there is no union" mean exactly what they say – that the union does not exist. It is hard to think of a clearer expression that an employee does want a union. The General Counsel's rejection of statements like "the union does not represent me" fare no better. Citing *Levitz*, the Board has ruled that an employer can withdraw union recognition when a "union does not represent a majority of employees." *DiPonio Constr. Co.*, 357 NLRB 1206, 1207 (2011). A statement that the Union "does not represent me" tracks this exact language. If a majority of employees say the union does not "represent me," then a majority of employees do not want the union.

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[13] HT at 162
[14] HT at 162.
[15] HT at 132.
[16] *Id.* ("He was concerned that it would be an open vote if there ever was a vote and he didn't want to be perceived as going against anybody, *specifically those in favor of the union.*" (emphasis added)).

Consistent with the ALJ's Decision, the General Counsel erects an impossibly high standard for an employer to withdraw recognition, in which a rank-and-file employee must say magic words such as "I reject union representation" and "I desire to remove the union as representative."[17] But in the workplace, the reality is that employees rarely speak in such legalistic terms. This creates another Catch-22 for employers like the Foundation – if an employer asks an employee to clarify whether his anti-union statements really do mean what the ALJ's Decision and the General Counsel would require to satisfy the "objective evidence" standard, the employer is prone to attack for an unfair labor practice for asking suggestive questions. *See, e.g.*, GC Answering Br. at 16 ("It is well settled that an employer may not lawfully withdraw recognition based on tainted evidence of a loss of majority support."). Once again, the ALJ and General Counsel's preferred legal approach is a "heads I win, tails you lose" scenario for the Union.

The General Counsel also tries to save the ALJ's Decision by claiming that Dunn's testimony was not "corroborated" by a single Foundation witness.[18] The General Counsel says that "Dunn testified repeatedly that employees told him there was no union, but no employee used language remotely similar" and "not a single witness corroborated Dunn's portrayal of their words."[19] This is a patently incorrect assertion by the ALJ and repeated by the General Counsel. Braithwaite testified that Piccerelli asked him "What did I think about the Union"," and Braithwaite responded "No."[20] This is a word-for-word corroboration of Dunn's testimony that employees had told him that there was "no union."

[17] See GC Answering Br. at 13.
[18] GC Answering Br. at 21.
[19] GC Answering Br. at 21.
[20] HT 218-219.

The General Counsel further argues that "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."[21] But this is not what the ALJ said. The ALJ discredited Dunn's testimony because it was "in service to the [the Foundation's] legal theory that its refusal to bargain was justified by a claimed union abandonment of the unit."[22] This is just another way of saying that Dunn was not credible because his testimony was consistent with the Foundation's legal theory. Under this logic, the testimony of any witness associated with a party must be disregarded based on their interest, which is a clear error of law. *E.g.*, *Adams v. Astrue*, No. CV-10-170-AC, 2011 U.S. Dist. LEXIS 151477, at *26 (D. Or. Dec. 8, 2011) (personal relationships between lay witnesses and interested parties are commonplace "and do not provide a germane reason to discount [such witnesses'] statements.").

The General Counsel misreads the Foundation's Brief as arguing that the ALJ discredited all of the Foundation's testimony.[23] Clearly he did not, because had he done so, there would have been almost no evidence on which to base a decision, since the Union presented only one witness – Fletcher Fischer – a union agent with minimal firsthand knowledge of the underlying facts. However, it is a fair statement that the ALJ repeatedly and consistently made credibility findings in favor of the Union. When the ALJ perceived any inconsistency in testimony between witnesses – including many that simply are not there (as pointed out in the Foundation's main brief) – the ALJ credited the version that most favored the Union. This is made clear in the General Counsel's Answering Brief, which argues that the ALJ "credited" Piccerelli's testimony over Brathwaite[24] and Sousa's over Dunn.[25] The General Counsel neglects to mention that in

