UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

MILUM TEXTILE SERVICES CO.,	**Cases**	**28-CA-20898**
		28-CA-20906
and		**28-CA-20973**
		28-CA-21050
UNITE HERE!		**28-CA-21203**

RESPONDENT MILUM TEXTILE SERVICES CO.'S REPLY TO THE GENERAL COUNSEL'S ANSWERING BRIEF TO RESPONDENT'S EXCEPTIONS TO THE ADMINISTRATIVE LAW JUDGE'S SUPPLEMENTAL DECISION ON REMAND

Respondent Milum Textile Services Co. ("Milum") submits the following Reply to the Answering Brief filed by the Acting General Counsel ("General Counsel") to the Exceptions filed by Milum to the Administrative Law Judge Mary Miller Cracraft's[1] Supplemental Decision on the remanded issues dated 30 May 2012.

All of the General Counsel's arguments in response to Milum's exceptions are based not only upon a misapplication or misinterpretation of the Board's Decision and Order ("Board's Decision"),[2] but on a misunderstanding of the established practice in the United States District Courts ("federal courts") and the requirements of the Federal Rules of Civil Procedure and the Federal Rules of Evidence. In response to Milum's arguments, the General Counsel fails to establish how it met its burden of proof with respect to the dispositive issues, i.e., the General Counsel failed to show (1) that the General Counsel submitted **admissible** evidence in the record

[1] Administrative Mary Miller Cracraft is hereinafter referred to as the "ALJ." Administrative Law Judge Joseph Gontram who presided over the administrative trial is hereinafter referred to as the "trial ALJ."

[2] *Milum Textile Services Co*, 357 NLRB No. 169.

that could have been used by the union to file a motion for summary judgment in federal court and have it granted on the basis of that evidence as to all causes of action, and (2) that Milum did not have evidence or could have obtained evidence at the time that it filed its opposition to the motion for summary judgment that would substantiate a colorable argument in opposition to a motion for summary judgment in federal court. The bottom line is if the evidence submitted by the General Counsel would have been inadmissible in federal court and if Milum could have been permitted to produce evidence in federal court that was rejected and/or prohibited during these administrative proceedings, then the General Counsel failed to meet its burden of proof. This reply addresses these bottom line dispositive issues in response to the General Counsel's arguments.[3]

I. The General Counsel's Burden of Proof.

The Board's Decision specifically set forth the General Counsel's burden in this remand case with respect to both the issue of baselessness and retaliatory motive: "The General Counsel must prove not only that **summary judgment would have been granted** had the Union moved for it prior to the voluntary dismissal, but that the Respondent **would not have been able to present a colorable argument in opposition to the grant of summary judgment at that time**." [Emphasis added; *Milum Textile Services Co*, 357 NLRB No. 169, slip op. 7]

Thus, the General Counsel had to prove that if the case had proceeded **in federal court** and the union had filed a motion summary judgment in federal court, the union's motion would not only have been granted by a federal judge, but that Milum would not have been able to present a colorable argument in opposition to the motion to summary judgment. This means that the General Counsel had to introduce evidence into the administrative trial record that would

[3] All other issues have been addressed in the brief in support of Milum's exceptions.

have not only been **admissible in a federal court proceeding** if used by the union to support a motion for summary judgment, and that this evidence would have been sufficient to support the union's motion for summary judgment in federal court, i.e., sufficient to show that there was "no genuine dispute as to any material fact" and the union "is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). The General Counsel failed to meet its burden of proof with respect to the admissibility of the evidence or with respect to the ability of Milum to present evidence to set forth a colorable argument in opposition to a motion for summary judgment.

II. The GC Failed to Meet its Burden of Proof that the Union had Admissible Evidence Sufficient to Prevail on a Motion for Summary Judgment in Federal Court on the Causes of Action Set Forth in the Complaint.

