

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

In the Matter of

KENNAMETAL, INC.

and

UNITED STEELWORKERS, LOCAL 5518, affiliated
with UNITED STEELWORKERS OF AMERICA,
AFL-CIO, CLC

CASE 01-CA-046689

**COUNSEL FOR THE ACTING GENERAL COUNSEL'S REPLY BRIEF TO
RESPONDENT'S ANSWERING BRIEF**

Respectfully submitted by,

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I. INTRODUCTION

Pursuant to Section 102.46(h) of the Board's Rules and Regulations, Counsel for the Acting General Counsel hereby submits this Reply Brief to Respondent's Answering Brief dated May 7, 2012 in the above-captioned matter. Counsel for the Acting General Counsel's previous brief has already discussed most of the issues Respondent raises in its Answering Brief. Accordingly, given the page limitations herein, this brief will respond only to the most egregious assertions raised by Respondent's Answering Brief that warrant Counsel for the Acting General Counsel's comment.

II. COUNSEL FOR THE ACTING GENERAL COUNSEL NEVER WAIVED THE RIGHT TO MAKE ARGUMENTS RELATED TO THE SIGNICANCE OF THE DISCREPANCIES BETWEEN RESPONDENT'S EXHIBIT 1 AND EXHIBIT 18.

On page 23 of its Answering Brief, Respondent erroneously contends that Counsel for the Acting General Counsel and the Union "explicitly waived any contention that the discrepancy itself was grounds for finding Respondent's Exhibit 1 to be an intentional fabrication or for drawing any type of adverse inference." The recitations in Judge Bogas' January 26, 2012 Order that Respondent relies on for this sweeping conclusion were understood to clarify only the parties' acknowledgement that the record did not establish that the erroneous RX 1 was intentionally fabricated, and that Counsel for Respondent had not knowingly offered false evidence or made false statements by the presentation of RX 1. The arguments in the Counsel for the Acting General Counsel's Post-Hearing Brief to the Administrative Law Judge (herein "GC's Brief to ALJ"), clearly preserved the Counsel for the Acting General Counsel's right to make any and all appropriate arguments regarding the record as a whole, the pretextual nature of Respondent's defense, and issues of credibility with respect to the disparate numbers.

In the GC's Brief to the ALJ, the undersigned observed that Respondent's repeated claim that incoming orders had dropped to historically low levels prior to the layoffs was unsupported by the underlying business records;¹ Plant Manager Brighenti's credibility was seriously undermined by his testimony respecting the information in the summary document (RX 1);² and the record established that Respondent's proffered defense was untrue and a pretext for both the layoff and elimination of Garfield's position.³ Importantly, the alleged "historically low" order levels set forth in RX 1 was a cornerstone of Respondent's defense, and had been relied on repeatedly by Counsel for Respondent --- in his opening statement (Tr. 13), in key questioning of Respondent's primary witness (Tr. 248-249), and even in Respondent's Post-Hearing Brief to the Administrative Law Judge (herein, "Respondent's Brief to ALJ").⁴

Almost a month after post-hearing briefs were submitted, and almost three months after the record closed, Respondent filed a Motion to Reopen the Record and/or Submit a Reply Brief (herein, "Respondent's Motion to Reopen"), in which Counsel for Respondent admitted that at the time he introduced RX 1, he believed that the summary data contained therein was consistent with Respondent's underlying business records. As this was not the case, implicit in this assertion is that Counsel for Respondent had not reviewed the underlying documents before either introducing the summary exhibit

¹ GC's Brief to ALJ at pp.40-43.

² *Id.*, at p. 42.

³ *Id.*, at p. 3.

⁴ Note, for instance, that despite the existence of RX 18 in the record, Respondent's Counsel appears to rely exclusively on the inaccurate figures from RX 1 to describe the performance of Respondent's operations during 2010 and early 2011. See Respondent's Brief to ALJ at p.10-11, 15-16.

RX 1, or advancing the arguments based on the figures contained therein. It was only after he read the post-hearing briefs that he learned of the inconsistencies.

