

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 13**

SEARS, ROEBUCK AND CO.

And

Case No. 13-CA-191829

**LOCAL 881 UNITED FOOD AND COMMERCIAL
WORKERS**

**LOCAL 881 UFCW'S ANSWERING BRIEF
TO RESPONDENT'S EXCEPTIONS**

Respectfully submitted,



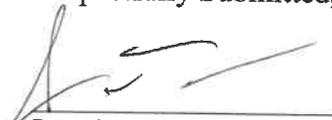
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Pursuant to Section 102.46 and the Board's Rules and Regulations, Series 8, as amended, Local 881 United Food and Commercial Workers ("Local 881") submits this Answering Brief to Respondent's Exceptions to Administrative Law Judge ("ALJ") Kimberly R. Sorg-Graves's August 17, 2018, Decision and Order. Local 881 relies upon the Statement of the Case and accompanying factual Findings as set forth in ALJ's Decision and the record of the hearing in this matter.

In support of its Answering Brief, Local 881 hereby adopts and incorporates by reference the findings of fact, arguments, positions, and conclusions set forth in the Counsel for the General Counsel's Answering Brief to Respondent's Exceptions, as if fully set forth herein (The Counsel for The General Counsel's Answering Brief is attached hereto as Exhibit A).

Dated: October 29, 2018

Respectfully Submitted,



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CERTIFICATE OF SERVICE

I hereby certify that on the 29th day of October, 2018, a copy of the **LOCAL 881 UFCW'S ANSWERING BRIEF TO RESPONDENT'S EXCEPTIONS** was filed electronically with the Board's E-Filing System and also in the manner indicated upon the following parties of record and their counsel:

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COUNSEL FOR THE GENERAL COUNSEL'S
ANSWERING BRIEF TO RESPONDENT'S EXCEPTIONS

Respectfully submitted,



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Pursuant to Section 102.46 of the Board's Rules and Regulations, Series 8, as amended, Counsel for the General Counsel ("General Counsel") submits this Answering Brief to the Respondent's Exceptions to Administrative Law Judge ("ALJ") Kimberly R. Sorg-Graves's August 17, 2018, Decision and Order. General Counsel relies upon the Statement of the Case and accompanying factual findings as set forth in ALJ's Decision and the record of the hearing in this matter.

The ALJ correctly found the Respondent violated Section 8(a)(5) and (1) of the Act when it relied on a decertification petition signed within the certification year in withdrawing recognition from the Union after the certification year expired.

The ALJ's factual findings are supported by the overwhelming evidence and her legal conclusions are supported by well-established Board law. The ALJ's sound decision that the Respondent violated the Act when it unlawfully withdrew recognition from the Union pursuant to a petition with signatures obtained during the certification year is based on all relevant facts and appropriate legal principles. The ALJ overwhelmingly credited the General Counsel's primary witness Barbara Gregory over the Respondent's witness Anthony "Tony" Harris. Accordingly, her decision should be sustained and Respondent's Exceptions should be dismissed in their entirety.

The General Counsel notes that Respondent's Exceptions 1 and 3 to the Administrative Law Judge's decision in the instant matter are related to the ALJ's reliance on *Chelsea Industries, Inc.*, 331 NLRB 1648 (2000); and *Latino Express*, 360 NLRB 911 (2014); and her appropriate recommended remedy that the Respondent be ordered to recognize the Union and, upon request, bargain for a reasonable period of time. Therefore, General Counsel will address these two specific exceptions together.

I. The Record Fully Supports the ALJ's Findings that the Board's holding and reasoning in both *Chelsea Industries* and *Latino Express* makes it unlawful for an employer to withdraw recognition from the Union after the certification year expired based on a petition obtained during the certification year.

Contrary to the Respondent's argument, the ALJ did not err in finding the Respondent unlawfully withdrew recognition from the Union on the basis of an antiunion petition circulated and presented to the employer during the certification year. Nor did the ALJ err in ordering the Respondent to recognize and bargain with the Union, upon request, for a reasonable period of time. During the certification year, it is Board policy to treat a certification under Section 9 of the Act as identifying the statutory bargaining representative with certainty and finality for a period of one year.¹ *Mar-Jac Poultry Co.*, 136 NLRB 785, 785-786 (1962). This black letter Board rule was upheld by the Supreme Court in *Brooks v. NLRB*, 348 U.S. 96, 103 (1954) where the Court stated, "The underlying purpose of this statute is industrial peace. To allow employers to rely on employees' rights in refusing to bargain with the formally designated union is not conducive to that end, it is inimical to it. Congress has devised a formal mode for selection and rejection of bargaining agents and has fixed the spacing of elections, with a view of furthering industrial stability and with due regard to administrative prudence." General Counsel submits that a petition generated during the certification year cannot provide a basis for withdrawal of recognition after the expiration of the certification year. *Latino Express, Inc.*, 360 NLRB 911, 923 (2014). An employer also cannot withdraw recognition after the certification year expires based on evidence of employee dissatisfaction that was obtained during the certification year.