As set forth in Milum's Brief in support of its Exceptions, the General Counsel's entire case is based upon inadmissible hearsay evidence and irrelevant evidence that would not have been admissible as evidence if the union had filed a motion for summary judgment in federal court. It is important to note that in her decision the ALJ relied heavily on the fact that the union publications adhered to "employee reports" even though such evidence would clearly be inadmissible hearsay in federal court proceeding. The General Counsel does not even address the fact that if the union had attempted to introduce hearsay and irrelevant evidence in a motion for summary judgment in federal court, the federal judge would not have permitted it to be used as evidence, and a motion for summary judgment based on inadmissible evidence would not have been granted. Simply because the trial ALJ admitted the "evidence" presented by the General Counsel during the administrative trial does not mean that the same "evidence" would meet the strict requirements of the Federal Rules of Evidence that would be in play in proceedings before a federal judge, i.e., the "evidence" to be admitted in federal court would have to satisfy the strict requirements of the Federal Rules of Evidence.

Hearsay in federal proceedings is defined as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Fed. R. Evid. 801(c); *Chao v. Westside Drywall, Inc.*, 709 F.Supp.2d 1037, 1048 (D.C. Or. 2010). And, hearsay is inadmissible in federal court unless it falls within a hearsay exception. *Id.* Furthermore, when a statement is hearsay within hearsay, or double hearsay, each statement must qualify under some exemption or exception to the hearsay rule. *Id.* Thus, hearsay is not admissible evidence. It cannot be overemphasized that Daisy Pitkin, the union organizer who directed the preparation of and signed the letters attached to and referenced in the lawsuit admitted in her testimony that she **did not have any evidence** to support the allegations in the letters **other than the hearsay statements made by unnamed employees**.[4] Daisy Pitkin had no personal knowledge of the alleged facts so her testimony was clearly hearsay, and her reliance on the hearsay statements of third parties constituted double hearsay. The situation is compounded by the fact that the double hearsay is based upon statements allegedly made by **unidentified** third parties. Thus, the union's entire motion for summary judgment would have primarily been based on inadmissible hearsay and therefore, would not have been granted by a federal judge. Furthermore, Milum contends that a federal judge would not have permitted the introduction of the irrelevant information introduced by the General Counsel.[5] Rule 402 of the Federal Rules of Evidence provides that irrelevant evidence is not admissible. Rule 401 provides that to be relevant, the evidence must have "a tendency to make a fact more or less probable than it would be without the evidence, **and** the fact is of consequence

[4] Daisy Pitkin's testimony. [Tr. 1693, 2253–2255] Daisy Pitkin stated that although she was aware of the 2002 citations from the Department of Labor [GC 61] she admitted that she "mostly relied on the statements of workers." [Tr. 2254: 7-8] Daisy Pitkin's statements constitute the basis of the General Counsel's case.

[5] The union would have had to attempt to introduce this evidence in a federal court in support of its motion for summary judgment.

in determining the action." [Emphasis added] It defies logic that reports that predated the statements made in reliance thereon by years would be deemed relevant by a federal judge.[6] Even if the statements or reports in 2002 were true, they do not show that those conditions existed in 2006.

Therefore, if the union had filed a motion for summary judgment in federal court based upon the hearsay and irrelevant evidence that was presented by the General Counsel at the administrative trial, the motion for summary judgment would not have been granted. Thus, the General Counsel failed to produce any evidence that the union could have used in a federal court to support a motion for summary judgment on any of the causes of action set forth in the complaint, and the General Counsel failed to prove that if the union had filed a motion for summary judgment that a federal court would have granted the motion as to any of the causes of action set forth in Milum's complaint.

II. The General Counsel Failed to Meet its Burden of Proof that Milum Could Not Have Presented a Colorable Argument in Opposition to a Motion for Summary Judgment filed by the Union.

Despite the severe admissibility problems with the "evidence" upon which the General Counsel relies to support its case, the Board acknowledged the fact that if the union had filed a motion for summary judgment in federal court, Milum would have been entitled to submit evidence in a federal court in opposition to a motion for summary judgment, i.e., evidence to show that Milum had "a colorable argument in opposition to the grant of summary judgment at

[6] The General Counsel rely on GC 139 which is a copy of a letter dated 2002 from the Arizona Department of Environmental Quality and dealt with medical waste not linens, and GC 61 which is a letter dated in 2002. Similarly, GC 137 and 138 would be deemed irrelevant by a federal court as they are dated in May 2006 – after the date that the union made the statements in question. All of these documents were admitted over relevancy objections solely for the limited purpose of showing that Daisy Pitkin relied upon them.

that time."[7] [*Milum Textile Services Co*, 357 NLRB No. 169, slip op. 7] There is no dispute that in federal practice Milum could have submitted and relied on any evidence that it had in its possession or obtained through discovery or other means at the time that it filed its opposition to the union's motion for summary judgment. The General Counsel ignores this fact.

