UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
WASHINGTON, D.C.

REPUBLIC SERVICES, INC.

Respondent,

and

INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL UNION NO. 150, AFL-CIO, a/w INTERNATIONAL UNION OF OPERATING ENGINEERS, AFL-CIO

Charging Party.

Cases 25-CA-31683 Amended
25-CA-31708 Amended
25-CA-31709 Amended
25-CA-31813 Amended

RESPONDENT'S COMBINED BRIEF ANSWERING ACTING GENERAL COUNSEL'S AND CHARGING UNION'S EXCEPTIONS TO ADMINISTRATIVE LAW JUDGE'S DECISION

Respondent, Republic Services, Inc. ("Republic" or "Respondent"), pursuant to Rule 102.46, respectfully submits the following Combined Answering Brief to both the Acting General Counsel's and the Charging Union's Exceptions to Administrative Law Judge Arthur J. Amchan's Decision.[1]

Both the AGC and the Union filed exceptions to the ALJD on July 19, 2011[2]. Both parties except to many of the same rulings by the ALJ. To avoid duplication of responses to the same exceptions, Respondent has combined both answering briefs into this single memorandum of fact and law in support of Respondent's positions on exceptions from both parties.

I. STATEMENT OF THE CASE

In this case, Respondent was provided objective evidence of an actual loss of majority

[1] The following abbreviations are sometimes used herein: Administrative Law Judge – ALJ; Administrative Law Judge's Decision – ALJD; Official Transcript – TR. The Charging Party is sometimes referred to as "Local 150" or "Union."

[2] By letter dated July 27, 2011, NLRB Deputy Executive Secretary Shinners notified Respondent that not all parties were properly served the ALJD issued on June 21, 2011 and set the due date for Exceptions as August 24, 2011. As a consequence, Respondent's Cross Exceptions and Answering Briefs are due and timely on September 7, 2011 pursuant to Section 102.46 of the Board's Rules and Regulations.

status shortly before the expiration of Respondent's collective bargaining agreement with the Charging Union. Respondent withdrew recognition under the anticipatory withdrawal of recognition doctrine, and continued to abide by the CBA until its expiration. After withdrawal, Respondent advised its employees, who would be non-union in a matter of weeks, of the company benefits that would be available after expiration of the CBA to ensure that they had sufficient time to enroll in the various benefits plans. The ALJ found that Respondent's withdrawal of recognition was unlawful and did not fit within the anticipatory withdrawal doctrine. The ALJ also found that Respondent violated the Act by: a) "direct dealing" with employees by discussing the benefits they were entitled to after the CBA; b) "temporarily" failing to deduct Union dues; c) and requiring union agents to be escorted by management during a worksite visit after the recognition, and engaging in surveillance and interrogation of employees during that visit.

Despite finding the withdrawal of recognition during the term of the CBA unlawful, the ALJ followed controlling Board precedent and denied the AGC's request for a bargaining order. The ALJ correctly held that, because the Union undisputedly did not have majority support after the CBA expired, Respondent could not be ordered to recognize and bargain with the Union.

II. STATEMENT OF FACTS

A. The Nature of Republic's Business and Its Prior Relationship With Charging Party Local 150.

Republic Services, Inc. is in the business of waste collection, disposal and recycling. TR 17-18[3]. In early January 2009, Republic and Allied Waste merged, and as a result of the merger Republic acquired and began operating County Line landfill in Argos, Indiana ("County Line").

[3] References to the official transcript are designated as "TR" followed by appropriate page numbers. References to the hearing exhibits are "JT" for Joint Exhibits; "AGC" for Acting General Counsel Exhibits; "CP" for Charging Party (Local 150); and "ER" for Employer (Respondent) Exhibits

TR 18. Republic has approximately 35,000 employees nationwide, and approximately 10,000 in the Midwest region. In the Midwest region alone, Republic has 51 collective bargaining agreements with various labor organizations. TR 62.

At the time of the Republic/Allied merger, there were approximately seven hourly employees at County Line. The operators employed at the time were Shannon Pugh, Travis Pugh, Mike Fairchild, Carleen Condon, Bob Styles, and Dennis Jaeger. One mechanic employed at the time was Jason Wiegand. These hourly employees were represented by Charging Party, Local 150. TR 19. The general duties of operators were to handle the waste as it comes into the landfill, deal with compacting duties, and operate the equipment. The mechanic's duties included maintenance of heavy equipment, such as the compactor and bulldozer. TR 19.

Republic and Local 150 were parties to a collective bargaining agreement with a term of January 1, 2008 to December 31, 2010. JT 1. The bargaining relationship covering this bargaining unit existed for more than 10 years. TR 16. Moreover, Republic and Local 150 have had and continue to have longstanding bargaining relationships covering eight other bargaining units in the Midwest region. TR 64.

Holly Georgell is Republic's Midwest Region Labor Relations Director. The Midwest region covers the County Line landfill. Her duties include providing advice in all labor relations matters to any supervisor or member of management for the Midwest region, training employees, handling grievance arbitrations, addressing any particular union-based activity such as organizing campaigns, and handling day-to-day labor relations matters for the company. She is also the chief negotiator of over 51 Republic labor agreements. TR 17.

Rodney Adkinson is the company's area human resources manager for Northern Indiana, an area covering County Line landfill. TR 22. He has held the position since August 9, 2010. TR

91. His duties are those of an HR generalist and include handling employee relations throughout the Northern Indiana area, which would be from Crown Point in northwestern Indiana to northeastern Indiana. *Id*. Adkinson has not worked in a union environment before, and unlike Georgell, he is not responsible for union-management relations, such as bargaining. TR 94, 106.

