

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

OAK HARBOR FREIGHT LINES, INC

and

Cases 19-CA-31797
19-CA-32001

TEAMSTERS LOCALS 81, 174, 231, 252, 324,
483, 589, 690, 760, 763, 839, and 962

**COUNSEL FOR THE ACTING GENERAL COUNSEL'S LIMITED
ANSWERING BRIEF TO RESPONDENT'S CROSS-EXCEPTIONS
TO THE DECISION OF THE ADMINISTRATIVE LAW JUDGE**

Submitted by:

Irene Hartzell Botero
Counsel for the Acting General Counsel
National Labor Relations Board
Region 19
915 Second Ave., Suite 2948
Seattle, WA 98174-1009

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Counsel for the Acting General Counsel submits this limited answering brief to the first of Respondent's Cross-Exceptions to the Decision of the Administrative Law Judge pursuant to Section 102.46 of the Board's Rules and Regulations.¹

I. Administrative Law Judge McCarrick Properly Found That Respondent Had Not Affirmatively Pled and, Therefore, Had Waived Its Impasse Argument Regarding Trust Fund Contributions For Returning Strikers

A. Facts

Following the conclusion of evidence presented by Respondent at the hearing after Respondent had rested, Counsel for the Acting General Counsel sought clarification as to Respondent's defenses.² Counsel for the Acting General Counsel queried Respondent as to whether it was intending to claim that legal impasse had been

¹ References to the transcript appear as (___:___). The first number refers to the pages; the second to the lines. References to Acting General Counsel Exhibits appear as (GC Exh ___). References to Respondent Exhibits appear as (R Exh ___). References to the ALJ's decision appear as (ALJD ___:___). The first number refers to the pages, the second to the lines. References to Respondent's Brief in Support of its Cross Exceptions appear as (RCEXP ___) The reference refers to the page number.

² TR 1555:7-25.

reached between February 17 and February 26, 2009, as to bargaining over pension health and welfare and retiree benefits *only* and, as such, whether Respondent was claiming that it had a legal right to implement its offer with respect to just these employee benefits, regardless of whether overall impasse in bargaining was reached.³

Counsel for Respondent was initially unprepared to respond to the question, as evidenced by the following colloquy:

Mr. Payne: Your Honor, I'm not sure I heard the entire question, so I'm not prepared to answer that question at this moment. Here we are 5:15 on the what, seventh or eighth day of trial and a long compound question and I'm just simply not prepared at this moment to answer that question.⁴

Ms. Botero: Well, Your Honor, I'll re-ask and I'll try to make it less compound. It impacts whether or not we will be bringing additional rebuttal witnesses. We do have one very short rebuttal witness apart from this particular issue.

Judge McCarrick: Uh-huh.

Ms. Botero: Essentially, we want to know is the employer claiming that a partial impasse was reached with respect to the benefits issues between February 17th and February 26th, and that the employer had a right to implement its offer as described on February 17th with respect to these issues without reaching overall impasse in bargaining.

Mr. Payne: Your Honor, I didn't write the entire question down. It's a very fundamental part of this trial. I'm not trying to be tricky, but I'm not in the position here to waive any of the employers defenses and I think I'm hearing General Counsel now wanting to know whether I'm prepared to waive a particular defense, and cloaking it, and I don't mean this disrespectfully, but cloaking it in a question about whether we're prepared to -- we being the Acting General Counsel -- is prepared to put on a rebuttal case and I'm --

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³ TR 1555: 13-23.

⁴ TR 1556: 2-6.

⁵ TR 1556:1 - 1557:2.

Judge McCarrick: I think I've indicated off the record, my view is that that would be in the nature of an affirmative defense that needs to be pled in an Answer and I don't recall seeing that in an Answer, so my sense is that I would not consider that if that's raised for the first time in briefs because we haven't litigated it. I mean I realize that we often, there's a whole line of cases that talks about unpled but fully litigated issues in a complaint. I don't think we've litigated the issue of impasse. I think I asked questions myself on cross examination and examination of witnesses, but I don't think anyone at any point said there was an impasse reached about anything.⁶

Ms. Botero: Well, whether the words were used or not, we need to know if that's going to be a defense. Perhaps the words impasse were not used, but if the employer intends to argue that somehow there was a partial impasse reached with respect to the benefit issues, we need to know that, because that will impact whether we're (sic) going to have brief additional testimony.⁷

Judge McCarrick: I think Counsel has indicated he's not going to take a position....⁸

Additional colloquy ensued between Judge McCarrick and Counsel for the Acting General Counsel regarding the potential need for Counsel for the Acting General Counsel to put on additional rebuttal testimony regarding impasse, should that be Respondent's defense.⁹ It was following this colloquy, after both parties had rested, that Counsel for Respondent claimed for the first time that Respondent was going to argue that an impasse was reached.

