UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

Drivers, Chauffeurs, and Helpers, Local Union No. 639, a/w International Brotherhood of Teamsters Charging Party, And **Daycon Products Company, Inc.** Respondent.	:	Case No: 5-CA-35687 5-CA-35738, 5-CA-35965, 5-CA-35994

REPLY TO GENERAL COUNSEL'S RESPONSE IN OPPOSITON TO RESPONDENT'S MOTION FOR EXPLANATION TO AVOID APPEARANCE OF PREJUDGEMENT OR BIAS, AND TO PLACE ON THE PUBLIC RECORD ANY COMMUNICATIONS CONCERNING THIS MATTER OR IN THE ALTERNATIVE FOR REFRRAL TO THE INSPECTOR GENERAL OR RECUSAL

Daycon Products Company, Inc. ("Respondent" or "Daycon") files this Reply to General Counsel's ("GC") Response In Opposition to Respondent's Motion For Explanation To Avoid Appearance of Prejudgment or Bias, And to Place On The Public Record Any Communications Concerning This Matter ("the Motion")

The Motion sought (1) a full explanation of the circumstances surrounding the selection of the decision of the ALJ as worthy of a front page news release on the Board's website; (2) the identity and an explanation as to the role of any employee involved in the selection, preparation, review, approval and/or placement on the website of the Press Release, as well as the reasons for doing so; and (3) the placement on the public record of any and all relevant communications concerning the foregoing issues.

In its opposition, General Counsel sets up a straw man and then knocks it down. The GC asserts that

> In Respondent's inventive yet far-fetched Motion, **it alleges that** by posting a press release about the February 15, 2011 decision of the Administrative Law Judge in the above-captioned cases on the Agency's website, **the Board's integrity has been compromised** and **the Board is not capable of rendering a fair and unbiased decision** in the case.

GC Response in Opposition, p. 1 (emphasis added).

Of course, Respondent alleged nothing of the sort. Nowhere does Respondent question the Board's integrity or its ability to issue a decision. Instead, Respondent seeks merely that the Board dispel the appearance of prejudgment that has been generated by its selection and wording of a press release in the instant matter.

In opposing the request, the General Counsel relies primarily on a letter written from Wayne Gold, the Regional Director of Region 5 of the National Labor Relations Board, to counsel for Respondent after the Motion was filed. See Letter from Regional Director Gold ("Gold Letter")(attached to GC Resp.).

In this letter, Regional Director Gold states that "The press release attributes to the judge the findings that the Employer unlawfully ceased negotiations and unlawfully refused to reinstate striking employees." Gold Letter, p. 1. This may or may not be true, but is merely another straw man. The wording of the press release attributes several findings to the ALJ, indeed, the first two paragraphs are couched in language making clear that they are findings of the ALJ.

In direct contrast, however, the third paragraph contains no such qualifying language. The sentence at the heart of this dispute asserts directly that the "union employees walked out on strike because of the unfair labor practice." This sentence is certainly NOT

attributed to the ALJ, nor is any other sentence in that paragraph, or the remainder of the press release. Nowhere does the press release indicate that the ALJ determined that the strike was an unfair labor practice strike; instead, it merely asserts it as fact. And, as made clear in Respondent's Motion, this presupposes both the illegal nature of the declaration of impasse and the cause of the strike – the two primary issues now before the Board for consideration.

The Regional Director also asserts that "At no point does the press release indicate that it is a statement of the Board[.]" Gold Letter, p. 1. This statement makes no sense – even if the press release did not contain a statement at its end that "The National Labor Relations Board is an independent federal agency…" making plain that it is issued on behalf of the Board, the press release is posted on www.nlrb.gov!! Of course the press release is a "statement of the Board," what else could it be?

This correspondence also purports to explain why the instant case was selected as the subject of a press release. It states that the press release was issued in accord with the Agency's Press Release Policy as described in GC Memorandum 10-02, and that it was issued in response to the "significant media interest in an NLRB development[.]" See Letter from Regional Director Gold ("Gold Letter"). Regional Director Gold's supposed explanation for the press release's issuance only bolsters the necessity of the relief Respondent seeks.

First, as described in the Motion, according to GC Memorandum 10-02 the Board's Office of Public Affairs, the Division of Operations Management, and the Region all must "agree with the appropriateness of a press release on the subject and its wording," only then will "the necessary clearance for release will be pursued." See Motion at 9, citing Memorandum GC 10-02. The Gold Letter fails to shed any light on whether this procedure was complied with, and seemingly indicates it was not.

The Gold Letter asserts that "prior to publication the release was reviewed and approved by my office." Gold Letter, p. 2. However, as made clear in the Motion, the Region cannot act on its own to issue a press release on behalf of the Board. Instead, the "necessary clearance" must come from a higher level. Thus, whether Regional Director Gold's office "approved" of the press release does not address the questions raised – namely who selected the case as the subject of a release, who drafted the release, and who ultimately gave the "necessary clearance" for its issuance. As each of these questions remain unanswered, the blanket statement that the "press release was issued in full accordance with the Agency's Press Release Policy" hardly alleviates the need for the relief which Respondent seeks.