Mike Beckley is the company's operations manager at County Line, starting in August 2010. TR 21. Bob Walls is the company's general manager overseeing County Line landfill. TR 21.

B. Republic Attempted To Initiate Bargaining For A Successor Contract With Local 150 From August to October 2010.

On about August 23, 2010, Georgell met with Local 150 agent James Gardner concerning a grievance. At that meeting, she advised Gardner that she was the company's chief labor negotiator and that she was interested in bargaining as soon as possible for a successor to the CBA set to expire on December 31. Georgell told Gardner that healthcare contributions, because of the increasing costs, were going to be a big concern. She and Gardner traded business cards, and she asked Gardner to please let her know as soon as possible when he wanted to bargain. TR 25-26.

Georgell did not hear back from Gardner personally. On about October 5, however, the executive director of Local 150 sent a letter to Republic requesting bargaining dates. Georgell responded in writing, advising Local 150 that the company would like to begin bargaining, is ready to start negotiations, and asking for bargaining dates in November. TR 26-27. Local 150 did not respond to her letter. *Id*.

C. Local 150 Undisputedly Lost Its Majority Support On November 10, 2010.

Effective November 9, unit members Michael Fairchild, Travis Pugh, and Jason Wiegand were terminated for time card fraud. TR 27, 95. Local 150 grieved the terminations, and those

grievances are pending in the arbitration process. TR 28. The Acting General Counsel did not allege that the terminations violate the Act or in any way taint employee disaffection with Local 150, which the ALJ acknowledged. ALJD p. 9.

On November 9, Local 150 member Dennis Jaeger was recalled from a voluntary layoff. TR 344. There is no dispute that Jaeger was next in line for recall. Thus, on November 9, the bargaining unit consisted of the following employees: Shannon Pugh, Carleen Condon, Robert Styles, Jr., and Dennis Jaeger. TR 19, 344.

On about November 9, Condon informed Operations Manager Mike Beckley that she and some other employees did not want to be represented by Local 150. TR 170. By a handwritten letter dated November 10, Condon, Jaeger and Styles (75 percent of the unit) notified Republic that they "did not wish to be represented by Local 150 Operating Engineers." CP 4.

Importantly, the Acting General Counsel did not allege or produce evidence that the employees' disaffection petition was coerced or tainted in any way. TR 57; ALJD p. 9. The Acting General Counsel confirmed several times in the trial the critical fact that it has not alleged that Republic violated § 8(a)(3), or that the voluntary and uncoerced expression of the employees to not be represented by Local 150 was in any way tainted by actions of the company. TR 185-6 ("Judge Amchan: So [taint is] not part of the case at all? Mr. Williams: . . . as far as the taint – there is no taint"; "Mr Williams: . . . there's no evidence of taint –").

The ALJ correctly noted at the trial: "three of the four remaining employees had – as a matter of free choice – expressed the desire not to be represented by Local 150 anymore." TR 186.

Based on this objective evidence of Local 150's loss of majority support, and pursuant to established NLRB law allowing an employer in these circumstances to withdraw recognition

anticipatorily prior to the end of an expiring CBA, Republic notified the union on November 11 that it was withdrawing recognition. TR 33; AGC 8. Republic advised employees that the withdrawal would take effect after the existing collective bargaining agreement expired. TR 239. In this regard, Carleen Condon testified that management representatives Georgell and Adkinson advised her that "they would [withdraw recognition] after the Contract was up." *Id*.

D. Republic Continued To Administer And Abide by The Parties' CBA Until Its Expiration.

Notwithstanding the actual loss of Local 150's majority status and Republic's subsequent anticipatory withdrawal, Republic continued to administer the expiring Local 150 CBA through its termination on December 31. TR 65. On November 12, Georgell and Adkinson met with the four unit employees and informed them unequivocally that the withdrawal of recognition would not affect Republic's continued performance under the existing CBA. Georgell testified that the employees were informed that Republic "would continue to operate the business, and we still had to honor the labor contract. We talked about some benefits that would be available to the employees, the healthcare. We talked about the 401(k). We talked about the fact that we would continue to pay the benefits related to healthcare and pension, the dues all of the way to the end of the contract. We talked about honoring the grievance procedure." TR 46.

The AGC does not dispute that Republic maintained the same contractual wages, benefits and terms of employment required by the CBA. The AGC factually cannot dispute that Republic continued abiding by the grievance procedure in the CBA. The AGC does not dispute that Republic collected all dues and paid them to Local 150, and paid all fund contributions, until the expiration of the CBA. While Respondent mistakenly failed to deduct union dues from employee paychecks for one week, the AGC did not contradict abundant evidence showing that this was a clerical error that was promptly corrected. TR 43; ER 3.

Administrative Law Judge Arthur Amchan presided over a three-day trial in Rochester, Indiana, on May 9-11, 2011. The ALJ issued his Decision on June 21, 2011.

III. ARGUMENT

A. The ALJ Correctly Held That Respondent Demonstrated An Actual Loss Of Majority Support On November 11, 2010, Notwithstanding That Local 150 Filed Grievances Challenging The Discharge Of Certain Employees (AGC Exception 4; CP Exception 1).