Mr. Payne: Your honor, can I address -- I just want to make sure the record's clear on something here. We firmly believe that our affirmative defenses, particularly affirmative defenses 8 and 9 without limitation of others encompass the Respondent's right to argue that an impasse was reached following negotiations with the union and Respondent therefore had the legal right to implement its offer.

⁶ TR 1557: 2-13.

⁷ TR 1557: 14-20.

⁸ TR 1557: 21-24,

⁹ TR 1557 - 1559.

Judge McCarrick: Eight and 9?

Ms. Botero: Hold on.

Mr. Payne: Eight and 9 both address, Your Honor, changes in business operations which Respondent implemented for legitimate business reasons and in compliance with the Act and with the (sic) CBA, and then 9 addresses any alleged unilateral changes made by Respondent where lawfully accomplished.

Judge McCarrick: Nothing says anything about impasse. I don't think 8 and 9 are sufficient to raise the question of impasse.

Mr. Payne: That being the case, Your Honor, then we're not waiving any rights. I'm going to make a motion to amend our affirmative defenses.

Judge McCarrick: Motion denied.

Mr. Payne: Okay. Can I restate for the record what my proposed amendment would be?

Judge McCarrick: Go ahead.

Mr. Payne: That any alleged changes made by Respondent were lawfully implemented by Respondent following good faith negotiations and an impasse.

Judge McCarrick: Yeah, it's a little late to raise an affirmative defense, the motion is denied.¹⁰

B. Argument

ALJ McCarrick properly denied Respondent's motion to amend its affirmative defenses to assert that impasse had been reached between the parties and, thus, that it was privileged to implement its February 17, 2009 offer. An employer may raise an

¹⁰ TR 1555: 25 - 1561: 3.

affirmative defense in its answer or at the hearing, but the affirmative defense has to be timely.¹¹

In the instant case, both the Acting General Counsel and Respondent had rested their cases when Counsel for the Acting General Counsel, in order to assess rebuttal needs, attempted to seek clarification on whether Respondent was going to attempt to argue that the parties reached a partial impasse with respect to health, welfare and pension benefits as of February 26, 2009. Respondent's counsel was initially reluctant to commit to the ALJ regarding whether it was even going to raise impasse as a defense. It was only after the ALJ remarked that, in his view, since Respondent had never raised impasse as a defense either in its Answer or on the record, he wasn't going to entertain the defense for the first time on brief, that Respondent pointed out that it was its belief that its affirmative defenses 8 and 9 encompassed an impasse defense.

Under the Board's Rules and Regulations, Section 102.33, a respondent may amend its answer at any time before trial. After the trial opens, the judge has the discretion to permit an amended answer, particularly if the motion to amend is made early, with no prejudice to the Acting General Counsel. In *St. George Warehouse, Inc.*, 349 NLRB 870 (2007), the Board upheld the judge's denial of respondent's motion on the second day of trial to amend its answer denying a supervisory-status allegation that it had previously admitted, assertedly by mistake. Manifestly, an affirmative defense

¹¹ In *New Associates*, 314 NLRB 893, 894 (1994), a case in which the Board adopted the ALJ's rulings without comment, the ALJ found that Respondent had timely raised the issue of deferral to the arbitration award during the hearing, even though it had not in its answer to the complaint. *Id.* Not only was deferral to the arbitration award raised at trial by Respondent, but Respondent additionally introduced the arbitration award itself into evidence at the trial. *Id.* As such, evidence was taken at trial on this issue, Respondent's defense was known when the parties were developing their cases, and accordingly, the affirmative defense was proper and timely.

raised in an answer has to be clearly stated by the party raising the defense, so that all parties are aware of what the defense is developed and the record fully developed at the hearing.