Regional Director Gold's letter explains a press release is warranted when "significant media interest" in an NLRB development exists. See Gold Letter at 2 ("The Agency has a general rule that if there is significant media interest in an NLRB development it will issue a release.") Regional Director Gold references a prior article in the Washington Post to substantiate that the instant matter had generated significant interest.[1] Id. at 2.

However, the prior Washington Post article was only tangentially related to the case before the ALJ. That article centered on the Board's pursuit of injunctive relief – not the underlying matters before the administrative law judge. See Exhibit A (January 9, 2011 Article from Washington Post). Interestingly, the Board didn't see fit to issue a press release at that time. Moreover, the brief blurb that appeared in the Washington Post after the ALJ decision was merely an abbreviated recitation of the Board's own press release - issued one day earlier. See Exhibit B (February 17, 2011 Article from Washington Post). The fact that the supposed

[1] Presumably then, a single inquiry from a reporter constitutes "significant media interest." Does the Board issue a press release in every case in which it has received an inquiry from the media? If not, why did it do so here?

continuing media interest post-dated the Board's own press release suggests that it was an effect, rather than a cause of the press release.[2]

Even so, if "significant media interest" was the sole impetus for the press release, then it should be a simple matter to release all communications regarding the case between the Regional Director, the OPA and anyone else at the Board or outside of it, such as the Washington Post. Simply put, why not release all the communications? Presumably, the communications would confirm that nothing out of the ordinary occurred, and the controversy would fade away. But as it stands, the General Counsel's vague and defensive Reply to the Motion only raises further questions regarding why the decision of the ALJ warranted a press release. Accordingly, for the reasons stated herein and in the Motion, Respondent seeks a full explanation of the circumstances underlying the Board's issuance of the press release as well as the placement on the public record of any and all communications concerning this matter.

Respectfully submitted,

EPSTEIN BECKER & GREEN, P.C.

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[2] At least one other article appears to have been precipitated by the issuance of the press release. See Exhibit C (2/18/11 article in Maryland Gazette noting communication with Nancy Cleeland on February 17, 2011 – one day after the press release was issued.); Motion at p. 6, fn. 7.

CERTIFICATE OF SERVICE

I hereby certify that on the date shown below, copies of the foregoing **REPLY TO GENERAL COUNSEL's OPPOSTION TO DAYCON'S MOTION FOR EXPLANATION TO AVOID APPEARANCE OF PREJUDGMENT OR BIAS** were electronically filed and served by email upon the following:

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Dated: April 6, 2011

EXHIBIT A

The Washington Post

Labor board asks court to reinstate striking Daycon workers pending inquiry

By Amanda Becker
Capital Business Staff Writer
Sunday, January 9, 2011; 5:49 PM

The government agency charged with investigating unfair labor practices has asked a federal judge to compel a Washington area janitorial supply manufacturer to rehire its striking workers, pending the outcome of an inquiry into whether the company unfairly ended the contract negotiations that led to the strike.

The National Labor Relations Board's request for an injunction against Upper Marlboro-based Daycon Products will be the subject of a Jan. 20 hearing in U.S. District Court in Greenbelt. If the request is granted, Daycon will have to reinstate the remaining striking workers, potentially imperiling the jobs of those who have replaced them.

"Generally, if the court orders strikers to be reinstated, that could present a problem for the company," said Dannie Fogleman, an employment litigation specialist with Ford & Harrison, which is not involved in the case.

As many as 30 employees of privately owned-and-operated Daycon, which reports annual revenue in excess of $500,000, have been on strike since late April. The two sides have been tussling over a variety of contract matters, including the company's desire to move to a performance-based wage system, since late 2009.

The union claimed that management improperly walked away from the bargaining table, and filed a complaint with the NLRB asking the agency to investigate the company's actions.

In a court filing, the company said talks had reached an impasse and it denied acting improperly.

At issue are the events that occurred right before the strike. The union presented a proposal to the company during an informal meeting at a restaurant in the District in early April, according to NLRB testimony. At the time, Daycon attorney Jay P. Krupin of Epstein Becker & Green said his client would "crunch the numbers" and get back to the union the next week, testimony shows.

But the union said it did not receive a response from Daycon's legal team and arrived at a negotiation session with a federal mediator on April 22 with further revisions. At that point, company leadership requested a caucus to discuss the details but did not return, filings show.

"We were prepared to bargain around the clock, and they basically told us they were going down the hall to crunch some numbers," said union representative Doug Webber, who was present for the negotiations. "We found out later they'd left the building, never informed us, never informed the federal

mediator, and later they declared an impasse."

Daycon's president, John Poole, did not respond to a request for comment. Attorneys at Epstein Becker & Green declined to discuss the matter.

In its request for an injunction, the NLRB said that since the union is likely to prevail in its complaint, the workers should be returned to their jobs as soon as possible.