The ALJ held that on November 11, 2010, Respondent had evidence that the Union lost its majority support. The AGC and the Union sought to create new law by arguing that a withdrawal of recognition cannot occur when potentially outcome-determinative discharge grievances are pending. The ALJ rejected their arguments and noted that the "Board has never held that an employer may not withdraw recognition because an employer cannot demonstrate a loss of majority support (or a good faith belief) due to the fact that grievances were pending regarding the termination of unit employees." ALJD p. 8.

In their briefs to the ALJ, the AGC and Union cited *Pacific Tile & Porcelain Co.*, 137 NLRB 1358 (1962), and other cases that relied upon it – all of which deal solely with the election context, not withdrawal of recognition. The ALJ properly held "I conclude that these cases cannot be read for the proposition that an employer may not withdraw recognition or anticipatorily withdraw recognition because a sufficient number of grievances regarding termination are pending." ALJD p. 8. The AGC and Union make the same arguments in their Exceptions.

The Union argues that when Respondent anticipatorily withdrew recognition, there was not an "actual numerical loss of majority support" but only a "potential" loss of majority support. CP Brief, p. 3. This argument, however, is the direct opposite of what occurred. On November 11, 2010, there was an "actual" loss of majority support, because three of the four employees

expressed the free choice to be union-free. This actual loss of majority support had only the potential of being different in the future if all three discharge grievances were granted, all three employees were reinstated retroactively to their positions, and the unit size and employee union/non-union preference remained unchanged during the time taken by the litigation process.

Both the AGC and Union argue that pending grievances should preclude withdrawal of recognition because discharged employees who grieved their terminations are permitted to vote under challenge in Board elections. This procedural rule in the election context permits employees whose eligibility is unclear to cast challenged ballots. The rule has several purposes. It ensures that employees, who are determined to be eligible at a later date, are not disenfranchised. The rule also avoids lengthy delays in the election process by not requiring pre-election rulings on questions of eligibility.

The Board has refined its election procedures to ensure the efficient and fair conduct of elections, but it has never extended these rules outside the election context to withdrawals of recognition. In a withdrawal of recognition, if at some later date it is adjudicated that former employees were by law employed on the date of withdrawal, the Union can attempt to seek its remedy by filing an unfair labor practice charge.

The Union argues that new law should be created for policy purposes, and 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." Union Brief, p. 4. It claims that any other rule is inconsistent with any notion of "industrial peace" or "employee free choice." *Id*. However, just the opposite would be the case. If new law were to be created as requested by the AGC and the Union, then employee free choice could easily be destroyed by the union that lost their support. In this regard, under such an interpretation, a union whose majority support is lost

after the termination of an employee could block the free choice of the majority by filing a frivolous grievance – a process *the union* controls as the representative of the unit. Unlike in the election context, where a vote will still take place, an employer would not be allowed to withdraw recognition while the grievance is pending if the law is changed as the AGC and Union request. While the grievance is pending, an employer would be required to meet and bargain with a union that does not represent a majority of employees, a result which is as destructive of employee free choice as any of the hypotheticals offered by the Union or the AGC in their briefs. See, e.g., Union Brief p. 4, AGC Brief, p. 24.

B. The ALJ Correctly Held A Bargaining Order Is Not An Appropriate Remedy In Circumstances Such As This Case Where A Union Does Not Have Majority Support At The Expiration Of A Collective Bargaining Agreement (AGC Exception 6; CP Exception 2).

The AGC and Union argue that the ALJ erred by applying controlling Board precedent to find that an affirmative bargaining order is not lawful in these circumstances, where the undisputed evidence shows that the Union lost its majority status and continued to have no majority support after the parties' CBA expired.

Respondent has filed cross-exceptions including an exception to the ALJ's conclusion that Respondent did not properly engage in anticipatory withdrawal of recognition. Even assuming the ALJ did <u>not</u> err in reaching that conclusion, the facts in this case make an affirmative bargaining order improper. The ALJ correctly applied *Burger Pits, Inc.*, 273 NLRB 1001 (1984), and the AGC and Union have provided no argument that *Burger Pits* does not control the outcome of this case.

In *Burger Pits*, the employer received a petition from a majority of its union-represented employees stating that they no longer wished to be represented by the union. At the time, a collective bargaining agreement was in place, set to expire in four weeks. Three days after

getting the petition, the employer notified the union that it no longer recognized it as the employees' bargaining representative. After this notice, but before the contract expired, the employer unilaterally implemented a new health and welfare benefit plan, stopped making contributions to the union pension and health and welfare funds, refused the union's request for a list of employees and refused to grant the union access to the kitchen areas of its facilities. *Burger Pits*, 273 NLRB at 1001.

The *Burger Pits* Board stated that it is "established that within a reasonable time prior to the expiration date of a collective-bargaining agreement, an employer who establishes a good-faith doubt of a union's majority status may announce that it does not intend to negotiate a new agreement." *Id*., *citing Master Slack Corp*., 271 NLRB 78, 84-85 (1984) and *Bennington Iron Works*, 267 NLRB 1285 (1983). An employer who does so "may then lawfully implement unilateral changes upon the expiration of the contract." *Id*.; *see also Bridgestone/Firestone, Inc.*, 331 NLRB 205 (2000) (applying *Burger Pits*, employer lawfully relied upon untainted disaffection petition received prior to expiration of contract).

