

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

**LEE ENTERPRISES, INC.
d/b/a ARIZONA DAILY STAR**

and

Case 28-CA-23267

BRIAN PEDERSEN, an Individual

**ACTING GENERAL COUNSEL'S RESPONSE TO
RESPONDENT'S OPPOSITION TO THE ACTING GENERAL COUNSEL'S
REQUEST FOR SPECIAL PERMISSION TO APPEAL**

In response to the Opposition to the Acting General Counsel's Request for Special Permission to Appeal the Rulings of the Administrative Law Judge Joel P. Biblowitz (Respondent's Opposition), filed by Respondent Lee Enterprises, Inc., d/b/a Arizona Daily Star on August 26, 2011, the Acting General Counsel (General Counsel) submits that its Request for Special Permission to Appeal the Ruling of Administrative Law (General Counsel's Special Appeal) should be granted for the reasons stated therein. Furthermore, as shown below, Respondent's claim that the General Counsel's Special Appeal was untimely is without merit. Finally, the Board should not consider the settlement proposals and discussions between Respondent and the General Counsel, as such matters are inadmissible, and irrelevant to the matters herein.

I. ARGUMENT

1. The General Counsel's Special Appeal was timely filed.

The Board's Rules and Regulations contain no time limit for the filing of a special appeal, only requiring that it "be filed promptly, in writing, and shall briefly state (1) the reasons special permission should be granted and (2) the grounds relied on for the appeal." See, Section

102.26 of the Board's Rules & Regulations. The Board has clearly noted that, when its rules do not contain a time limit for the filing of a specific pleading, it will not grant a motion to strike that pleading for being untimely. *T. Steele Construction, Inc.*, 351 NLRB No. 55 fn.1 (2007) (Board denies motion to strike General Counsel's opposition brief on the ground it was untimely as the Board's rules do not specify such a time limit). In such circumstances, the only question is whether the pleading was filed within a sufficient period of time for the Board to consider the pleading before issuing its Order.

The Board's approach is both sensible and practical. Unlike jurisdictional limits enacted by Congress, such as Section 10(b) of the Act, procedural filing limits are simply adopted for the orderly transaction of business. *Bowles v. Russell*, 127 S.Ct. 2360, 2365 (2007). Since they are not jurisdictional, they "can be relaxed by the Court in the exercise of its discretion." *Id.*

The Board has shown that it can, when it deems necessary for the orderly transaction of its business, set forth firm filing deadlines in its Rules. See, e.g., Section 102.20 (answer shall be filed within 14 days from the service of the complaint); Section 102.24(b) (motions for summary judgment shall be filed no later than 28 days before hearing or after the date for filing an answer); Section 102.31 (b) (a petition to revoke subpoena shall be filed within 5 days after the date of service); Section 102.42 (after the close of a hearing the ALJ may set a time limit for the filing of a supporting brief, not to exceed 35 days); Section 102.46 (a) (exceptions to the Board to be filed within 28 days); Section 102.46 (b) (answering briefs to be filed within 14 days); Section 102.48 (d)(2) (motion for reconsideration shall be filed within 28 days after the service of the Board's order); Section 102.148 (EAJA application must be filed no later than 30 days after the entry of the Board's final order). Regarding special appeals, however, acknowledging the fluidity of administrative hearings and the need for flexibility, the Board has determined that

the orderly transaction of its business does not require a strict filing deadline. Accordingly, Respondent's assertion that the Special Appeal fails to comply with the Board's Rules, or is otherwise untimely, is meritless, because no time limits exist for the filing of a special appeal.

T. Steele Construction, Inc., supra.

Moreover, Respondent's cannot show that it has been prejudiced from the fact that the General Counsel's Special Appeal was not filed earlier, within some time-limit that Respondent itself wants to determine. The Respondent has had full opportunity to file, and has in fact filed, a fully articulated brief opposing the legal arguments set forth by the General Counsel's Special Appeal. Accordingly, under these circumstances, where the Board's Rules provide no time deadline for the filing of a special appeal, and where Respondent has suffered no prejudice, Respondent's claims are meritless.

2. The Board should not consider the Acting General Counsel's pre-hearing settlement proposal.

Pre-hearing settlement proposals are not admissible into evidence. Fed. R. Evid. 408; *Hicks-Ponder Co.*, 174 NLRB 51, 55-56 (1969) enfd. 424 F.2d 538 (5th Cir. 1970) cert. denied 400 US 825 (1970). Accordingly, the Board should strike all references to proposed settlement offers, along with the accompanying exhibits, set forth in Respondent's Opposition.

Moreover, to avoid costly litigation, the General Counsel many times offers to settle a case on terms that may vary from those ultimately sought after settlement talks break down and litigation ensues. *Hicks-Ponder Co.*, supra. Here, while the General Counsel was amenable to offer more favorable terms to Respondent before the hearing date, Respondent refused these proposed terms. Accordingly, any pre-hearing settlement discussions are of no bearing to the ultimate issues set forth in the General Counsel's Special Appeal.

II. CONCLUSION

The General Counsel's Special Appeal was properly filed within the parameters set forth in Section 102.26 of the Board's Rules and Regulations. Furthermore, the matters set forth in pre-hearing settlement proposals presented by the General Counsel to Respondent should not be considered by the Board. Based upon the foregoing, and the arguments set forth in the General Counsel's Special Appeal, the Board should grant the General Counsel's request for special permission to appeal, revoke the ALJ's approval of the settlement, and remand this matter for further processing.

Dated at Phoenix, Arizona, this 12th day of September 2011.

Respectfully submitted,

/s/ Chris J. Doyle

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CERTIFICATE OF SERVICE

I hereby certify that a copy of ACTING GENERAL COUNSEL'S RESPONSE TO RESPONDENT'S OPPOSITION TO THE ACTING GENERAL COUNSEL'S REQUEST FOR SPECIAL PERMISSION TO APPEAL in LEE ENTERPRISES, INC. d/b/a ARIZONA DAILY STAR, Case 28-CA-23267, was served via E-Gov, E-Filing, and electronic mail on this 12th day of September 2011, on the following:

Via E-Gov, E-Filing:

Lester A. Heltzer, Executive Secretary
Office of the Executive Secretary
National Labor Relations Board
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Washington, DC 20570-0001

Honorable Joel P. Biblowitz
Associate Chief Administrative Law Judge
National Labor Relations Board
Division of Judges
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Served via electronic mail on the following:

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