

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

INTERNATIONAL UNION OF OPERATING
ENGINEERS LOCAL 627

and

Case 17-CB-072671

STACY M. LOERWALD, an Individual

**ACTING GENERAL COUNSEL'S ANSWERING BRIEF TO
RESPONDENT'S EXCEPTIONS**

On October 16, 2012, Respondent filed its "Exceptions to Decision of ALJ" in this matter. Counsel for the Acting General Counsel respectfully moves to strike Respondent's exceptions, and in the alternative submits this answering brief in response.

I. Motion to Strike: Respondent's Exceptions are Defective and Should be Disregarded by Board

Respondent's exceptions fail to comply with Section 102.46(b)(1) of the Board's Rules and Regulations. The relevant rule states:

(b)(1) Each exception (i) shall set forth specifically the questions of procedure, fact, law, or policy to which exception is taken; (ii) shall identify that part of the administrative law judge's decision to which objection is made; (iii) shall designate by precise citation of page the portions of the record relied on; and (iv) shall concisely state the grounds for the exception. If a supporting brief is filed the exceptions document shall not contain any argument or citation of authority in support of the exceptions, but such matters shall be set forth only in the brief. *If no supporting brief is filed the exceptions document shall also include the citation of authorities and argument in support of the exceptions*, in which event the exceptions document shall be subject to the 50-page limit as for briefs set forth in § 102.46(j). (*emphasis supplied*)

Respondent's filing, a single nine-page document presumably intended to be both exceptions and a brief, does not contain a single citation to *any* legal authority. The Board should show no tolerance for such disregard of the plain language of its Rules and Regulations, and has not done so in the past. In *Holsum de Puerto Rico, Inc.*, 344 NLRB 694 fn. 1 (2005), enfd. 456 F.3d 265 (1st Cir. 2006), the Board disregarded respondent's exceptions where it merely recited portions of the ALJ's decision and failed to provide grounds for overturning those portions of the decision. In *James Troutman and Associates*, 299 NLRB 120 (1990), the Board reiterated the importance of citing legal authority in exceptions under Section 102.46(b):

Thus, the exceptions document *must*, in addition to satisfying the first four requirements listed above, support the contentions with "the citation of authorities and argument." *Id* (*emphasis supplied*).

Not surprisingly, the Board in *James Troutman* disregarded respondent's exceptions, which largely amounted to references to the ALJ's decision and respondent's comments, "most" of which lacked citation to any legal authority. *Id*. Observing that that the defects in the respondent's exceptions were beyond mere technical problems and noting that "It is the excepting party's duty to frame the issues and present its case," the Board struck the respondent's exceptions. *Id*. 121-122.

Here, Respondent's "grounds" for overturning the ALJ's decision amount to nothing more than a narrative argument for which it makes no effort to cite any relevant legal authority. For example, Respondent repeatedly accuses Loerwald of engaging in a "game of 'gotcha'" but fails to cite any legal authority suggesting that Loerwald engaged in conduct that might strip her of her Section 7 rights. (See, e.g., R. Ex. Nos. 7 and 13). Respondent's exceptions even fall short of those disregarded by the Board in *James*

Troutman, inasmuch as the respondent in that case cited at least *some* legal authority for its position. Here, Respondent invites the Board to guess which among the body of well settled cases applicable to its conduct should be overturned or disregarded by the Board. The Board was unwilling to engage in such a “fishing expedition” in *James Troutman*, and should be unwilling to do so here. *Id.* at 122. See also *Dial One Hoosier Heating and Air Conditioning Co, Inc.*, 351 NLRB 776, 781 fn. 1 (2007) (portion of the respondent’s exceptions struck where it cited no legal authority); but see *Keystone Auto Parts* 373 NLRB 1373 (1984) (finding the exceptions in substantial compliance with rule, notwithstanding a lack of citation of legal authority; decision pre-dates *James Troutman* and lacked the Board’s more robust analysis in that case).