The Board in *Burger Pits* noted that the petition given to the employer was not tainted by unfair labor practices, and thus the employer had a good-faith, reasonable doubt of the union's majority status. *Id*., at 1002. Nevertheless, the employer was not privileged to withdraw recognition and unilaterally implement contract changes, but rather was "obligated to administer the collective-bargaining agreement until its expiration." *Id*. The Board found the withdrawal and pre-expiration unilateral changes to the contract to be Section 8(a)(5) and (1) violations. Importantly, however, the Board did <u>not</u> impose a bargaining order. The Board held as follows:

> Contrary to the judge, however, **we shall not order the Respondent to recognize and bargain with the Union, and we shall not extend the make-whole remedy beyond its expiration date of the contract**. In view of its reasonable, good-faith doubt of the Union's majority status, the Respondent would have been privileged

> to announce an intention not to bargain with the Union for a new contract, and it was only obligated to administer the old contract until its expiration date. In addition, the **Respondent would have been privileged to withdraw recognition from the Union and implement unilateral changes upon the expiration of the contract on 30 June**. The **Respondent's misconduct consisted simply of taking those measures prematurely**, and we therefore **find it appropriate not to extend the remedy beyond the date when it lawfully could have taken those measures**.

Id., (Member Zimmerman noted in particular that a bargaining order was not appropriate because the employer had evidence of actual loss of majority status before recognition was withdrawn) (emphasis added). Zimmerman's position foreshadowed the Board's *Levitz* decision which is current Board law and requires objective evidence of actual loss of majority status. *Levitz Furniture Co. of the Pacific, Inc.*, 333 NLRB 717 (2001).

The *Burger Pits* decision is squarely on point and controlling Board precedent. The ALJ correctly noted that the facts in *Burger Pits* "make it virtually impossible to distinguish that case from this one." ALJD p. 11. Thus, the ALJ correctly applied controlling authority, and the AGC or Union have offered no credible argument (other than asking for *Burger Pits* to be overruled) for why *Burger Pits* does not require exactly what the ALJ concluded about the inappropriateness of an affirmative bargaining order. Had the ALJ ignored *Burger Pits* he would not only have erred by failing to follow controlling precedent, he would have wrongly required Respondent's employees to be saddled with a union they do not want and wrongly ordered Respondent to bargain with a union that undisputedly has no actual majority support.

1. The *Spectrum Health* Decision Relied Upon By The AGC and Local 150 Is Not Applicable.

Instead of challenging the applicability or continued precedential effect of *Burger Pits*, the AGC and Union rely on *Spectrum Health-Kent Community Campus*, 353 NLRB No. 99 (Feb. 26, 2009), adopted by a three-member panel at 355 NLRB No. 101 (Aug. 23, 2010). The AGC

and Union claim that a bargaining order[4] beyond the expiration of a contract is warranted because a bargaining order was issued in *Spectrum Health*. AGC Brief, pp. 27-31; CP Brief, pp. 5-8. The ALJ correctly held that *Spectrum Health*, however, is distinguishable from the very different facts present in this case. ALJD p. 11.

In *Spectrum Health*, the employer withdrew recognition from the union on January 7, 2008, more than three months prior to the expiration of the collective bargaining agreement. The employer believed that the CBA had expired on January 1, 2008, and thus believed its withdrawal of recognition to be post-expiration.[5] Thus, *Spectrum Health* does <u>not</u> involve an employer's attempt to anticipatorily withdraw recognition.

In fact, the day after withdrawing recognition, the employer in *Spectrum Health* expressly stated to unit employees that the "current UAW contract will no longer be in effect." *Id*., p. 16. Immediately after withdrawal, the employer stopped deducting dues from employee paychecks and stopped utilizing the grievance process, telling employees that "[m]oving forward, you will now be covered by the KCC Fair Treatment Policy, which gives you the right to appeal disciplinary action." The employer then denied a grievance filed under the existing contract, taking the position that the dispute would be handled by its non-bargained fair treatment policy. *Id*. Moreover, the employer began referring to unit employees as "Former UAW Staff" and implemented a series of unilateral changes in the terms and conditions of employment of the unit employees, involving changes to wage rates, the wage structure, and changes to the eligibility waiting period for short-term benefits. *Id*.

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[4] In the 2010 Board decision adopting *Spectrum Health*, Member Hayes agreed with the statement made by Member Schaumber in the two-member decision, concerning the need for <u>case-by-case analysis of whether an affirmative bargaining order is the appropriate remedy</u> for a refusal to bargain with an incumbent collective-bargaining representative. *Id*. fn. 3.

[5] Much to the employer's surprise, no doubt, the Board ultimately held that the CBA expired on April 13, 2008, based on extrinsic evidence about the parties' intent.

The facts in this case are in sharp contrast to *Spectrum Health*. In this case, Republic expressly told employees and acknowledged to Local 150 that it was obligated to comply with the existing CBA until its expiration. Republic continued processing grievances. Republic deducted and forwarded to Local 150 all required dues and paid all required contributions to the union benefit funds. Republic maintained the same wages, benefits and other terms and conditions of employment until the CBA expired. The employer in *Spectrum Health* explicitly repudiated the existing CBA and acted as a nonunion employer immediately after withdrawal of recognition.