In a conference call to discuss Respondent's Motion to Reopen, Counsel for Respondent expressed his significant embarrassment. By the assertions made in the motion and the discussion in the conference call, it was clear that the primary concern was the contention made in the Brief of the Charging Party that the inaccurate figures had been fabricated.⁵ During the call, the parties acknowledged that because the inconsistencies had not been addressed during the hearing, the record contained no evidence concerning the motivation for the discrepancies in RX 1. As such, Counsel for the Charging Party and Counsel for the Acting General Counsel agreed, consistent with recitations in the administrative law judge's subsequent Order, dated January 26, 2012, that there was no basis for arguing that the figures were intentionally fabricated.

The judge's Order included the additional comment that "no negative inference should be drawn from the *presentation* [by Counsel for Respondent] of those erroneous figures," which is now relied on by Respondent to assert a broad waiver.⁶ However, this comment by the judge was taken by the undersigned merely to reiterate the understanding that Counsel for Respondent, despite having made numerous arguments based on the presumed veracity of RX 1, had done so without knowing that the figures were erroneous. Given an attorney's professional obligation of candor towards a tribunal, this added recitation seemed reasonable.⁷ With respect to the statement in the

⁵ See Motion to Reopen, p. 2.

⁶ Emphasis added.

⁷ See Massachusetts Rule of Professional Conduct 3.3. *Candor Toward the Tribunal*.

(a) A lawyer shall not knowingly:
(1) make a false statement of material fact or law to a tribunal;...

Judge's Order that he would "rely" on the figures from RX 18, in the call the parties were asked whether there was any contention that the figures in RX 18 were inaccurate. All counsel acknowledged that there was no basis for such an assumption. In this context, the undersigned understood the administrative law judge's statement of reliance to indicate merely that the figures from RX 18 would be presumed accurate, except of course that there were no figures for January 2011. Beyond these understandings, it was clearly expressed that RX 1 would remain part of the record, and that the record would "speak for itself."

Importantly, Counsel for Respondent's failure to confirm the accuracy of summary documents provided to him was never a valid basis for reopening the record.⁸ Counsel for Respondent made no offer of proof regarding any new evidence that would be admitted if the motion to reopen were granted. Moreover, absent some additional evidence, a reply brief would be equally improper, and the judge was under no obligation to allow one. Against this backdrop, there was simply no reason why Counsel for the Acting General Counsel or the Charging Party would abandon important arguments related to the unsupported assertions, further straining the plausibility of the sweeping contentions made by Respondent's Answering Brief.

(4) offer evidence that the lawyer knows to be false, except as provided in Rule 3.3 (e).

⁸ ALJ's are guided by Section 102.48(d)(1) of the Board's Rules and Regulations in considering requests to reopen the record, which states:

"A party to a proceeding before the Board may, because of extraordinary circumstances, move for reconsideration, rehearing, or reopening of the record after the Board decision or order....A motion to reopen the record shall state briefly the additional evidence sought to be adduced, why it was not presented previously, and that, if adduced and credited, it would require a different result. Only newly discovered evidence, evidence which has become available only since the close of the hearing, or evidence which the Board believes should have been taken at the hearing will be taken at any further hearing."

In the judge's decision, he acknowledged that following the hearing, Respondent's Counsel had conceded that the figures in RX 1 were erroneous.⁹ The judge's decision contains no finding or conclusion that by virtue of the post-hearing discussion, Counsel for the Acting General Counsel or the Charging Party waived any arguments respecting the significance of the erroneous figures in the record. Significantly, Respondent *did not take exception* to the administrative law judge's failure to find that Counsel for the Acting General Counsel or Charging Party waived arguments concerning the erroneous information in RX 1, or its significance as part of the record as a whole.