Based on the foregoing, and pursuant to NLRB Rules and Regulation Section 102.46(b)(2), counsel for the Acting General Counsel moves to strike Respondent’s exceptions in its entirety.

II. Loerwald Was Entitled to See the Out of Work (OWL) List During the Relevant Time Period

The ALJ properly concluded that Loerwald was entitled to see Respondent’s exclusive hiring hall out of work list (OWL) during the relevant time frame, even under a line of Board cases indicating that the requesting employee must demonstrate a reasonable basis for requesting to see the OWL. (ALJD at 10, lines 34-47; 11, lines 1-7); see e.g., *Boilermakers Local 197*, 318 NLRB 205 (1995)¹. Indeed, the ALJ found that Loerwald’s suspicions about the Union’s mishandling of the OWL was a reasonable basis to support her numerous requests to inspect the OWL. Respondent appears in its

¹ Counsel for the Acting General Counsel suggests that the ALJ intended to refer to this case at ALJD, p. 11, line 3, though her citation to a *Boilermakers Local 197* case there and elsewhere in her decision appears to be incomplete.

exceptions to be fixated on litigating whether the bases for Loerwald's suspecting mishandling of the list was absolutely correct. That focus is misplaced.

The proper focus is on record evidence showing that Loerwald had *a reasonable basis to suspect* that the OWL was not being handled properly.² Business agent Farris' own misgivings and regrets about the handling of the OWL, expressed to her on October 13 and 14, 2011, were alone sufficient to convince Loerwald that she needed to inspect the list for herself. (GC Ex. 3, p. 30, lines 6-9; p. 31, lines 11-25; p. 32, lin1; p. 53). For example, and as admitted by Respondent, it was Farris who revealed that the Union allowed an employer to pick three from a group of five employees for a particular job, rather than follow the proper dispatch procedure. (R. Ex. No. 4; GC Ex. 3, p. 31; lines 11-25; p. 32, line 1). Farris also admitted that he had not removed employees from the OWL who had refused dispatch on three occasions, a clear violation of the Union's OWL procedures. (GC Ex. 3, p. 53, lines 11-25; Joint Ex. 1, p. 21). The threat of such defects in the operation of an exclusive hiring hall to an employee's livelihood is precisely why the Board mandates that employees be allowed to inspect the OWL and *test their suspicions*. Respondent would presumably require an employee to "prove" that Respondent was improperly operation the hiring hall before being entitled to look at the OWL. Respondent cites not authority for this proposition, and it is inconsistent with well settled precedence. See, e.g., *Operating Engineers Local 513*, 308 NLRB 1300, 1302-

² Counsel for the General Counsel is not conceding that a "less stringent" standard should not apply, i.e., that employees utilizing an exclusive hiring hall have an absolute right to inspect the OWL. See, e.g., *IBEW Local 48*, 342 NLRB 101, 125-126 (Board silently adopts portion of ALJD in which ALJ observes "it is enough to establish a right to hiring hall information if the applicant just wants to see the information.") Indeed, in *Operating Engineers Local 324*, 226 NLRB 587 (1976), the lead case cited by the ALJ in the ALJD at p. 10, the Board observed the "Union's comprehensive and exclusive power and authority in this matter affecting Carlson's employment automatically obligated it to deal fairly with Carlson's request for job-referral information."

1303 (2004); *IBEW Local 48*, 342 NLRB 101, 125-126 (2004) and *Carpenters Local 35*, 317 NLRB 18, fn. 1 (1995).

III. Respondent Unlawfully Refused to Show Loerwald the OWL

Respondent's defense of the ALJ's finding that it violated Section 8(b)(1)(A) of the Act by refusing to show Loerwald the out of work list (OWL), as alleged in the complaint as amended at trial, is incomplete and unpersuasive. (ALJD pp. 10-13; R. Ex. 7, 12). