

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 24**

CC-1 LIMITED PARTNERSHIP D/B/A COCA-COLA
PUERTO RICO BOTTLERS

Respondent Employer

and

Cases 24-CA-11018 et al.

CARLOS RIVERA, et al.

Charging Parties

and

UNION DE TRONQUISTAS DE PUERTO RICO,
LOCAL 901 INTERNATIONAL BROTHERHOOD
OF TEAMSTERS

Respondent Union

and

Cases 24-CB- 2648, et al.

CARLOS RIVERA, et al.

Charging Parties

and

MIGDALIA MAGRIS, et al.

Charging Parties

Cases 24-CB- 2706, et al.

**OPPOSITION OF COUNSEL FOR THE ACTING GENERAL COUNSEL TO
RESPONDENT’S MOTION FOR RECONSIDERATION**

Comes now Counsel for the Acting General Counsel and respectfully submits to the Board its Opposition to the CC-1 Limited Partnership d/b/a Coca-Cola Puerto Rico Bottlers’ (herein Respondent) Motion for Reconsideration of the Board’s Decision and Order.

The Acting General Counsel (herein CGC) hereby requests that Respondent's Motion be denied. In support of this position, the General Counsel states the following:

I. The Request to Amend the Remedy

In its Motion, Respondent “requests that the Board amend the Remedy granted in its Decision to only reflect the five cases that remain unsettled.” No case law is cited by Respondent in support of its request. Counsel for the Acting General Counsel (herein CGC) opposes such untimely request and notes that the request to reconsider is unnecessary and inappropriate as it is not based on any record evidence. As noted by Respondent, prior to the issuance of the Decision, the CGC filed a Motion with the Board requesting that 12 cases, involving 12 discriminatees who had entered into settlement agreements with Respondent, be severed from the cases pending Board Decision and be remanded to the Regional Director for Region 24 for processing of their requests to conditionally withdraw their charges (conditioned on the payment of the agreed to backpay amounts). CGC stated that the filing of that Motion, as well as the settlement referred to above, only affected, or constituted a withdrawal of the allegations that pertained to the discharge of the above-referenced 12 discriminatees. On May 10, 2012, the Board severed these cases and remanded these 12 cases for further processing. Thereafter, the Regional Director approved the withdrawal of those 12 charges, thereby, in effect, approving those settlements.

Respondent now requests that the names of 27 additional discriminatees be removed from the Remedy section and, consequently, from the Notice to Employees to be posted, due to non-Board settlements entered into between those 27 employees and the Respondent. Unlike the situation described above, here no Motion was filed asking the Board to sever and remand to the Regional Director the cases involving those 27 discriminatees. Accordingly, the Regional Director has not, and could not (as she had no jurisdiction while the cases were pending before

the Board), approve any request to sever those cases from the Board cases (and consequently to approve those non-Board settlements).¹

CGC submits that in order to remedy the violations found by the Board, the names of those 27 employees should remain in the Notice to Employees so that those employees currently in the employ of Respondent become aware that those discharges were found to be unlawful by the Board. Such notification is likely to be more effective in terms of removing the chilling effect caused in this case by the mass discharge of employees engaged in concerted activities than a Notice, as espoused by Respondent, limited to five discriminatees (as this may be the only notice the employees may get of what was the outcome of the Board case).

II. Miguel Colon and the September 9 Work Stoppage

A. Article 12 Did Not Survive the Expiration of the CBA

Respondent argues that Article 12 survived the expiration of the contract and urges the Board to compare the language of Article 12 with Article 5 (no strike clause). In order to advance its argument Respondent pointed out that the parties did not impose a durational clause to Article 12, while Article 5 was limited to the “duration of the Agreement.” According to the Respondent, since there is no durational clause in Article 12, the prohibition imposed to shop stewards not to call strikes, a clear waiver of shop stewards’ Section 7 rights, did not expire.

Respondent’s interpretation and construction of Article 12, as opposed to that of Article 5, is clearly implausible. In this regard, it is noted that Article 5-Strikes and Lockouts, of the parties’ expired contract, states that “during the duration of the agreement there will be no strike or picketing from part of the Union, **its members or any other employee covered by this**

¹ In fact, the Respondent was apprised at the time of the settlement that no request to sever the cases would be filed with the Board and that the Regional Director would not execute or approve as such the non-Board settlements, but that (in the event of a favorable Board Order) the same would be deemed to constitute compliance with the reinstatement and backpay remedies in the Board Order.

agreement, including pickets, sit down, stay-ins, walk-outs, slow downs, wildcat strikes, or sympathy strikes”; while Article 12 states that shop stewards “will not interrupt the work of the rest of the employees. In fact, the delegate (shop steward) will not have the authority to declare strikes or any other action that paralyzes or obstructs the work of the company or work place...” (emphasis supplied).

Although Respondent urged the Board not to analyze Article 12 in isolation, inconsistently, Respondent is doing exactly that. Respondent intends to exclude shop stewards from the benefits or entitlements they enjoy, as Union members and employees covered by the parties’ agreement, pursuant to Article 5. It is clear that when the parties bargained and agreed to the language contained in Article 5 they did not intend to omit shop stewards from its coverage. When the parties limited the duration of the no strike clause contained in Article 5 for Union members and employees covered by the agreement they, consequently, limited as well the duration of the waiver of Section 7 rights for the shop stewards, who are both Union members and employees covered by the agreement.

