UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION TWENTY-FIVE

In the Matter of:	)	
	)	
REPUBLIC SERVICES, INC.,	)	
	)	
Respondent,	)	Cases: 25-CA-31683
and	)	25-CA-31708
	)	25-CA-31709
INTERNATIONAL UNION OF	)	(All Amended)
OPERATING ENGINEERS,	)	
LOCAL UNION NO. 150, AFL-CIO a/w	)	
INTERNATIONAL UNION OF	)	
OPERATING ENGINEERS, AFL-CIO,	)	
	)	
Charging Party.	)	

CHARGING PARTY'S EXCEPTIONS TO THE ADMINISTRATIVE LAW DECISION

International Union of Operating Engineers, Local 150, AFL-CIO ("Local 150" or "the Union"), excepts pursuant to Rule 102.46 of the Rules and Regulations of the National Labor Relations Board to the Decision of Administrative Law Judge, JD-34-11 ("Decision") in this case dated June 21, 2011 as follows[1]:

EXCEPTION NO. 1 – Actual Loss Of Majority Support:

Local 150 excepts to the finding that "[o]n November 11, 2010 Respondent had evidence that the Union had lost majority status in the Countyline unit, assuming that it was entitled to exclude the three terminated employees from its calculation of the number of employees in the bargaining unit," and that an employer can withdraw recognition even if a "sufficient number of

[1] Pursuant to Rule 102.46(b)(1), Local 150, in excepting, in part, to the ALJ's decision, files this exception document complete with argument and supporting citation to authority. Accordingly, Local 150 will not be filing a separate brief in support of its exceptions.

grievances regarding termination are pending." Decision at p. 8. Contrary to the ALJ's legal conclusion, Respondent Republic was not entitled to exclude the three terminated employees, for whom grievances were filed, from its calculation of majority support, and therefore did not have the requisite evidence of a loss of majority support to withdraw on November 11, 2010.

Pursuant to *Levitz Furniture Co.*, 333 NLRB 717 (2001) Respondent did not have actual evidence of loss of majority support on November 11, 2010 such that it was privileged to withdraw upon expiration of the CBA. "We emphasize that an employer with objective evidence that the union has lost majority support – for example, a petition signed by majority of the employees in the bargaining unit – withdraws recognition at its peril." *Levitz* at 725. Under *Levitz*, an employer must show an actual numerical loss of majority support amongst the bargaining unit. *GC Memo* 09-04 (November 26, 2008). In this case, Republic did not show an actual numerical loss of majority support when it withdrew on November 9, 2010.

In January of 2009, when Republic took over the Countyline landfill, there were seven employees: Shannon Pugh, Robert Styles Jr., Carleen Condon, Travis Pugh, Mike Fairchild, Jason Wiegand and Dennis Jaeger (Tr. 18-19). In September of 2010, the same group of employees was working at the landfill (Er. Ex. 2).

On November 9, 2010, Shannon Pugh, Robert Styles, Carleen Condon, Travis Pugh, Mike Fairchild, Jason Wiegand were working at the landfill (Er. Ex. 2). On that day, Republic terminated three of those six employees: Travis Pugh, Mike Fairchild and Jason Wiegand (Decision at 3). On November 10, 2010, Local 150 filed grievances over the three discharges (Decision at 3, GC. Ex. 4). Also on November 9th, Republic recalled Dennis Jaeger (Decision at 3).

On November 11, 2010, three of the four employees, Carleen Condon, Robert Styles Jr., and Dennis Jaeger informed Republic in writing that they no longer wished to be represented by Local 150 (Decision at 3).

Based on the written notice from employees Condon, Styles Jr, and Jaeger, Republic withdrew recognition (Decision at 3-4).

Republic failed to show a *Levitz* actual numerical loss of majority support precisely because it relied upon the discharges of Pugh, Wiegand and Fairchild to make its calculation. The Merriam-Webster online dictionary defines "actual" as "existing in act and not merely potentially" http://www.merriam-webster.com/dictionary/actual. On November 11, 2010, the numerical loss of majority support was only potential – it did not exist yet. That is because the employee/employment status of Pugh, Wiegand and Fairchild was not decided at the time of withdrawal.

In this case, Local 150 filed grievances over the three terminations on November 10th.[2] Therefore, at the time of the withdrawal, Republic was on notice that an arbitrator might return the discharged employees to work - which would alter Republic's calculation of actual numerical loss of majority support made on November 11, 2010.[3] But for the terminations, Republic did not have, and could not have calculated, an actual numerical loss of majority support at the time of withdrawal as required by *Levitz*. Because Republic could not calculate actual numerical loss

[2] Local 150 did not file ULPs over the terminations. Even if it had, it is highly likely that the discharge ULPS would have been deferred to arbitration.