The record shows that at every stage of these administrative proceedings Milum has been denied its right to introduce evidence that it could have used in a federal court to oppose a motion for summary judgment that was filed by the union. Milum maintains that if the union had filed a motion for summary judgment in federal court that Milum would have been able to introduce the rejected documents, it would have been able to elicit the excluded testimony of Daisy Pitkin,[8] and that it would have been able to introduce additional testimony and evidence to oppose a motion for summary judgment in a federal court. It is impossible to understand how a party like Milum is not denied its due process rights when it prohibited from introducing evidence into the administrative proceedings that it would have been permitted to use in a federal court in summary judgment proceedings to substantiate the causes of action set forth in its complaint.

First, Milum was prohibited from submitting evidence during the administrative trial because the trial ALJ ruled that it was outside the four corners of the complaint, i.e., that it was not attached to the complaint. Then when the Board remanded the issue involving the complaint, Milum was again prohibited from reopening the case to elicit such evidence as the ALJ denied

[7] It is important to note that this language relates to Milum being able to make a colorable argument at the time that Milum would have been required to file its opposition to the motion for summary judgment in federal court – not the time of the filing of the complaint.

[8] This is the type of situation, unlike these remand proceedings, where a party opposing a motion for summary judgment might file a 56(d) affidavit requesting permission from the court to extend the time for its response to a motion for summary judgment until it could depose witnesses to elicit further evidence.

the motion to reopen the record. This is a clear denial of Milum's right to due process.

It is undisputed that Milum in fact attempted to introduce testimony and documentary evidence to support its case during the administrative trial. The trial ALJ improperly rejected the testimony and evidence that was introduced by Milum at the administrative trial when he limited the evidence to the four corners of the complaint. If the union had filed a motion for summary judgment in federal court, a federal judge would not have limited the evidence that Milum was permitted to introduce to the four corners of the complaint.

In federal practice pursuant to Rule 8(a) of the Federal Rules of Civil Procedure it is clear that a complaint for relief must set forth "a short and plain statement of the claim showing that the pleader is entitled to relief." *Aktieselskabet AF 21 November 2001 v. Fame Jeans Inc.*, 525 F.3d 8 (D.C. Cir. 2008); *Conley v. Gibson, 355 U.S. 41, 47, 78 S. Ct. 99, 2 L. Ed. 2d 80 (1957).* This is the so-called "notice pleading," i.e., providing notice to the defendant regarding the nature of the claims against him. The federal rules are clear that there is absolutely no requirement that a complaint set forth detailed factual allegations. *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544,573, 127 S. Ct. 1955; 167 L. Ed. 2d 929 (2007); *Aktieselskabet AF 21 November 2001 v. Fame Jeans Inc.*, 525 F.3d 8, 15 (D.C. Cir. 2008). Furthermore, there is no requirement in federal practice that documentary evidence supporting the claims be attached to the complaint to be admissible during motion practice or at trial. In the instant case Milum in fact included more specific facts in the complaint than it was required to, and attached documentary evidence that it was not required to attach. The inclusion of additional facts and documentary evidence, however, does not limit the evidence that Milum **could** present in opposition to a motion for summary judgment or at trial in a federal court proceeding. The ALJ and the General Counsel do not grasp this concept. Their position, as was the position of the trial

ALJ, is that because Milum set forth specific facts and attached documents that Milum was specifically prohibited from introducing additional evidence. This improper analysis not only flies in the face of federal civil procedure, but ignores the fact that the Board itself recognized that no plaintiff in federal court is required to "possess all the evidence necessary to prove its case at the time of filing," and that there will be evidence that can be acquired during **discovery** after the complaint is filed "**or other means**." [*Milum Textile Services Co*, 357 NLRB No. 169, slip op. 7] If the Board recognized, and the federal rules of procedure and evidence mandate, that Milum was not required to possess all the necessary evidence at the time that the complaint is filed and could rely on evidence acquired through the federal discovery practice **or other means**, then it is clearly improper to limit the evidence (testimony and documentary) that Milum could introduce to substantiate the causes of action set forth in the complaint. Therefore, the ALJ's reliance on the trial ALJ's rejection of Milum's evidence is erroneous.