"Granting the temporary injunctive relief requested . . . will cause no undue harm . . . because [Daycon] will merely be required to do what it is already legally obligated to do, to cease and desist from committing unfair labor practices and to bargain in good faith," the board argued in its request to the court.

View all comments that have been posted about this article.

EXHIBIT B

Digest

Issa issues subpoena over Countrywide VIPs

Thursday, February 17, 2011

Rep. Darrell Issa (R-Calif.), chairman of the House Committee on Oversight and Government Reform, issued a subpoena Wednesday as he seeks to out the lawmakers who benefited from home loans offered at below-market rates by former mortgage giant Countrywide.

The Committee wants Bank of America, which bought Countrywide in 2008, to hand over all documents related to Countrywide's VIP program by March 7. The benficiaries of the VIP program were known as "Friends of Angelo," after then-chief executive Angelo Mozilo.

"Countrywide orchestrated a deliberate and calculated effort to use relationships with people in high places in order to manipulate public policy and further their bottom line to the detriment of the American taxpayers even at the expense of its own lending standards," Issa said.

- Jia Lynn Yang

LABOR

Md. firm ordered to resume union talks

An administrative-law judge on Tuesday ruled that a janitorial supply company based in Upper Marlboro violated federal labor law by prematurely ending union negotiations and ordered it to reinstate its striking workers.

National Labor Relations Board Judge Joel P. Biblowitz told Daycon Products to reinstate its workers and resume negotiating with Local 639 of the Teamsters union within 14 days of his ruling.

The company's legal team said it plans to appeal the decision.

As many as 30 employees of privately owned and operated Daycon went on strike in April, following a contract dispute.

Biblowitz agreed with the union's assertion that Daycon had improperly walked away "at a time when there was no impasse in its negotiations with the Union," according to the opinion.

Although the administrative ruling is not self-enforcing, the NLRB in January asked a U.S. District Court in Greenbelt to compel Daycon to rehire the striking workers while the board's decision was pending. The judge has not yet ruled in the parallel proceeding, which would apply while the company appeals its decision with the board.

- Amanda Becker,

Capital Business

Funding for the F-35 alternate engine was budgeted at $450 million.

Enlarge Photo

HEALTH CARE

FDA approves Lap-Band for the less obese

Cosmetic drug and device maker Allergan said late Wednesday it received approval to market its stomach-shrinking Lap-Band to millions more patients who are less obese than those currently using the device.

The Food and Drug Administration expanded approval to patients with a body mass index between 30 and 40 and one weight-related medical condition, such as diabetes or high blood pressure. Patients must also have previously attempted to lose weight by other methods.

Allergan, based in Irvine, Calif., said an additional 26.4 million American patients meet the new criteria for the device. That's up from roughly 15 million under the previous criteria: a body mass index of 40 or higher, or 35 and higher with weight-related complications.

The adjustable band has been available in the United States since 2001 and about 600,000 people have had the device implanted, according to Allergan. During surgery, the band is placed over the top of the stomach and inflated with saline to tighten it and restrict how much food can enter and pass through the stomach. The device was developed as an alternative to gastric bypass surgery, a permanent procedure in which food is rerouted from a pouch in the stomach to the small intestine.

- Associated Press

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EXHIBIT C

Friday, Feb. 18, 2011

Daycon ordered to reinstate workers

Judge rules against Upper Marlboro firm in strike case

by Lindsey Robbins | Staff Writer

A National Labor Relations Board administrative judge has ruled in favor of union workers who went on strike against an Upper Marlboro cleaning company last year.

Judge Joel P. Biblowitz issued his decision Tuesday, finding that Daycon Products violated federal labor laws by breaking off negotiations with the union and later refusing to reinstate the strikers when the union, via Teamsters 639 in Washington, D.C., unconditionally offered to return to work in July, according to board information. Biblowitz also ruled that the company illegally subcontracted out work without negotiating with the union.

Biblowitz ordered Daycon to reinstate the employees within 14 days and provide back pay from July 6 to the date of reinstatement, plus interest. He also ordered Daycon to resume bargaining with the union and rescind any unilateral charges.

The board also is awaiting a decision on its petition against Daycon for injunctive relief, which was filed in U.S. District Court in Greenbelt last month, spokeswoman Nancy Cleeland wrote in an e-mail to The Gazette on Thursday.

"We definitely feel like we've been vindicated," said Doug Webber, Local 639's business agent. "The wheels of justice move a little slow sometimes, but they do move."

Workers started their strike against Daycon on April 26, after contract negotiations collapsed. The union protested the company's uneven pay scale, which results in newer workers being unable to catch up to pay rates of senior employees. Fifty-five union workers were part of the original strike, although some have since crossed the picket line.

Although Daycon can appeal the judge's decision, Webber said the union hopes Daycon will "do the right thing."

Daycon representatives declined comment.

Privately held Daycon generates $50 million in annual revenues. The company provides cleaning equipment and supplies, services and vendor-managed inventory.

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