2. The AGC's Reliance Upon *Syscon International* Is Misplaced And Does Not Support An Affirmative Bargaining Order.

The AGC, but not the Union, cites *Syscon International, Inc.*, 322 NLRB 539, 544-45 (1996) in its discussion of *Spectrum Health*, for the proposition that an affirmative bargaining order is required to remedy a withdrawal of recognition prior to the expiration of a contract. AGC Brief, p. 27, n. 4. In *Syscon*, however, the Board upheld *Burger Pits* and held that employees' disaffection petitions "may not be relied upon during the contract term, **except for a period at the end where the employer may announce its intention not to negotiate a successor agreement, a situation not present here**." *Id.*, at 543, *citing Burger Pits, supra* (emphasis added). The Board in *Syscon* extended the remedy beyond the contract expiration, but only because "[u]nlike in *Burger Pits, Inc.*, supra, where the employer's withdrawal of recognition came very near the expiration of the agreement and was viewed as 'anticipatory' because it suggested a good-faith doubt of majority in connection with the negotiation of a new agreement, **the withdrawal of recognition here came only 5 months after the contract took effect and 19 months before its expiration**." *Id.*, at 544-45 (emphasis added). Because the withdrawal of recognition in *Syscon* occurred so early in the contract term, the Board noted that

the employee petition "would have been stale at the expiration of the contract and would have, in any event, been **tainted by Respondent's unlawful refusal to bargain and unilateral conduct over an extended period of time**." *Id*. (emphasis added).

The *Syscon* decision actually supports Republic's argument. Clearly, the facts in *Syscon* supporting a remedy extending beyond contract expiration, instead of a limited *Burger Pits*-type remedy, are simply not present in this case. Here, Republic announced its anticipatory withdrawal only weeks before contract expiration (as opposed to 19 months in *Syscon*) and it continued complying with the CBA. See ALJD p. 11.

Accordingly, the ALJ correctly held that neither *Spectrum Health* nor *Syscon* override the controlling Board precedent of *Burger Pits* or otherwise support an affirmative bargaining order in this case. In *Spectrum Health* the employer expressly repudiated the existing contract prior to its expiration, because the employer believed the CBA had already expired when recognition was withdrawn. In that case, where employees were stripped of collectively bargained terms of employment for three months prior to the expiration of the contract, the Board found a bargaining order to be an appropriate and necessary remedy. In this case, Republic informed employees of the anticipatory nature of the withdrawal,[6] continued administering the CBA until its expiration, and implemented new employment terms only *after* the CBA expired, as it is permitted to do under established Board law.

[6] Again, Carleen Condon's undisputed testimony confirmed the anticipatory nature of Republic's withdrawal of recognition. Counsel for the AGC asked her if Republic informed her of the withdrawal of recognition. Condon testified that Adkinson and Georgell "said they would [withdraw recognition] after the Contract was up." TR 239.

3. An Affirmative Bargaining Order Is Not Justified Because Employees' Section 7 Rights To Refrain From Union Representation Must Be Considered.

i. The Balancing Of Interests Required Before Issuing Bargaining Orders Demonstrates That Such An Order Is Unwarranted In This Case.

Additionally, although not addressed by the ALJ, in bargaining order cases, the United States Court of Appeals for the District of Columbia Circuit has required the Board to justify, on the facts of each case, the imposition of an affirmative bargaining order. *See, e.g., Vincent Industrial Plastics, Inc. v. NLRB*, 209 F.3d 727 (D.C. Cir. 2000); *Lee Lumber & Building Material Corp. v. NLRB*, 117 F.3d 1454, 1462 (D.C. Cir. 1997); *Exxel/Atmos, Inc. v. NLRB*, 28 F.3d 1243, 1248 (D.C. Cir. 1994). In *Vincent Industrial Plastics*, the court stated that an affirmative bargaining order "must be justified by a reasoned analysis that includes an explicit balancing of three considerations: (1) the employees' Section 7 rights; (2) whether other purposes of the Act override the rights of employees to choose their bargaining representatives; and (3) whether alternative remedies are adequate to remedy the violations of the Act." *Id*. at 738.

The Board has followed the *Vincent Industrial Plastics* balancing requirement, and now examines the facts of each case to determine whether a balancing of the three factors warrants an affirmative bargaining order. *See, e.g. Vincent/Metro Trucking, LLC*, 355 NLRB No. 50 (July 13, 2010). This analysis is particularly appropriate in this case, and confirms that the bargaining order sought by the AGC is not justified. Again, because the ALJ found that *Burger Pits* controls, he did not engage in this analysis. Yet, if the Board were to accept the AGC's request to overrule *Burger Pits*, a bargaining order is inappropriate when viewed against the *Vincent Industrial Plastics* balancing analysis.

First, an affirmative bargaining order in this case will prejudice the Section 7 rights of Republic's employees, a majority of whom undisputedly oppose representation by Local 150. The AGC wants to saddle them with continued union representation whether they like it or not, solely because their employer may have prematurely withdrawn recognition (according to the AGC) from Local 150. Clearly, the Section 7 rights of employees who tossed out their union are entirely ignored by AGC's requested bargaining order.

Second, there are occasions where important policies underlying the Act will at times override free choice considerations. In this case, such policies are clearly not present. If the AGC had argued that the union's loss of support was tainted, or that Republic did not have evidence of actual loss of majority support, an unlawful withdrawal of recognition might warrant a bargaining order. Here, however, Republic was presented with a valid, untainted, and properly supported petition, and to this day the employees still unequivocally reject union representation. AGC has identified no compelling policy that should override the clear choice of these employees.