Chelsea Industries, 331 NLRB 1648 (2000), enfd. 285 F.3d 1073 (D.C. Cir. 2002). The

¹ Respondent incorrectly urges the Board to follow the holding in *Levitz Furniture Co. of the Pacific, Inc.*, 333 NLRB 717 (2001). However, *Levitz* is not applicable here because this petition was procured during the certification year. In *Levitz*, the union was not in its certification year, thus, the withdrawal of recognition based on a showing of loss of support was legally appropriate. The Board's 1 year certification rule was not an issue in *Levitz*.

certification year rule applies for one year following the date of certification. *Americare-New Lexington Health Care Center*, 316 NLRB 1226, 1226-1227 (1995). This rule is applied strictly. *United Supermarkets*, 287 NLRB 119, 120 (1987).

On its face, the unlawful petition relied on by the Respondent to withdraw recognition shows the signatures were collected on November 8 and November 10, 2016; both dates are clearly within the certification year. (ALJD 4; Tr. 44-46, 50-51; GC 2, R 1.) The record evidence established that after collecting the signatures on the petition employee Barbara Gregory placed the petition inside Store Manager's Anthony "Tony" Harris' desk on November 10, 2016, based on a previous understanding between Gregory and Harris. (ALJD 6, 7; Tr. 51-52.) The Respondent claims they were not aware of the petition until November 29, 2016, when Store Manager Harris allegedly found the petition in his desk drawer. (ALJD 5; Tr. 109, 114-115). The ALJ completely credited Barbara Gregory's testimony over Mr. Harris where they contradicted each other. (ALJD 5-8) More importantly, the ALJ specifically did not credit Harris' testimony with respect to his assertion that he did not find the decertification petition until November 29, 2016, one day prior to the end of the certification year on November 30th. (ALJD 8) The Board does "not overrule a Trial Examiner's resolutions as to credibility except where the clear preponderance of all the relevant evidence convinces [the Board] that the Trial Examiner's resolution was incorrect." *Standard Dry Wall Products*, 91 NLRB 544 (1950). The Board, rightly so, places great weight on administrative law judges' credibility findings since the trial examiner observes the witnesses testify first hand. Here there is no evidence that the ALJ's credibility determinations were wrong.

In fact, all the evidence and facts adduced at the hearing support the ALJ's findings. As the ALJ noted, this was a desk drawer that Harris opened 2 or 3 times per day to retrieve office

supplies. (ALJD 8, Tr. 109) The ALJ also found it highly suspicious that Respondent did not provide any evidence of communication from Harris to the vice president of human resources about the petition on November 29, 2016, which was the date Harris says he claimed that he informed Corporate about the existence of the petition. (ALJD 8, Tr. 120-121) Significantly, the Respondent never provided an explanation for the time lapse between Gregory leaving the petition in Harris' drawer on November 10th and his alleged discovery of the petition on November 29th. There was also no documentary evidence proffered by the Respondent showing what date Harris provided a copy of the petition to his superiors in corporate. (ALJD 8, Tr. 118, 120-121) Thus, the only logical conclusion that can be drawn is that the Respondent was holding the decertification petition in abeyance and waiting for the certification year to end on November 30th in order to withdraw recognition from the Union.

The Respondent argues the Board should overrule the decisions in *Chelsea Industries, supra.* and *Latino Express, supra.* because these decisions are not rooted in case law or the Act. The Respondent's argument is specious and should not be given any weight. First, the certification year rule is an established legal principle and has been sanctioned by the Supreme Court since it decided *Brooks v. NLRB*, 348 U.S. 96 (1954) where it approved the Board's requirement that an employer must recognize the union for the entire certification year, even if it is presented with evidence of the union's loss of majority. Second, the very reason the certification year rule was adopted was to ensure industrial peace for the one year period after an election. This is clearly a bright line rule. By asking the Board to overrule *Chelsea Industries* and *Latino Express* the Respondent is asking the Board to erode the certification year rule in an unlawful manner.

The Respondent erroneously argues the Board should adopt the rationale set forth by former Member Peter Hurtgen in *Chelsea Industries*. However, the Board should not follow the dissent as it is not extant law. It should be noted that Hurtgen based his dissent on *Rock-Tenn, Co.*, 315 NLRB 670 (1994), enf'd, 69 F.3d 803 (7th Cir. 1995) which the *Chelsea Industries* Board specifically overruled to the extent that it suggests that based on evidence received during the certification year, an employer may announce that it intends to withdrawal recognition from the union at the end of the certification year. The Board found that the anticipatory withdrawal of recognition line of cases on which *Rock-Tenn* relied involved anticipatory withdrawal of recognition during the term of a collective bargaining agreement and in the context of an established bargaining relationship, not during a certification year. *Chelsea* at 1650. Thus, *Rock-Tenn* "must be regarded as an aberration that is in conflict not only with the Board's prior decision in *United Supermarkets* (on which *Rock-Tenn* itself relied), but also with the Supreme Court's historic decision in *Brooks*." *Id.* For these reasons, the Board should not overturn *Chelsea Industries* and *Latino Express* as the Board has consistently upheld the union's majority status is irrebuttably presumed for one year after the certification. *Brooks v. NLRB*, 348 US 96 (1954).