[21] GC Answering Br. at 22.
[22] ALJ Dec. at 8 n.6.
[23] GC Answering Br. at 22.
[24] GC Answering Br. at 22-23.

both of these instances, and in others, the ALJ interpreted any perceived inconsistencies in favor of the Union. It is in support of this point that the Foundation conducted a survey of the ALJ's publicly-reported decisions and discovered that he rules in favor of unions either partially or completely approximately 87% of the time.[26] The Foundation does not question the ALJ's integrity, but it does question the ALJ's pattern of decision-making, and urges the Board to afford the ALJ's credibility determinations less deference based on that pattern.[27]

Turning to the ALJ's finding that the Foundation violated the ALJ's sequestration order, both the ALJ's Decision and the General Counsel's Answering Brief are riddled with errors on this point. The General Counsel claims the Foundation's position that the ALJ disregarded Brathwaite and Smith's entire testimony based on a violation of the order is "untenable" and "patently false."[28] But that is precisely what the ALJ did on the key question of whether the Foundation had evidence of lack of Union support. In reference to "employee testimony about what they told Dunn and Piccerelli," the ALJ decided to "disregard it (at least with regard to Smith and Braithwaite) for [a violation of the sequestration order]" that he claimed "strikes at the heart of the credibility of the Respondent's case" for which the "taint [was] severe."[29] In other words, the ALJ wiped out the Foundation's key testimony on the matters under dispute. More fundamentally, both the ALJ and the General Counsel make speculative assumptions to find a violation of the sequestration order that simply are not supported by the testimony or the reality of the underlying events. The General Counsel claims that Foundation employees discussed

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[25] GC Answering Br. at 27 n.80.
[26] Foundation Br. 30 n.112 and *Exhibit B* to Brief.
[27] See Foundation Br. at 30 n.112. The Foundation is also confused by the General Counsel's assertion that "Respondent makes no mention of the fact that [the ALJ] has dismissed numerous claims brought by various NLRB attorneys over the years." Far from hiding the ball, *Exhibit B* to the Foundation's brief notes decisions wherein the ALJ ruled only partially in favor of unions, which means he also ruled partially in favor of the employers. *Exhibit B* also includes a list of cases wherein the ALJ ruled in favor of employers.
[28] GC Answering Br. at 25.
[29] ALJ Dec. at 20.

their testimony when they met "at the station on the second day of trial" when "Respondent's counsel was not present."[30] The ALJ made a similar error, finding that "Brathwaite admitted that he, Smith, and Piccerelli met together the morning of their testimony to discuss their testimony."[31] In reality, the hearing transcript establishes that Smith, Brathwaite and Piccerelli met with their counsel, at his office (literally across the street from where the trial was being held), on the second day of the hearing.[32] At the meeting, Brathwaite testified that – *at most* – they talked about "how Brathwaite fe[lt] about it."[33] There is *nothing* in the transcript that suggests they discussed "either the testimony that they [had] given or that they intend[ed] to give." *Greyhound Lines, Inc.*, 319 NLRB 554, 554 (1995). Like so many other aspects of the ALJ's Decision, the Union received every advantage and the ALJ built inference upon inference to reach the conclusion that the Foundation violated the sequestration order. The ALJ did not establish a violation of the sequestration order by any competent evidence, let alone a preponderance of the evidence.

III. CONCLUSION

For the foregoing reasons, and those stated in the Foundation's opening Brief, the Foundation respectfully requests that the Board reverse the ALJ's conclusions that the Foundation violated the Act and dismiss the Union's unfair labor practice charge.

[30] GC Answering Br. at 23-24.
[31] ALJ Dec. at 20.
[32] HT at 222-223.
[33] HT at 222.

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Dated: October 12, 2018

CERTIFICATE OF SERVICE

I hereby certify that on October 12, 2018, I filed a copy of the foregoing document electronically via the National Labor Relations Board's website and caused copies to be served upon the following individuals via e-mail:

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