

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

STAGE HANDS REFERRAL SERVICE, LLC * **Case No. 34-CA-10971**
*
and *
*
STEPHEN FOTI, AN INDIVIDUAL *
*

INTERNATIONAL ALLIANCE OF THEATRICAL & * **Case No. 34-CB-2774**
STAGE EMPLOYEES & MOTION PICTURE *
TECHNICIANS OF THE UNITED STATES & *
CANADA, LOCAL 84, AFL-CIO *
(Meadows Music Theatre) *
*
and *
*
STEPHEN FOTI, AN INDIVIDUAL * **MARCH 7, 2011**

**RESPONDENTS' MOTION TO SUPPLEMENT THE RECORD
WITH RESPONDENTS' POST-TRIAL BRIEF**

1. Introduction

The respondents move to supplement the record with their post-hearing brief. A copy of that brief is attached as Exhibit A.

The respondents submitted exceptions to the supplemental record under date of February 2, 2009. A copy of the exceptions is attached as Exhibit B. The exceptions, which is part of the board's official record, contains a number of specific citations to the post-hearing brief.

The gravamen of the respondents' exceptions is that the Administrative Law Judge ignored all the arguments and evidence the respondents presented. The ALJ wrote a decision as if the respondents had no answer at all to the region's arguments. If the ALJ had disagreed with the respondents and sided with the region, that would be an

entirely different situation. But the ALJ acted as if the respondents never showed up for trial; never put on evidence; and never filed a post-hearing brief. That was the basis of the respondents' argument that the ALJ's decision was unreasonable, arbitrary, and capricious.

The NLRB, in its April 29, 2009 decision, did not address any of the arguments or evidence the respondents raised. Once again, it was as if this were not a contested case. The respondents are union-side entities. They were treated by the Bush-era board as non-entities; their evidence was ignored entirely.

The respondents appealed to the DC Circuit. The DC Circuit reversed the NLRB and remanded this case following the Supreme Court's decision in New Process Steel v. N.L.R.B., 560 U.S. ___, 130 S. Ct. 2635, 177 L. Ed. 2d. 162 (2010). The NLRB has taken no action in this case since the remand.

2. Argument

In its 2009 decision, the board declined to take into account the respondents' evidence because the respondents did not refile their posthearing brief as a supporting document. The basis was Section 102.45(b). It is true that that section does not specifically mention briefs as part of the record before the NLRB, but the rule is obtuse. It is far from clear that briefs are not part of the record, for it is the general rule in appeals, including in administrative appeals from hearing officers' or administrative law judges' decisions, that the parties' briefs are available for review by the reviewing body. The rule, as interpreted by the board in the pre-remand decision, serves no useful purpose and is a trap for the unwary, as shown by the fact that in the case cited in the

ruling, CPS Chemical Co., 324 NLRB 1018, fn. 2 (1997), it was the General Counsel who was “trapped.” If the General Counsel’s office was penalized for not going through the talismanic exercise of identifying its brief below as part of the record, the rule is one that is guaranteed to be a trap for lawyers who do not litigate NLRB cases as their only job.

The respondents now move to supplement the record with their brief because their exceptions, which are in the record, cannot be understood without reference to the brief. The interests of justice and fair play are served by the board’s allowing the brief into the record and actually considering the evidence in this case. Specifically, the following respondents' exceptions were cited in the brief and deserve consideration:

-- the explanation given in pages 4-8 of the brief, supported by pages 182-196, 201, 480-486, 550-559 of the transcript, and in pages 17-19 of the brief, supported by pages 45-75, 144, 109-110, 172-173, 493 of the transcript to show the ALJ and the region erred in calculating the claimant's supplemental earnings;

-- the explanation given in pages 8-10 and 10-17 of the brief, supported by pages 110-116, 60, 116, 154 189, and 157-159, 227-232, 236-239, 244-246, 568-569 of the transcript, and Exhibit GC -3, to show the ALJ and the region erred in labeling Entertainment Partners as "Local 84 work";

--the explanation given on page 14 of the brief, supported by pages 242-243 of the transcript and Exhibit GC-3, to show the ALJ and the region erred in labeling Volume Services America as "Local 84 work";

--the explanation given on page 25 of the brief, supported by pages 202-204 of the transcript, that the claimant was a union member as of July 2006 and could not possibly be entitled to back pay after that time;

--the explanation given on page 24 of the brief, supported by pages 53, 133,141-143, 200-201, 485-486, 551-552, that the claimant was unavailable for work with Local 84 after the fourth quarter of 2004 and was not entitled to back pay for that period of time;

--the explanation given on pages 4, 24-25, and pages 413, 421 452-453, 477 486-487, 488 of the transcript, and Exhibit GC-3, that Respondent SRS' largest client was lost in the first quarter of 2006, and it was error to treat the claimant in the same way after that point in time;

-- the explanation given in page 26 of the brief and in pages 375-387 of the transcript that a new, perfectly legal referral system was introduced in October 2005, and the claimant was not entitled to back pay after that period of time;

--the explanation given in pages 7-8, 23 of the brief, and in pages 260-269, 484-487, 550-560, 589, 603, 606-608 of the transcript, that the plaintiff was working full-time with another union local after the first quarter of 2006 and was not eligible for back pay;

-- the showing, given in pages 30-31 of the brief and pages 533-537 of the transcript, that no formula was needed to determine back pay because it was determined precisely what were calls the claimant would have been eligible for absent discrimination.

All of the information above was ignored by the ALJ.

The brief and exceptions total 39 pages.

For the Respondents,

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CERTIFICATION

This is to certify that a copy of the foregoing was emailed and mailed, postage prepaid, on this the 7th day of March, 2011, to:

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