

UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
REGION 9

In the Matter of

K-VA-T FOOD STORES, INC.  
D/B/A FOOD CITY

and

RETAIL, WHOLESALE & DEPARTMENT  
STORE UNION, UFCW, CLC

Cases 9-CA-46125  
9-CA-46126  
9-CA-46127  
9-CA-46152  
9-CA-46153

COUNSEL FOR THE ACTING GENERAL COUNSEL'S MOTION  
TO STRIKE A PORTION OF RESPONDENT'S BRIEF  
IN SUPPORT OF EXCEPTIONS

Comes now Counsel for the Acting General Counsel and respectfully moves that the Board strike and/or disregard Respondent's brief insofar as it raises arguments that are not properly before the Board for review. More specifically, Respondent did not except to the Judge's recommendation that Glenda Burton, Martha Smith and Ruth Ann Kirk be reinstated and made whole or to his related finding that the purported settlement agreements that they signed did not preclude such relief. (ALJD p. 35, ll. 23-51) Section 102.46(b)(2) of the Board's Rules and Regulations provides that, "Any exception to a ruling, finding, conclusion or recommendation that is not specifically urged shall be deemed to have been waived." Notwithstanding its failure to except to the Judge's findings regarding the inefficacy of the purported settlements to preclude a make whole remedy, Respondent argues at pages 19 to 22 of its brief that the discriminatees are not entitled to the recommended relief and urges the Board to reject the Judge's finding and recommendations to this effect. Such arguments are clearly beyond the scope of Respondent's exceptions and thus improperly before the Board.

Section 102.46(c) provides that "[a]ny brief in support of exceptions shall contain no matter not included within the scope of the exceptions[.]" The Board has specifically relied on

the failure to comply with Section 102.46(c), i.e. arguing in a brief matters that are not raised in the exceptions, as a basis for finding that matters raised only in the brief are not properly before the Board for review. See, *Millmen and Industrial Carpenters Union Local 1618*, 356 NLRB No. 76, slip op. p. 2 (2011); *Engineered Comfort Systems*, 346 NLRB 661, 661 (2006).

It is insufficient to argue that Respondent somehow implicitly excepted to the Judge's findings regarding the settlement agreements by generally excepting to the Judge's findings that Respondent unlawfully disciplined and terminated Burton, Smith and Kirk. The Board rejected this approach in *Engineered Comfort Systems*, supra at 661, when it declined to review the legal question of whether a purported statement violated Section 8(a)(1) where the respondent had only excepted to the administrative law judge's *credibility* determination that such statement had been made. The Board found that the respondent failed to comply with the Board's Rules by arguing the legal issue in its brief when it was "not included within the scope of the exceptions" in accordance with Section 102.46(c). *Ibid.* It concluded that, under such circumstances, the legal question was not properly before the Board. *Ibid.*

For the foregoing reasons Counsel for the Acting General Counsel respectfully requests that the Board strike and/or disregard pages 19 to 22 of Respondent's brief insofar as it raises arguments that are beyond the scope of its exceptions and not properly before the Board for review.

Dated at Cincinnati, Ohio this 7<sup>th</sup> day of September 2011.

Respectfully submitted,



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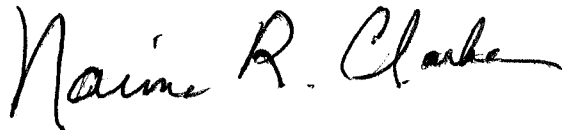
**CERTIFICATE OF SERVICE**

September 7, 2011

The undersigned hereby certifies that the foregoing Counsel for the Acting General Counsel's Motion to Strike a Portion of Respondent's Brief in Support of Exceptions was served by electronic mail to the following persons:

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