The General Counsel seems to believe that the fact that Milum's due process rights were preserved because Milum was **permitted** to "attempt" to introduce evidence that the trial ALJ as "happy to receive" and "reject" – and then placed in the rejected exhibit file to "preserve the record."[9] Counsel for Milum is perplexed as to how the cheerfulness of the trial ALJ in rejecting Milum's evidence or the right to have its evidence rejected protects its right to due process of law. Further, Milum does not comprehend how it could actually utilize or base arguments on the substance of the rejected exhibits to substantiate its position during these administrative proceedings, and the General Counsel does not provide any alternative mechanism for so doing.

Second, Milum was also prohibited from introducing evidence to substantiate its case

[9] Acting General Counsel's Answering Brief to Respondent's Exceptions, at 15.

(causes of action) by reopening the record. Milum filed a motion to reopen the record in an attempt not only to revive the documentary evidence that had been rejected by the trial ALJ and the testimony that it had been precluded from eliciting at the administrative trial, but to elicit testimony and introduce additional evidence that it had to support the causes of action set forth in the complaint – evidence that it would have been able to acquire "during discovery after the complaint is filed." [*Milum Textile Services Co*, 357 NLRB No. 169, slip op. 7] The General Counsel's argument that the denial of the motion to reopen was well founded because the General Counsel is only relying upon the evidence and testimony admitted into the record,[10] is rather an absurd argument in light of the fact that the General Counsel's evidence was not rejected, the Board specifically stated that evidence obtained after the complaint was filed was to be considered, and the specific rules of federal procedure. The General Counsel's argument that to permit Milum to reopen the record would result in needless litigation is similarly without merit. But the denial of Milum's right to due process was compounded by the fact that the ALJ not only denied Milum's motion to reopen the record, but created a new unprecedented procedure whereby Milum was required to submit a Rule 56(d)[11] affidavit. Since Milum did not file such an affidavit because it was not aware of such a requirement in NLRB proceedings,[12] the ALJ proceeded to treat the motion to reopen the record that Milum did file as the equivalent of this affidavit. The bottom line is that if Milum is not permitted to introduce evidence (testimony and documents) during the administrative trial because it was outside the four corners of the complaint, and if Milum is not permitted to reopen the record to put the rejected evidence and testimony into the record, then how does Milum ever prove that it had a colorable argument in

[10] Acting General Counsel's Answering Brief to Respondent's Exceptions, at 17.
[11] Pursuant to Fed. R. Civ. Pro. 56(d).
[12] Milum also challenges the validity of this procedure as set forth in its Exceptions.

opposition to a motion for summary judgment if the union had filed a motion for summary in federal court?

III. Conclusion

It is clear from the record and the law that if the union had filed a motion for summary judgment in federal court based upon the "evidence" that was presented by the General Counsel at the administrative trial, the union's motion would not have been granted by a federal judge as all of the evidence is inadmissible evidence under the federal rules. Further, if the union had filed the motion for summary judgment in federal court, Milum would have been able to oppose the motion in federal court utilizing all of the evidence that it had obtained at the time of the filing of the complaint as well as all evidence that it had obtained during discovery and other means. There is absolutely no doubt that Milum would not have been limited to the use of evidence attached to the complaint in a federal court., and to prohibit Milum from introducing evidence outside the four corners of the complaint is a denial of due process. Thus, the General Counsel failed to meet its burden of proof with respect to the alleged baseless and retaliatory nature of the lawsuit filed by Milum.

Dated this 25th day of July 2012.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing document was served by E-Gov, E-filing, and E-mail on this 25th day of July 2012, upon the following:

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