Third, the AGC has articulated no compelling reason that a cease-and-desist order, instead of an affirmative bargaining order, would be inadequate to remedy the allegedly unlawful withdrawal of recognition by Republic. In light of the serious prejudice to employee Section 7 rights created by an affirmative bargaining order, it is clear that a less onerous remedy is warranted (assuming, of course, a violation even occurred).

ii. There Is Abundant Evidence On This Administrative Record Establishing The Fundamental Unfairness To Employees Of An Affirmative Bargaining Order.

The AGC seeks an order requiring Republic to recognize and bargain with Local 150, even though its employees <u>unequivocally state that they want no such outcome</u>. A bargaining

order "would be rational if there were reason to believe that the union retains the support of a majority of the workers in the bargaining unit, but not otherwise." *NLRB v. Thill, Inc.*, 980 F.2d 1137, 1142 (7th Cir. 1992); *citing Mosey Mfg. Co. v. NLRB*, 701 F.2d 610, 613 (7th Cir.1983) (en banc); *NLRB v. P*I*E* Nationwide, Inc.*, 894 F.2d 887, 893-94 (7th Cir.1990); *Montgomery Ward & Co. v. NLRB*, 904 F.2d 1156, 1160-63 (7th Cir.1990) (concurring opinion). "The National Labor Relations Act is concerned with **protecting workers against unwanted unions as well as against union-busting**." *Id*. (emphasis added). The AGC seems to have forgotten this clear principle.

An affirmative bargaining order is an extreme remedy that is reserved only for very serious cases. It is extreme because it results in employees being unable to decertify the union for at least six months, and possibly as long as twelve months if the Board finds the parties are getting close to an agreement – and as long as three to four years if a new contract is agreed upon during the "reasonable period" for bargaining. *Lee Lumber & Building Material Corp.*, 334 NLRB 399, 402-405 (2001), *enf'd*, 310 F.3d 209 (D.C. Cir. 2002). This is why the Board should be especially skeptical of the relief sought by the AGC, which includes an affirmative bargaining order. "[I]f the union lacks the support of the workers whom it is supposed to be representing, it should not be bargaining on their behalf." *Thill*, 980 F.2d at 1143.

Employee Carleen Condon testified the she no longer wanted to be represented by Local 150, because the union was not representing her fairly. TR 251. She explained that she is not now a member of Local 150 and that it would not be acceptable to her to be required to resume her membership. She testified that "since we've done this [signed the petition] – they will hold it against us – if we try to pay our dues up – they'll blackball us. They won't – if we get laid off out here – they won't put us to work – we'll starve." TR 252.

Similarly, employee Dennis Jaeger attempted to testify at the administrative trial about his fears of retaliation by Local 150 if a bargaining order is entered. Both counsel for AGC and counsel for Local 150 vigorously objected to such testimony. TR 344-47. Despite the Act's commitment to preserving employee free choice, the AGC attempted to block every effort to place on the record the actual free choice of the affected employees. Jaeger, of course, had good cause for fearing retaliation by Local 150. As stated above, when Jaeger was slated for recall from layoff following the discharge of Pugh, Fairchild and Wiegand, Local 150 business agent Jim Gardner attempted to block his recall. TR 161. In fact, even after Adkinson raised concerns about doing so without an investigation (because refusing to recall him would be tantamount to discharge), and even though Jaeger was next in line for recall based on seniority, Gardner told Adkinson that Local 150 would support the company if it did not recall Jaeger. *Id*. Ultimately, Republic chose to recall Jaeger, under a last chance agreement. TR 162. Thus, it is no mystery why Jaeger fears a bargaining order that abolishes his considered choice to be free from Local 150. Moreover, employee Styles and Condon told Georgell that they were "very concerned about retaliation from the Union internally." TR 32.

Local 150's Constitution and By-Laws, which are similar to every other labor organization's governing documents, confirm that Condon's and Jaeger's fears are not groundless. In this regard, should an affirmative bargaining order issue, those employees who freely exercised their right to no longer be members of Local 150 face a real danger of reprisal by Local 150. Again, like most labor organization constitutions, the Constitution of the International Union of the Operating Engineers in Article III, Section 1, grants Local Unions the authority to "…prefer charges…against their members (individually or collectively) an order trials with authority to discipline those affected…" Article XVI of the Constitution, titled

"Discipline And Expulsion In General" provides that members engaging in "conduct that would interfere with the performance by the International Union or any of its subordinate bodies of their legal or contractual obligations, may be tried by the General Executive Board upon charges filed with it, and upon conviction, may be disciplined or expelled as the General Executive Board may determine." Article XVI, Section 4, further provides that any member found guilty of "advocating or otherwise supporting the overthrow of the established order . . . of this organization, by … subversive tactics, shall forthwith be expelled from membership or otherwise disciplined as the circumstances may require, which action may be taken and penalty imposed by either the Local Union of which the guilty party is a member or by the General President."

The By-Laws of Local 150 also authorize in Article IX, Section 2, suspension and expulsion of members. In Article XX the By-Laws set forth broad authority to discipline and apply penalties including expulsion to members who do not comply with the International Constitution and the By-Law requirements of Local 150.

4. Established Board Law Prohibits Republic From Negotiating A New Collective Bargaining Agreement With A Union That Does Not Have Majority Support.

In its zeal to obtain a bargaining order, the AGC chooses to ignore established Board law such as *Dura Art Stone*, 346 NLRB 149 (2005). In that case, shortly before the expiration of a collective bargaining agreement, the employer was presented with a petition from a majority of unit employees stating they no longer wished to be represented by the union. This occurred at a time when the employees could not file a decertification petition with the NLRB, due to contract bar. The employer did <u>not</u> withdraw recognition, but instead negotiated with the union for a new contract.