Here, even when Counsel for the Acting General Counsel attempted to ascertain if Respondent was indeed claiming impasse as a defense, Respondent was reluctant to commit to the ALJ and the parties what its defense was. This appears to have been because Respondent was attempting to esconce its impasse defense within the language of affirmative defenses 8 and 9, and raise it for the first time on brief. It could not do so as affirmative defenses raised for the first time in post-hearing briefs are untimely and may be considered waived. *Harco Trucking, LLC*, 344 NLRB 478, 479 (2005). The Acting General Counsel would have been greatly prejudiced had ALJ McCarrick allowed Respondent to raise this affirmative defense after all parties had rested. Under the circumstances of this case, given the stage of the proceedings when first raised, the ALJ followed well settled principles and did not abuse his discretion in denying Respondent's motion to amend affirmative defenses 8 and 9 to assert impasse.

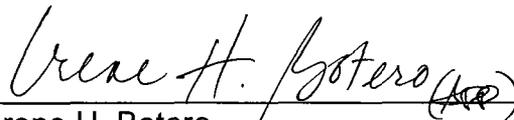
II. Should the Board Grant Respondent's Cross-Exception Number 1, the Only Appropriate Remedy Would be to Remand the Matter and Reopen the Record

Before Respondent asserted its position on impasse as of February 26, 2009, Counsel for the Acting General Counsel had intended to call Mr. Hobart to the stand as a rebuttal witness the following day. When the ALJ ruled that the impasse defense had not been properly raised, and Respondent then first attempted to amend its Answer and assert impasse as an affirmative defense, the ALJ denied this motion as untimely. As a result of the late-raised assertion and resultant ALJ ruling, any rebuttal evidence, including witness testimony on this issue became moot. Accordingly, should the Board

grant Respondent's Cross-Exception Number 1, and find that ALJ McCarrick improperly denied Respondent's motion to amend its affirmative defense, Counsel for the Acting General Counsel urges that the appropriate remedy would be to remand the matter to ALJ McCarrick so that the record may be reopened and evidence adduced rebutting Respondent's late-raised defense. Only such a procedure would promote the interest of fairness and ensure a fully developed record for review.

DATED at Seattle, Washington, this 8th day of April, 2011.

Respectfully submitted,

A handwritten signature in cursive script that reads "Irene H. Botero" followed by a circled "HCB" in the right margin. The signature is written over a horizontal line.

Irene H. Botero
Counsel for the Acting General Counsel
National Labor Relations Board, Region 19
2948 Jackson Federal Building
915 Second Avenue
Seattle, Washington 98174

CERTIFICATE OF SERVICE

I hereby certify that on this 8th day of April, 2011, I caused copies of Counsel for the Acting General Counsel's Limited Answering Brief to Respondent's Cross-Exceptions to the Decision of the Administrative Law Judge to be served upon each of the following parties by E-File, and E Mail and United States postage pre-paid mail:

E-File: Lester A. Heltzer, Executive Secretary
National Labor Relations Board
1099 14th St NW, Room 11602
Washington, DC 20570-0001

**E-Mail and
U. S. Mail:** John Payne, Attorney
DAVIS GRIMM PAYNE & MARRA
701 Fifth Ave, Suite 4040
Seattle, WA 98104-1071
ipayne@davisgrimmpayne.com
Phone: (206) 447-0182
Fax: (206) 622-9927

**E-Mail and
U.S. Mail** Michael R. McCarthy, Attorney
REID PEDERSEN McCARTHY &
BALLEW, LLP
101 Elliott Ave W, Suite 550
Seattle, WA 98119-4220
mike@rpmb.com
Phone: (206) 285-3610
Fax: (206) 285-8925

U.S. Mail Oak Harbor Freight Lines, Inc.
Attn: Edward Vander Pol
1339 West Valley N
Auburn, WA 98001-4123

U.S. Mail Teamsters Local 174
Attn: Rick Hicks
14675 Interurban Ave S, Suite 303
Tukwila, WA 98168-4614

U.S. Mail International Brotherhood of Teamsters
Attn: James A. McCall
25 Louisiana Ave NW
Washington, DC 20001-2130


Winnie Willmore, Secretary