In this case, it is necessary to conclude that the language of Article 5, which waived employees’ and shop steward’s Section 7 rights to engage in strikes and other concerted activities during the duration of the agreement, when read with Article 12, does not demonstrate a different intent. Allowing Respondent to impose discipline to shop stewards because they engaged in protected concerted activity, while it could not impose discipline to the rest of its employees for engaging in the same conduct, would eliminate the intent of Article 5, and render it meaningless, a result inconsistent with the clear language of the parties’ contract and extant Board law. See [International Union of Operating Engineers, Local 12](#), 298 N.L.R.B. 44, 1990. See also, [Exceptions Of Counsel for the General Counsel To the Administrative Law Judge’s Decision and Recommended Order, and Brief in Support Thereof, Section A- The Clause](#)

Imposing a Higher Duty on The Shop Stewards Did Not Survive The Expiration of The Contract, Pages 4-11.² As a result, it is respectfully submitted that Respondent's argument should be found without merit.

III. Miguel Colon Did Not Encourage Employees to Stop Working in Violation of Article 12 of the CBA. Alternatively, even if He Encouraged Employees to Stop Working Miguel Colon Engaged in Concerted Protected Activity under the Act

Respondent contends that shop steward Miguel Colon encouraged employees to stop working on September 9, thus, violating Article 12 of the expired CBA. Respondent main argument is that the ALJ erred in not crediting the testimony of Supervisor Troche, who testified that Colon encourage employees to stop working. It is clear that Respondent is asking the Board to overrule the ALJ's credibility finding concerning Respondent's witness, supervisor Troche, even when the Board did not base its decision on the ALJ's finding that Supervisor Troche's affidavit failed to mention Colon as one of the shop stewards that encouraged the work stoppage.

It is well established that the Board will overrule a judge's credibility findings only where "the clear preponderance of all the relevant evidence convinces [the Board] that they are incorrect." Standard Drywall Products, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). This high standard must be applied in this case when analyzing that the ALJ did not only discredited Supervisor Troche, but it in fact, credited the testimony presented by other witnesses, Jose Adrian Lopez, employee Alexis Hernandez and shop steward Miguel Colon himself, who testified that Miguel Colon did not encourage the work stoppage. Consistently, the ALJ in its decision stated that "with respect to Shop Steward Miguel Colon, the evidence establishes that he

² As noted by the Board in its Decision, Article 12, although not a traditional no-strike clause that applies to all employees, contains a waiver of the right of employees serving as shop stewards to engage in otherwise protected activities, and absent clear evidence that the parties intended such a waiver to outlive the contract, the same expires with the contract. In this case, no evidence was presented that the parties intended the waiver to survive the expiration of the contract.

did not arrive at the facility on September 9 until sometime between 8:30 and 8:45 p.m., and upon arriving at the cafeteria discovered that the meeting had already ended.” See ALJD slip op. 13 and Brief On Behalf Of Counsel For The General Counsel To The Administrative Law Judge, Pages 40-41.

Notwithstanding the above, even if Colon had encouraged employees to join the work stoppage, Respondent still violated Sec. 8(a)(3) and (1) of the Act by suspending and terminating Colon because the ALJ found that the September 9 work stoppage was protected under the Act, a finding to which Respondent did not file Exceptions to. See Brief On Behalf Of Counsel For The General Counsel To The Administrative Law Judge, Pages 66-84.

Since a clear preponderance of all the relevant evidence does not demonstrate that the ALJ's credibility findings with regards to Miguel Colon are incorrect, Respondent's request for reconsideration, seeking to overrule the ALJ's credibility resolutions and findings, should be denied.

IV. Respondent Failed to File Exceptions Contesting the ALJ's Finding that the September 9 Work Stoppage Was Protected under the Act. Thus, Respondent Cannot Raise Said Objection in Its Motion for Reconsideration because It Was Waived

In its Motion for Reconsideration to the Board, Respondent, for the first time before the Board, raised that the September 9 Work Stoppage was not protected under the Act. Respondent did not file Exceptions to the ALJ's finding that the September 9 Work Stoppage was protected activity, thus, at this time it cannot request reconsideration of said finding. (See Respondent's Exceptions to the ALJD dated June 14, 2010). As a result, it is respectfully requested that Respondent's Reconsideration request be rejected outright. In this regard, it is noted that if no exceptions are filed within 28 days, or within such further period as the Board may allow, from

the date of the service of the order transferring the case to the Board, pursuant to Section 102.45, as provided by Section 102.46 of the Board's Rules and Regulations, the ALJ's findings, conclusions, and recommended Order shall, as provided in Section 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes. See *Mastec Advanced Technologies*, 357 NLRB No. 17, slip op. at 6 (2011).

