UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

ATLANTIC SCAFFOLDING COMPANY

and **Case No. 16-CA-26108**

UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, LOCAL 502

ACTING GENERAL COUNSEL'S RESPONSE TO RESPONDENT'S MOTION FOR RECONSIDERATION OF THE BOARD'S DECISION AND ORDER

COMES NOW Jamal M. Allen, Counsel for the Acting General Counsel, and submits this Response to Respondent's Motion for Reconsideration of the Board's Decision and Order to the National Labor Relations Board, hereinafter Board, and in support of said Motion, Counsel for the Acting General Counsel offers the following:

1.

On March 18, 2011, the Board issued its Decision and Order finding that Respondent violated Section 8(a)(1) of the Act by discharging seventy-three (73) of its employees in retaliation for the employees' protected, concerted activity of engaging in a work stoppage over pay[1].

[1] Respondent erroneously asserts on page 4 of its Motion for Reconsideration of the Board's Decision and Order that the "Board's remedial order covered 54 employees." Although the Board's Order only names 54 employees, the Board specifically found that Respondent had unlawfully discharged the seventy-three employees named in the Complaint and Notice of Hearing. Thus, the Board stated "[s]eventy three of those employees were included in the complaint, and are thus encompassed by our remedial order" (356 NLRB No. 113, slip op. at 5, 2011).

2.

Pursuant to Section 102.48(d)(1) of the Board's Rules and Regulations, Respondent filed a Motion for Reconsideration of the Board's Decision and Order, hereinafter Respondent's Motion, on April 15, 2011. Respondent's Motion argues that its due process rights were infringed because the General Counsel's theory of the case was different than the violation found by the Board. Respondent further seeks clarification from the Board regarding whether the Board's Decision and Order definitively determined that the discriminatees are entitled to reinstatement or backpay beyond the end of the ExxonMobil maintenance turnaround.

As shall be discussed in greater detail below, Respondent's Motion has no merit. First, contrary to the argument advanced in Respondent's Motion, the Board properly determined that Respondent unlawfully discharged its employees on March 19, 2008 as the allegation was covered by the pleading of the Complaint and Notice of Hearing and fully litigated at the unfair labor practice hearing. Finally, with respect to Respondent's request for clarification of the Board's Order, the issues of the discriminatees' entitlement to any reinstatement remedy and the appropriate length of the backpay period are issues that should be left for resolution at the compliance stage.

3.

Respondent's Motion erroneously alleges that it was denied due process in this proceeding as the General Counsel solely alleged that the employees were discharged on March 17, 2008, whereas the Board's Decision and Order found that the employees were, in fact, discharged on March 19, 2008. Respondent's argument above fails for two

material reasons: (1) the finding that Respondent unlawfully discharged its employees on March 19, 2008 is clearly encompassed by the Complaint and Notice of Hearing; and (2) the facts in support of the finding that Respondent unlawfully discharged its employees on March 19, 2008 were fully litigated at the administrative law hearing.

4.

In determining whether a respondent's due process rights were violated, the Board has considered the scope of the complaint, and any representations by the General Counsel concerning the theory of a violation, as well as the differences between the theory litigated and the judge's theory. See generally *Sierra Bullets, LLC*, 340 NLRB 242, 242-243 (2003) (violation based on broader theory improper and violates due process when General Counsel expressly litigated case on narrow theory).

In the instant case, the General Counsel's theory of the case was relatively straightforward. The General Counsel alleged that Respondent unlawfully discharged its employees in retaliation for their protected, concerted activity of engaging in a peaceful work stoppage at the ExxonMobil facility in March 2008. It is uncontested that this discharge theory was specifically pled in the Complaint and Notice of Hearing; and advanced in both the General Counsel's post-trial brief and the Exceptions to the Decision of the Administrative Law Judge.

The Respondent does not contest the preceding, rather it rests its claim of a lack of due process on the allegation that the effective date of the discharge found by the Board (March 19) conflicts with the date alleged by the General Counsel (March 17). Respondent's argument has no merit. As shall be discussed below, the Board's finding that Respondent discharged its employees on March 19 is clearly within the scope of the

Complaint and Notice of Hearing and facts fully litigated by both parties at the trial and argued for in the General Counsel's post-trial brief.

5.

On August 29, 2008[2], the General Counsel issued a Complaint and Notice of Hearing alleging that Respondent's employees engaged in protected, concerted activity by engaging in a work stoppage on March 17 over a pay raise at the ExxonMobil facility in Beaumont, Texas (GC Exh. 2). The Complaint and Notice of Hearing further alleged that "on or about March 17" Respondent discharged its employees in retaliation for their protected activity (GC Exh. 2). As correctly noted by the Board in its Decision and Order, "[b]ecause the complaint alleges that the Respondent discharged employees 'on or about' March 17, a finding that the employees were discharged on March 19 is well within the scope of the complaint" (356 NLRB No. 113, slip op. at 2, fn. 8, 2011).

In addition to being clearly encompassed by the scope of the complaint, the facts regarding the March 19 discharge were fully litigated at the administrative law hearing and referenced in the General Counsel's post-trial brief. Specifically, at the administrative law hearing, the General Counsel introduced into evidence a March 19 email that Respondent sent to ExxonMobil containing an Excel attachment identifying the employees it discharged (GC Exh. 6). The email listed the names of the 73 discriminatees that the Board found were unlawfully discharged in this matter with the word "Terminated" by each discriminatee's name. Several other employees had the words "didn't participate" by their names which the Respondent's witness conceded under questioning from the General Counsel referred to the fact that the employees did not participate in the March 17 work stoppage. In response to the preceding,

[2] All dates are 2008 unless otherwise indicated.