[3] Republic withdrew anyway and, as the record demonstrates, attempted to cover this fact up with proven false testimony at the hearing (Tr. 37-38, Tr. 201, GC. Exs. 30-31).

of majority support at the time of withdrawal, Republic violated 8(a)(1), (5) and (d) of the Act and was not privileged to withdraw at the expiration of the CBA.

Additionally, for policy purposes, the Board should hold that an employer should never be allowed to rely upon either grieved, or ULP, discharges to calculate an actual numerical loss of majority support - period. Such a factor is too ephemeral and therefore, inconsistent with any notion of industrial peace or employee free choice.[4] 29 USC 151.

Furthermore, allowing employers to rely on discharges creates a destructive path for employers to follow to rid themselves of a union. Even in an established bargaining unit, employers know who supports the union and who does not. It is too easy to discharge the supporters, legally poll the non-supporters and voila - withdrawal. Where discharges are a factor, an employer can file an RM petition. *See, Levitz* at 726. Employers should not be allowed to unilaterally determine the fate of the bargaining unit where the evidence of loss of support is not a certainty.

If the Board, however, decides that employers can rely upon grieved, or ULP, discharges to withdraw recognition, and further concludes that Republic's calculation of actual numerical loss of majority support can be revisited based upon the arbitrator's grievance determinations, then it is important to note that Republic at the ULP hearing did not show by a preponderance of evidence, that if the terminated employees, one, two or all, were returned to work, that Local 150 had still lost majority support at the time it withdrew recognition on November 11, 2010. *Levitz* at 725.

[4] Additionally, the ability of an employer to immediately withdraw by playing a numbers game does not comport with the Board's stable unit theory. Here, the stable unit consisted of seven employees. Any calculation of numerical loss should therefore have been based on seven employees, not four.

<u>EXCEPTION NO. 2</u> – Denial Of A Bargaining Order Remedy:

Local 150 excepts to the finding rejecting "the General Counsel's plea for a bargaining order." Decision at pp.10-12. A bargaining order in this case is dictated by current Board precedent and warranted by the facts.

In this case, the ALJ found that Republic had unlawfully withdrawn recognition, yet denied the General Counsel's request for a bargaining order. In withdrawal of recognition cases, the Board, however, "has held 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.'" *Spectrum Health*, 353 NLRB No. 99, 2009 WL 499308 (N.L.R.B.)(2009), citing *Caterair International*, 322 NLRB 64 (1996). In denying the bargaining order remedy, the ALJ wrongly relied upon *Burger Pits, Inc.*, 273 NLRLB 1001 (1984), a case decided before *Levitz* and *Spectrum Health Care*. In addition to finding merit to this exception and awarding a bargaining order in this case, Local 150 respectfully urges the Board to overturn *Burger Pits*.

The Board should find that *Spectrum Health* controls this case and that a bargaining order is appropriate. In *Spectrum Health*, the employer received evidence of a loss of majority support in January, while the contract was still in effect. The employer wrongfully believed that the CBA expired in January and withdrew recognition. The CBA, however, did not expire until April of the same year. Even though the employer had the requisite *Levitz* evidence of loss of majority support in April, the Board did not allow the employer to go ahead and withdraw in April. Rather, the Board ordered that it must first remedy its unlawful withdrawal. To that end, the Board imposed the traditional remedy of a bargaining order and justified the remedy for the

reasons set forth in *Caterair International*, 322 NLRB 64 (1996) and *Vincent Industrial Plastics v. NLRB*, 209 F.3d 727 (D.C. Cir. 2000). In particular, the Board held "it is only by restoring the status quo ante and requiring the Respondent to bargain with the Union for a reasonable period of time that the employees will be able to fairly assess for themselves the Union's effectiveness as a bargaining representative." *Spectrum* at *2.

In this case, the traditional remedy of a bargaining order is appropriate. Here, the ALJ refused to apply *Spectrum Health* because Republic did not entirely repudiate the CBA as the employer in *Spectrum Health* had done (Decision at 11). As the ALJ found, however, Republic, did repudiate the CBA in significant ways that justify a bargaining order under the rationale as articulated in *Spectrum Health*.

Here, Republic after its unlawful withdrawal, then unlawfully denied access to Local 150 representatives; and, when it did allow access, unlawfully escorted them while they attempted to interact with the bargaining unit. "In interfering with the Union's access to unit members, Respondent prohibited the Union from attempting to recapture its majority status…and interfered with the right of employee free choice at the intervals mandated by the Act" (Decision at 12). Furthermore, Republic, at the time that it was denying Local 150 access to bargaining unit members and unlawfully escorting them about the landfill, engaged in direct dealing with the bargaining unit (Decision at * 9).