Given this context, Respondent's contention that Counsel for the Acting General Counsel and the Union "explicitly waived any contention that the discrepancy itself was grounds for finding Respondent's Exhibit 1 to be an intentional fabrication or for drawing any type of adverse inference" is unfounded. The recitations in the judge's order merely clarified the parties' acknowledgement that the record did not establish that the erroneous exhibit was intentionally fabricated, and clarified that Counsel for Respondent had not acted improperly by his presentation of RX 1. The arguments in the GC's Brief to the ALJ clearly preserved the Counsel for the Acting General Counsel's right to make any and all appropriate arguments regarding the record as a whole, the pretextual nature of Respondent's defense, and issues of credibility with respect to the disparate

⁹ See ALJD at n.6.

"I take these figures from Respondent's Exhibit 18, which consists of records kept by the Respondent in the ordinary course of business. Somewhat different figures appear for some months in Respondent's Exhibit 1, a summary document prepared by the Respondent for this litigation. During a post-hearing telephone conference with all parties, the Respondent conceded that the figures in the summary exhibit were erroneous to the extent that they were inconsistent with the information in Respondent's Exhibit 18. I note also that while the summary exhibit contains figures for January 2011 orders – a key time for evaluating the workload at the time of the February 2011 layoff – I do not credit those January figures because the underlying business records contain no order figures at all for January 2011."

numbers. Moreover, there is simply no basis for Respondent to argue that recitations in the judge's order denying Respondent's Motion to Reopen operate to prohibit Counsel for the Acting General Counsel from arguing that the judge failed to properly apply the law to the facts of this case, including failing to consider the record as a whole in determining animus, or in creating a defense that Respondent had not previously advanced.

Antioch Business Materials, Co., 323 NLRB 73, 74 (1997), cited by Respondent, does not provide support for Respondent's position. In that case, the Board clarified an earlier award, by specifying that the Employer/Respondent be required to arbitrate *all* outstanding grievances that had been initiated during the term of a collective-bargaining agreement, including both written and *oral* grievances. In affirming that the Employer's failure to raise the issue before the judge operated as a waiver to the argument, the Board noted that the Employer had failed to object to testimony regarding the oral grievances, failed to argue in its brief that to the judge that it had no obligation to process oral grievances, and failed to take exceptions to judge's findings that the oral grievances had been initiated during the term of the collective-bargaining agreement.

Here, in contrast, it is undisputable that Counsel for the Acting General Counsel has argued that the erroneous data supports a finding of pretext and undermines the credibility of Respondent's key witness. Moreover, Respondent did not file either exceptions or cross-exceptions to the judge's findings regarding the significance of events at the post-hearing telephone conference. Accordingly, *Antioch Business* undermines rather than supports the Respondent's position, as it directs that Respondent's failure to file exceptions or cross-exceptions to the judge's finding

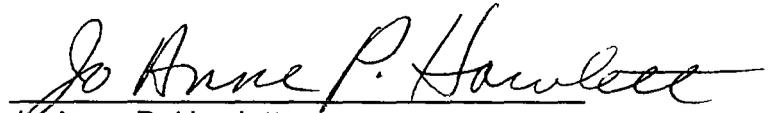
concerning any substantive admissions or waivers made during the post-hearing conference call operates as a waiver to Respondent's current argument.

III. CONCLUSION

For all foregoing reasons, the Board should find that Respondent violated Section 8(a)(3) and (4) of the Act when it announced and implemented the layoff of seven employees, and the associated elimination of Leon Garfield's inspector position in February 2011, and affirm the administrative law judge's conclusion that it violated 8(a)(1) of the Act by the repeated statements of the plant manager about the lingering "dark cloud" over Lyndonville in April 2011.

Dated this 21st day of May, 2012.

Respectfully submitted by,



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CERTIFICATE OF SERVICE

I, Mary H. Harrington, do certify that I have this day served by electronic and/or regular mail copies of COUNSEL FOR THE ACTING GENERAL COUNSEL'S REPLY BRIEF TO RESPONDENT'S ANSWERING BRIEF to the parties listed below:

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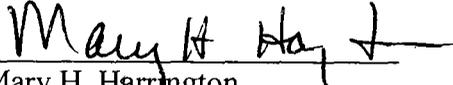
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