Respondent's counsel elicited testimony from the witness alleging that Respondent's use of the term "Terminated" on the March 19 Excel sheet "just meant that they were terminated for the reason of quitting" (Tr. 619; L.L 3-10).

In its post-trial brief, the General Counsel noted that "[a]dditonal evidence that the employees were terminated in retaliation for protected activity is found in [the] Xcel spreadsheet attached to Respondent March 19th email to ExxonMobil" (GC Br. at 29). After summarizing the contents of the email attachment, the General Counsel argued that Respondent's witness' testimony that the discriminatees were discharged for quitting was undermined by the fact that the list stated "quit" by the name of employee Jubar Cortez (GC Br. at 31). The General Counsel's post-trial brief concluded that Respondent's use of the term "Terminated" in the March 19 email was intended to convey to ExxonMobil that these employees had been terminated for their participation in the March 17 work stoppage (GC Br. at 29-31). In its Decision and Order, the Board correctly found that Respondent discharged the employees on March 19 based in part on the March 19 email referred to above. (356 NLRB No. 113, slip op. at 5, 2011).

Thus, the March 19 discharge of the employees was fully litigated at the administrative law hearing and alleged in the General Counsel's post-trial brief. The Board has found an issue was "fully and fairly litigated" where the employer did not object during the hearing that the issue was outside of the scope of the complaint, cross-examined and elicited testimony from witnesses on the issue, and the issue was addressed in post hearing briefs. *Yellow Ambulance Service*, 342 NLRB 804, 824 (2004). See also *Dilling Mechanical Contractors, Inc.*, 348 NLRB 98, 105 (2006).

Concededly, the main thrust of the General Counsel's post-trial brief was the argument that Respondent discharged its employees on the March 17 date that it bused the employees out of the ExxonMobil facility. However, this argument in no way denied Respondent of its due process rights to defend against the finding that the discharges actually occurred on March 19. Both arguments are premised on the same allegation that the Respondent discharged the employees in retaliation for their protected, concerted activity of March 17. As referenced above, facts in support of the March 19 discharge date were encompassed by the pleadings and fully litigated at the trial and thereafter referenced in the General Counsel's post-trial brief.

The Board has previously stated that the failure to specifically make an argument in a post-trial brief does not preclude the finding of a violation where the allegation is encompassed by the complaint and litigated at trial:

> For example, in *Louisiana Pacific Corp.*, 299 NLRB 16, 18 (1990), the Board concluded that the failure of the General Counsel to argue a theory of a violation in the posthearing brief to the judge did not preclude the judge from making a finding on that theory where it was encompassed by the complaint allegations and the General Counsel elaborated on the theory at the hearing with evidence to support it. *Sierra Bullets, LLC,* 340 NLRB 242, 243 (2003).

> Finally, we reject the judge's finding that by failing, in the posthearing brief, to include any argument regarding Cramer's discharge, the General Counsel has abandoned the allegation. "As filing of a posthearing brief is permissive in the first instance, the mere omission of the 8(a)(3) argument from his brief at that point hardly, by itself, warrants finding, that the counsel for the General Counsel thereby waived the 8(a)(3) theory explicitly put in issue by the complaint." *Aldworth Co.*, 338 NLRB 137, 146-147 (2002) quoting from *Louisiana-Pacific Corp.*, 299 NLRB16, 18 (1990).

In the instant case, the General Counsel did not waive the argument that Respondent discharged its employees on March 19 as the facts in support of that finding were litigated at trial and clearly argued for in the post-trial brief.

In sum, Respondent was not denied its due process right to defend against the Board's finding that it discharged its employees on March 19. The Board has already found that the allegation was clearly encompassed by the wording of the Complaint and Notice of Hearing and the facts in support of the finding were fully litigated at trial.

6.

In addition to the due process argument, Respondent's Motion for Reconsideration of the Board's Decision and Order seeks clarification regarding whether the remedial order definitively determines the discriminatees eligibility for reinstatement and backpay beyond the end of the ExxonMobil turnaround. The Board's Decision and Order in this matter conforms to the remedy traditionally articulated in a discharge case such as this. Facts regarding the employees' eligibility for reinstatement and the extent of the backpay period were not litigated during the unfair labor practice hearing.

The discriminatees' eligibility, if any, for reinstatement and the appropriate length of the backpay period herein are matters normally left for determination in the compliance proceeding. Counsel for the Acting General Counsel submits that there is no need for clarification or deviation from the standard Board remedy in this matter as the matters pertaining to the scope and extent of the Respondent's remedial obligations shall be determined by the compliance officer and Respondent shall be entitled to present all evidence in support of its contention in those proceedings, if necessary.

Based on the foregoing, Counsel for the Acting General Counsel respectfully requests that Respondent's Motion for Reconsideration of the Board's Decision and Order be denied as the Respondent was not denied due process in connection with the Board's finding that it unlawfully discharged its employees on March 19. Further, the issues of the discriminatees' eligibility for reinstatement and the extent of the backpay period should be determined during the compliance stage of these proceedings.

DATED at Houston, Texas, this 3rd day of May, 2011.

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CERTIFICATE OF SERVICE

I certify that a copy of the above and foregoing Counsel for the Acting General Counsel's Response to Respondent's Motion for Reconsideration of the Board's Decision and Order has been served upon each of the following by first class mail this 3rd day of May, 2011:

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