The NLRB ruled that the employer violated the Act by "continuing their negotiations and executing a collective-bargaining agreement when they had knowledge of the employee disaffection petition establishing the Union's loss of majority status." *Id*., fn. 2; *see also Hart Motor Express*, 164 NLRB 382 (1967) (union and employer committed an unfair labor practice by entering into a new contract after becoming aware that a majority of the represented employees no longer wanted union representation).

While *Dura Art Stone* was not discussed by the ALJ, the Board should not ignore the fact that Republic's employees exercised their right to say they no longer wanted to be represented by the union. Section 7 of the Act gives employees "the right to self-organization, to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and ... <u>the right to refrain from any or all of such activities</u> ...." 29 U.S.C. § 157 (emphasis added). Because Republic's employees freely chose to reject Local 150's continued representation, their statutorily protected rights would have been undermined if an affirmative bargaining order was granted.

For all these reasons, the ALJ correctly held that an affirmative bargaining order is not justified or proper.

C. The ALJ Made No Finding Of Fact That Respondent Told Employees Before Contract Expiration That They Were No Longer Represented By The Union, Thus The AGC's Exception Concerning This Allegation Should Be Rejected (AGC Exception 1).

The AGC argues that the ALJ failed to find and conclude that Respondent violated the Act by "informing employees that they were no longer represented by the Union and informing employees that employees at Respondent's facility were no longer represented by the Union." AGC Brief, p. 17.

The ALJ correctly refused to make such a finding of fact, because the AGC offered no evidence to support the allegation. Respondent's witnesses credibly testified that they did not make such representations, and the AGC offers no basis in its Brief to upset the ALJ's findings of fact in this regard.

D. The ALJ Correctly Refused To Find Respondent's November 12 Memo To Employees To Be A Violation Of The Act (AGC Exception 2).

The AGC argues that the November 12 Memo to employees from Senior Vice President of Operations Jack Perko violated the Act. AGC Brief, p. 18. The ALJ correctly refused to find that the Memo violated the Act.

In the November 12 Memo, Perko advised landfill employees that they may be asked to engage in walkouts by Local 150, and reminded them that they have no-strike clauses in their CBAs. AGC 12. Georgell explained that the memo was "sent specifically to the landfills that were not County Line Landfill. It was all of the other Local 150 landfills, with the exception of EnviroTech." TR 35-36. Republic issued the memo because Local 150's president, Dave Fagan, told the general manager at Republic's Newton County landfill that "he was going to shut down, and he used the bad swear word, the f-word, and I won't go there, but the entire Chicago and Indiana market by picketing us." *Id*. In an amendment to the Consolidated Complaint on March 21, 2011, only a little over two weeks before the initially set hearing date in this matter, the AGC alleges that, "by Jack Perko, by written memo, informed employees that employees at Respondent's facility were no longer represented by the Union". In fact, Perko's memo specifically says, in pertinent part, "As required by law, the Company has informed the Union that it has withdrawn recognition from Local 150 at that location". AGC 12. While the memo does not use the word "anticipatory" the employer in *Abbey Medical* also did not do so. 264 NLRB at 972-973.

The AGC never proved that Perko informed employees "they were no longer represented by the Union," and in fact he did not do so. The memo speaks for itself, of course, and does not make this statement, either. There is no basis for the AGC's exception, just as there was no basis for its Complaint allegation in the first place.

E. The ALJ Correctly Held That The Transfer Of Wayne Miller Was Permitted By The Parties' CBA And Was Not A Violation Of The Act (AGC Exception 3; CP Exception 5).

The ALJ correctly applied the plain language of the parties CBA to find that Respondent's transfer of Wayne "Mike" Miller was outside the Union's referral system. Neither the AGC nor the Union submitted evidence to contradict the CBA's clear provisions.

The AGC sought to establish at the hearing that Respondent failed to utilize the Union's referral system on November 12 when Miller was transferred from Wabash to the County Line landfill due to the need to handle the trash volume at that point subsequent to the terminations of Pugh, Wiegand, and Fairchild. The ALJ cited Article X of the CBA, which deals with situations where "the company deems it necessary to hire an employee to perform work covered by the agreement…" JT 1 (emphasis added). The uncontradicted testimony and documentary evidence before the ALJ was that Miller was *transferred* not hired. There is no contractual requirement that prohibits transfer of employees from other Republic facilities. Thus, Republic did not have any obligation to use the contractual referral system for the temporary transfer of Miller to County Line.[7]

[7] At the hearing, the AGC claimed that the transfer of Miller, and the alleged performance of unit work by Mike Beckley, demonstrate that Republic stopped following the CBA after the November 11 withdrawal of recognition, and thus the withdrawal was not anticipatory in nature. Respondent denied both of the allegations. Nevertheless, the AGC also introduced evidence of *pre-November* use by Republic of a subcontractor to support this "theory that the Company used outside contractors -- other people to do work that the bargaining unit could do." TR 195; AGC 2. The AGC's theory, therefore, wholly contradicts its claim that the withdrawal was not anticipatory. In this regard, the AGC's allegation of a pattern by Republic (before and after November 11) of using laborers outside the bargaining unit, if true, demonstrates that Republic did not change its performance under the CBA after learning Local 150 lost majority status. Finally, Republic is participating in the contractual grievance process concerning

Thus, the ALJ correctly held that the AGC did not establish a violation of Article X of the CBA, and consequently did not establish a violation of the Act.