In this case, Respondent is objecting to a portion of the ALJ's decision more than two years after it issued. Respondent's attempt is not only improper but it would deprive the Charging Parties, as well as the Counsel for the Acting General Counsel, of their due process if allowed by the Board. It is clear that the Rules demand that exceptions be timely filed and argued in (and only in) the brief, if one is filed. Failure to do so amounts to a waiver of the exception and the argument. See *Tri-Tech Services*, 340 NLRB 894, 895 (2003).

V. The October 20-22 Strike

The evidence in the record clearly establishes that the October 20-22 strike was motivated and prompted by the Respondent's discharge of the five shop stewards for their alleged participation in the September 9 work stoppage and the desire of the striking employees to force the Respondent to reinstate them. The Respondent, in a re-hash of the arguments already made to the Administrative Law Judge (ALJ) and to the Board, acknowledges that a purpose of the strike was to get the shop stewards reinstated but continues to allege that the strike was not protected because it was not authorized by the Union. It ignores the fact that the Union had indeed taken a vote before the strike took place in support of the discharged shop stewards and that, as found by the ALJ, the Union's attorney himself (Carreras) had advised the discharged shop stewards that the only way to get them reinstated was to go on strike (ALJD, at p.15). The testimony of shop steward Miguel Colon in this latter regard was undisputed. Respondent opted not to call Carreras as a witness. It is noted that Attorney Carreras was not a

party allied with CGC, but rather one of the attorneys for an adverse party (Respondent Union) who would have qualified as a hostile witness if called to testify by CGC.³

In its Motion, Respondent asserts that “the Union’s position was not to strike over the suspension/discharge of the Shop Stewards.” There is no citation to the record to support this assertion. The Union was present at the hearing and did not testify that that was its position. The fact that the Union may have sought to resume negotiations is not, in and of itself, evidence that it had discarded going on strike or that it was not willing to go on strike to get the shop stewards reinstated; or that the strike to get them reinstated was at odds with the Union’s objectives.⁴

Similarly, the Respondent’s assertion that the strike had the purpose of forcing the Respondent to bargain directly with the shop steward is a red herring. As more fully discussed in CGC’s Answering Brief to the Respondent Employer’s Exceptions to the Administrative Law Judge Decision, at pages 15 – 33, there is no evidence that the purpose of the strike was to replace the Union with the shop stewards. The Respondent’s only argument is based on piecemeal testimony that shop steward Miguel Colon asked the Respondent to bargain. CGC submits that such statement has been taken out of context and, in any event, does not by itself equate to a request for recognition, nor is it in derogation of the Union as

³ The remarks of the Union’s attorney not only conveyed the message that the Union was supporting a strike, but also that the strike was the only available alternative for the Union. In this regard, it is noted that there was no CBA in effect, and therefore, no feasible means to arbitrate the discharge of the shop stewards. It appears that the Union was unwilling to formally call a strike, while encouraging it with a “wink and a nod”, because of a broad Order issued by a U.S. Court of Appeals against it, restricting its ability to engage in strike activity and imposing fines for violations of the Court’s Order.

⁴ As noted by the Board, when the employees’ action is more nearly in support of the things in which the union is trying to accomplish, the activity will be protected. In Architectural Research Corp., 267 NLRB 996, 996 n. 2, 1005 (1983), the Board found that the conduct of the employees when they sought a second break period was protected, where the union was seeking to negotiate with the employer over the reinstatement of the second break, even though that the union had previously agreed to the elimination of said break. See also, East Chicago Rehabilitation Center, Inc., 259 NLRB 996, n. 2 1000 (1982), where the Board found that the employees’ spontaneous walkout to protest a unilateral change in the lunchtime practice was protected activity in view that the union had also protested the change.

the employees' exclusive bargaining representative, where, as here, Colon was a member of the Union's bargaining committee. While in his Motion Respondent attempts to mischaracterize the testimony of employee Carlos Rivera-Rodriguez, to make it look as if the employees wanted the Respondent to bargain with the shop stewards, the fact is that he undisputedly testified that what the strikers requested was for the continuation of the negotiations with the Respondent Union (Union de Tronquistas) (Tr. 427).⁵

In the present case, the Respondent failed to present any evidence to show that during the strike any of the shop stewards ever addressed the Respondent with an intention of gaining its recognition, nor to replace the Respondent Union. To the contrary, the uncontradicted testimony of Rivera-Rodriguez demonstrated that at all times the employees were referring to the continuance of the negotiations with the Respondent Union.

Based on the foregoing, CGC requests that the Respondent's Motion for Reconsideration be denied.

Respectfully submitted,

Dated: October 31, 2012.

/s/

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⁵ The fact that the shop stewards, as well as the employees were expressing their request for the reinstatement of the shop stewards and were asking Respondent to discuss the matter does not change the purpose of the strike into one for recognition of a labor organization in the absence of a demand for such recognition.

CERTIFICATE OF SERVICE

I hereby certify that on this date a true and exact copy of the “**OPPOSITION OF COUNSEL FOR THE ACTING GENERAL COUNSEL TO RESPONDENT’S MOTION FOR RECONSIDERATION**” was served by electronic mail (e-mail) to the following parties:

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Dated at San Juan, Puerto Rico, this 31st day of October 2012.

/s/

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