

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

PESSOA CONSTRUCTION COMPANY,)	
)	
Respondent,)	
and)	Case Nos. 5-CA-34547
)	5-CA-34761
LABORERS' INTERNATIONAL)	5-CA-35083
UNION OF NORTH AMERICA,)	
)	
Charging Party.)	

**RESPONDENT'S ANSWERING BRIEF TO THE GENERAL COUNSEL'S
EXCEPTIONS TO THE DECISION OF THE ADMINISTRATIVE LAW JUDGE**

Respondent Pessoa Construction Company ("Pessoa" or "Company"), files this answering brief in opposition to the General Counsel's Cross-Exceptions pursuant to Rule 102.46(f)(1) of the Board's Rules and Regulations.

COUNTER-STATEMENT

The General Counsel takes three exceptions to paragraphs 2(e) of the ALJ's Decision for 1) failure to require a poster in English and Spanish, 2) failure to order that said poster be posted on all the Company's jobsites where employees are currently working, and 3) not ordering compound interest on any back pay award.

These Exceptions may be summarily dismissed for the following reasons.

Exception 1. The General Counsel argues that because one former employee required an interpreter at the hearing, a Spanish poster should have been ordered.

The General Counsel introduced no evidence that any of Pessoa's Spanish speaking employees cannot *read* English. Neither did the General Counsel produce any evidence at the hearing that because the Union's organizing flyers were printed in English and Spanish that posters should be in two languages.

Rather, at the hearing, the record shows that one Spanish speaking former employee had

difficulty *speaking* English, an entirely different skill.

Finally, the General Counsel's stereotyping of Pessoa's employees and concomitant assertion that "Spanish-speaking employees are unable to read English, the Notice to Employees should be posted in both English and Spanish" is a dubious one. There is no record evidence to support the General Counsel's argument.

The mere citation to the record of certain documents without any testimony to establish the proposition, fails in both proof and in failing to "designate by citation of page the portions of the record relied on" as required by Section 102.46(b)(1)(iii) of the Board's Rules and Regulations.

Carson Trailer, Inc., 352 N.L.R.B. 352 n.3 (2008), is completely distinguishable. In that case there was record evidence of how many Spanish speaking employees the employer had. Moreover, every employee witness in that case required an interpreter.

In the instant case, only one witness, a former employee required an interpreter. All other witnesses for the General Counsel, Union, and Pessoa were either English speaking or multi-lingual and required no interpreter for their testimony.

With no record made by counsel for the General Counsel for the Board to review in these circumstances, the Exception taken to mandate a Spanish poster is without merit.

Exception 2.

The General Counsel asserts that any notices should be posted not only at Pessoa's main office, but on other jobsites, such as Route 231 and Lusby, Maryland. It is asserted that it is not clear that all employees report to the main office in Fairmount Heights, Maryland on a regular basis.

The evidence shows that employees picked up their paychecks every Friday at the

Fairmont Heights office. Tr 246 1.16.

Counsel for the General Counsel adduced no evidence that Pessoa sufficiently has control or a presence on every jobsite it works on to even post a notice. The failure to cite to record documents and without any testimony to establish the proposition that employees might not see a poster at the main office, fails in both proof and in failing to “designate by citation of page the portions of the record relied on” as required by Section 102.46(b)(1)(iii) of the Board’s Rules and Regulations.

The claim that the Act’s purposes could be promoted when no evidence was adduced by counsel for the General Counsel in support of such a change in policy, is without merit.

Exception 3.

The General Counsel asserts that compound interest should be ordered in the instant case.

Here, the record is barren of *any basis* for the award of compound interest or that the New Horizon for the Retarded, 283 N.L.R.B. 1173 (1987), formula already chosen by the Board to employ does not provide the remedy the Act was designed for.

First, counsel for the General Counsel adduced no testimony in support of this Exception. On its face, the General Counsel violates Section 102.46(b)(1)(iii) of the Board’s Rules and Regulations by arguing a point not supported by the record in the case.

Second, if in fact the arguments suggested by the Exceptions were true, then expert testimony should have been adduced to support the proposition. Respondent could have offered counter testimony. Then, the Board could fairly review the record to make a policy choice. Otherwise, APA Rulemaking is a better choice for establishing a change in policy than in a case where Pessoa has no record concerning the issue to confront. Neither the Board nor any reviewing Court would have the benefit on review of any reasonable decisionmaking based on an

administrative record supporting the General Counsel's Exceptions where no evidence on the issue was presented in support of the Exceptions.

A change in policy based on a record upon which review may be undertaken is required. Argument is not APA required evidence.

Finally, the Board has rejected the General Counsel's request previously in cases such as National Fabco Mfg., 352 N.L.R.B. No.37 n.4 (2008). The General Counsel has not argued there has been any change in factual circumstances considered by the Board since 1987 when New Horizons was established to suggest a change is necessary. There has been none. Not even Charging Party supports the position of the General Counsel here.

Respondent notes that the General Counsel addresses arguments against granting compound interest on page 1 of his brief,, but this effort is ethereal and argumentative. It is but a cats paw to induce a further discussion where none is necessary. Courts are self-empowered by the Constitution and statute to provide equitable relief. Other federal agencies are established for other purposes by Congress.

It is beyond the power of the Board to construe the intent and purposes of other federal statutes. In Hoffman Plastic Compounds, Inc. v. NLRB, 535 U.S. 137, 149 (2002), the Supreme Court stated: "We find, however, that awarding back pay to illegal aliens runs counter to policies underlying IRCA, policies ***the Board has no authority to enforce*** or administer. Therefore, as we have consistently held in like circumstance, the award lies beyond the bounds of the Board's remedial discretion." [Emphasis added]. Similarly, the Board does not have the authority to construe other statutes such as the Davis Bacon Act. See Kingston Constructors, Inc., 332 N.L.R.B. 1492, 1500 (2000) (adopting decision of the Labor Department's Wage & Appeals Board that job target money deductions as dues from employee wages was unlawful under the

Davis-Bacon Act and therefore it was “inimical to public policy” and could not be part of a mandatory subject of bargaining).

No where in the Exceptions does the General Counsel advise how he obtains the expertise to argue what the purpose for compound interest under those other federal statutes is so that the same rationale in the legislative histories of the other federal statutes should thus apply to the Board under the NLRA here.

To appropriately address the General Counsel’s cats paw argument requires not a disembodied argument on a limited record on the back of a small employer, but testimony and evidence whether such a change is necessary and whether its institution would be remedial or punitive. Rulemaking is the best mechanism to obtain such input from the Board’s constituents, the public, and the Congress.

Finally, the General Counsel waived the right to establish the basis for the Exception by failing to present any testimony or evidentiary proof to support the Exception and/or by having “designate[d] by citation of page the portions of the record relied on” as required by Section 102.46(b)(1)(iii) of the Board’s Rules and Regulations.

CONCLUSION

For the foregoing reasons, Respondent Pessoa respectfully requests that the General Counsel’s Exceptions be denied.

Respectfully submitted,

PESSOA CONSTRUCTION COMPANY

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