F. The ALJ Correctly Held That Respondent Did Not Violate The Act By Making Changes To Its Benefits And Wage Policies After Expiration Of The Parties' CBA (AGC Exception 5; CP Exceptions 3 & 4).

The AGC and Union argue that Respondent's policy and wage changes in February and March 2011, after expiration of the CBA, violate the Act. Their exceptions, of course, are premised upon their argument that an employer should not be permitted to withdraw recognition while grievances are pending, and that a bargaining order is appropriate in this case. For the reasons stated above, the ALJ correctly rejected those arguments. Because the Union undisputedly did not have majority status when Respondent anticipatorily withdrew recognition, and also when the CBA expired, Respondent had no obligation to bargain with the Union concerning these benefit and wage changes.[8]

G. Respondent Agrees That The ALJ Erred By Finding That Respondent Violated The Act By Temporarily Failing To Deduct Union Dues (AGC Exception 9).

The AGC argues that the ALJ was in error in concluding that Respondent temporarily violated the Act by failing to deduct Union dues for a brief period of time. AGC Brief, p. 32. The AGC then argues that Respondent's failure to deduct dues "was not cured based upon Respondent's subsequent conduct" – a conclusion <u>not</u> reached by the ALJ. See ALJD, p. 9, n. 7. In fact, Respondent has filed cross-exceptions to the ALJ's finding that Respondent had not cured its trivial mistake of failing to deduct union dues for a brief period of time. Thus, it is not

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these disputes, establishing once again that Republic fully abided by the CBA. Thus, it is no surprise that the AGC does not repeat these allegations in his Exceptions.

[8] The AGC also cites its Exception 8 in making this argument ("GAGC excepts to the Judge's finding and conclusion that, if arbitration resulted in reinstatement for the three discharged employees, Respondent would be obligated to resume recognition with the Union"). Respondent agrees with the AGC's exception to any conclusion by the ALJ that reinstatement of the three discharged employees results in an obligation by Respondent to recognize the Union. Respondent has preserved this exception in its cross-exceptions, filed the same day as this Brief.

clear why the AGC is taking exception to the ALJ's finding of a violation, but Respondent agrees that it was erroneous to conclude that Respondent either violated the Act or failed to cure such a violation.

H. The ALJ Did Not Err By Failing To Find That Respondent Failed To Recognize And Bargain With The Union (AGC Exception 10).

The AGC argues that the ALJ should have found that Respondent failed to recognize and bargain with the Union after Respondent's anticipatory withdrawal of recognition. AGC Brief, p. 33. This is another derivative exception, premised upon its allegation that Respondent was not allowed to refuse to negotiate a successor contract after obtaining evidence of actual loss of majority support. As argued above, however, Board precedent makes it clear that in circumstances where actual loss of majority support occurs prior to the expiration of a CBA, the employer is not required to bargain with the union for a successor agreement. *Abbey Medical*, 264 NLRB 969 (1982). Therefore, the ALJ correctly refused to conclude that Respondent was obligated to recognize and bargain with the Union.

I. The ALJ Did Not Err By Failing To Find That Respondent Violated Section 8(d) Of The Act (AGC Exception 11).

The AGC makes the blanket argument that the isolated Section 8(a)(1) and (5) violations found by the ALJ should also constitute a "modification of the provisions in the collective-bargaining agreement without the consent of the Union" in violation of Section 8(d). AGC Brief, p. 34. However, the ALJ correctly concluded that after announcing its withdrawal, Respondent "continued to adhere to most of the terms of the collective bargaining agreement…" ALJD, p. 9, n. 7.[9] The AGC overreaches by claiming that isolated allegations of violative conduct by Respondent rises to the level of a modification of the parties' CBA. To the contrary, Respondent

[9] Respondent maintains, of course, that it continued to abide by all of its obligations under the parties' CBA until its expiration.

continued to apply all provisions of the CBA until its expiration, including providing employees all wages and benefits under the existing CBA, deducting dues (except for one week where it erroneously did not do so, but then promptly remedied the error), paying all required welfare and pension fund contributions, and processing grievances under the existing grievance and arbitration procedure. Accordingly, the ALJ properly concluded that Respondent did not violate Section 8(d) of the Act.

III. CONCLUSION

For the reasons set forth above, the Board should reject the AGC's and the Charging Union's Exceptions to the Administrative Law Judge's Decision.

Respectfully submitted,

DEVANEY JACOB WILSON, PLLC

/s/Dennis M. Devaney
Dennis M. Devaney, Esq.
3001 W. Big Beaver Rd., Suite 624
Troy, MI 48084
(248) 649-0990
dennis@djwlawfirm.com
Counsel for Respondent

DEVANEY JACOB WILSON, PLLC

/s/ Jeffrey D. Wilson
Jeffrey D. Wilson, Esq.
3001 W. Big Beaver Rd., Suite 624
Troy, MI 48084
(248) 649-0990
jeff@djwlawfirm.com
Counsel for Respondent

Dated: September 7, 2011

ECF Certificate of Service

I hereby certify that on September 7, 2011, I electronically filed the foregoing Combined Answering Brief with the Executive Secretary of the National Labor Relations Board using the ECF system. I hereby further certify that I have also served via email Raifael Williams, Counsel for the Acting General Counsel and Charles Kiser, Charging Union's Counsel.

/s/ Jeffrey D. Wilson
Jeffrey D. Wilson, Esq.

Counsel for Respondent