In *Spectrum Health*, the Board held, in part, that a bargaining order was warranted so that the employees could freely assess the union's effectiveness as a bargaining representative and to allow the union to recapture its majority. 2009 WL 499308 (N.L.R.B.) at *2. Republic's unlawful interference with employees' Section7 rights, as found by the ALJ, deprived the

Countyline employees of an opportunity to assess Local 150's effectiveness as their exclusive bargaining representative, and prohibited Local 150 from recapturing its majority status. The Board should not allow Republic "to profit from its own unlawful conduct" *Spectrum* at *2, and should hold on these facts that a bargaining order should issue.

Additionally, a bargaining order is warranted in this case because Republic's withdrawal was arguably more egregious than that of the employer in *Spectrum*. Here, Republic was not confused about the expiration date of the CBA. It knew the CBA expired on December 31, 2010, but nonetheless withdrew recognition on November 11, 2010. Moreover, Republic, unlike the employer in *Spectrum Health*, lacked the *Levitz* actual numerical loss of evidence of majority support to enable it to withdraw recognition even at the expiration of the CBA. The employer in *Spectrum Health* had that evidence, but still could not walk away upon expiration of the CBA. It had to bargain for a reasonable time.

Lastly, the Board should not deny a bargaining order in this case by applying *Burger Pits*. First, *Burger Pits* predates both the Board's decision in *Levitz* and *Spectrum Health* and does not, in any way, address current Board law surrounding withdrawal of recognition. Second, this case is not analogous to *Burger Pits*. As argued, Republic did not have knowledge of an actual loss of numerical support when it withdrew and was not privileged, like *Burger Pits*, to withdraw upon expiration of the CBA. *See*, *Burger Pits* at 1002.

Lastly, the Board should overrule *Burger Pits*. To the extent that it stands for the proposition that a bargaining order need not issue when an employer withdraws recognition within some short time period prior to the expiration of a CBA, and does not completely repudiate the CBA, it is bad caselaw. Such a holding does not comport with the purpose of the

Act to foster collective bargaining and encourages bad actors, who know that they can simply walk away from a collective bargaining relationship even when they have violated the Act. A notice posting is simply an inadequate remedy for a withdrawal of recognition violation.

EXCEPTION NO. 3 – Respondent Not Obligated To Recognize And Bargain With Local 150 After The Expiration Of The CBA:

Local 150 excepts to the conclusion that "Respondent was not obligated to recognize and bargain with the Union after the expiration of the collective bargaining agreement…". Decision at p. 7. For the reasons articulated in Exceptions 1 and 2, the Board should find that Republic was not privileged to withdraw on November 11, 2010 and should have bargained a successor CBA.

EXCEPTION NO. 4 – No Unilateral Changes To The CBA Post Expiration:

Local 150 excepts to the finding that Respondent did not violate the CBA when it "implemented several unilateral changes in wages and working conditions of unit employees" post CBA expiration. Decision at p. 7.

For reasons articulated in Exceptions 1 and 2, Republic was not privileged to withdraw upon expiration of the CBA and therefore, had a duty to maintain the status quo while it bargained a successor CBA. Republic, did not, however, and violated the CBA by implementing a wage increase and a change to its vacation policy (Decision at 7).

EXCEPTION NO. 5 – The Transfer Of Miller Did Not Violate The CBA And Thus Did Not Violate The Act:

Local 150 excepts to the finding that "the General Counsel has not established that Respondent violated Article X…" when, upon the termination of three bargaining unit

employees, it transferred Mike Miller to the Countyline landfill to perform bargaining unit work. Decision at pp. 6-7. Mr. Miller has been at the landfill since November of last year. His transfer can hardly be deemed temporary. Furthermore, the CBA between the parties, Jt. Ex. 1, contains a provision addressing the temporary transfer of employees between sites during their shift – section 12.04. These facts together demonstrate that the Republic, because it had discharged three employees, but only called back one from layoff, needed to hire an employee at Countyline. As such, Republic was obligated to use the CBA's hiring hall provision. And, as the GC presented at the hearing, Republic did not.

CONCLUSION

For all the foregoing reasons, Charging Party Local 150 respectfully requests that the Board find merit to all the exceptions herein; award a bargaining order of a reasonable duration and any other appropriate remedy.

Dated: July 19, 2011

Respectfully submitted,

INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 150, AFL-CIO

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that he caused the foregoing ***Union's Exceptions to Administrative Law Judge Arthur J. Amchan's Decision*** to be served on the following persons via electronic filing on July 19, 2011:

NLRB Office of the Executive Secretary
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In addition, the undersigned hereby certifies that he caused the foregoing ***Union's Exceptions to Administrative Law Judge Arthur J. Amchan's Decision*** to be served on the following persons via e-mail on or before 5:00 p.m. on July 19, 2011:

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