The General Counsel contends strict adherence to the certification year rule is required and should be applied in the instant case. Here the signatures on the petition were collected during the certification period. The ALJ fully credited Gregory's testimony that she placed the decertification petition in Harris' desk on November 10th as he directed her prior to the end of the certification. (ALJD 6, 7, 8; Tr. 51-52, 61-62) Furthermore, the ALJ found Harris' testimony with respect to the date he alleges he received the decertification as unreliable. (ALJD 8) Respondent then withdrew recognition from the Union after the certification ended on November

30, 2016. The unlawful withdrawal of recognition based on a petition with signatures obtained during the certification is precisely the situation the Board found repugnant to the Act in both *Chelsea Industries* and *Latino Express*. To reiterate, the certification year rule is strictly applied. *United Supermarkets*, 287 NLRB 119 (1987). Therefore, the petition itself establishes independent violations of Section 8(a)(1) and (5) of the Act as the Respondent's withdrawal of recognition is based on a petition containing signatures obtained within the certification year.

With respect to the Respondent's exception to the remedy recommended by the ALJ that it be required to recognize and bargain, upon request, for a reasonable period of time. This is the legally appropriate remedy for an unlawful withdrawal of recognition. *Lee Lumber & Building Material Corp.*, 334 NLRB 399 (2001), enfd. 310 F.3d 209 (D.C. Cir. 2002).

II. Respondent's exceptions to the ALJ's legal analysis and rejection of *LTD Ceramics* should be upheld by the Board as the holding in *LTD Ceramics* is not applicable to this case.

The Respondent argues the ALJ erred in distinguishing the rationale in *LTD Ceramics, Inc.*, 341 NLRB 86 (2004) to the case at bar. The Respondent's argument is misleading as the holding in *LTD Ceramics* is not applicable to the facts in this case. In *LTD Ceramics*, the Board found the withdrawal of recognition was not unlawful because the employer actually received the petition after the certification year expired. The evidence also showed that while some of the signatures were obtained on the final day of the union's certification, the majority of the signatures were obtained after the expiration of the certification year.

By contrast to *LTD Ceramics*, in this case, the petition shows on its face the signatures were all obtained on November 8 and 10th, dates clearly weeks prior to the end of the certification year. (GC 2, R1) The ALJ fully credited Gregory's testimony that she placed the petition in Harris' desk on November 10th, thus, the facts show the Respondent had possession of

the petition prior to the end of certification year on November 30th. (ALJD 4,6,7,8; Tr. 51-52, 61-62) In sum, the critical different between *LTD Ceramics* and this case is that Respondent had receipt of the decertification petition prior to the end of the certification year and all the signatures on this petition were obtained three weeks prior to the expiration of the certification year. (ALJD 4, 6, 7, 8 Tr. 51-52) For these reasons, General Counsel contends that *LTD Ceramics* is not applicable to the instant case.

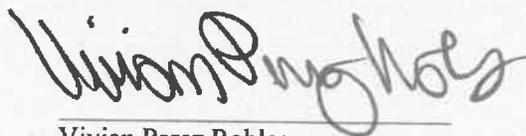
Thus, the Respondent's exceptions with respect to ALJ's analysis and her complete rejection of the holding in *LTD Ceramics, Inc., 341 NLRB 86 (2004)* to this case should be dismissed as specious and without merit.

CONCLUSION

Based upon the foregoing, the entire record in this case, and the Decision of Administrative Law Judge Kimberly Sorg-Graves, Counsel for the General Counsel submits that Respondent's Exceptions to the Administrative Law Judge's Decision are wholly without merit. Counsel for the General Counsel respectfully requests that Respondent's Exceptions be dismissed in their entirety and Judge Sorg-Graves's recommended Decision, Order and Remedy be affirmed.

DATED in Chicago, Illinois, this 29th day of October, 2018.

Respectfully submitted,



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I hereby certify that on this 29th day of October, 2018 a copy of the **COUNSEL FOR THE GENERAL COUNSEL'S ANSWERING BRIEF TO RESPONDENT'S EXCEPTIONS** was filed electronically with the Board's E-Filing System and also in the manner indicated upon the following parties of record and their counsel:

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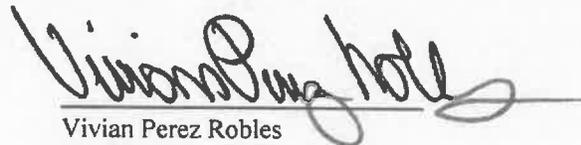
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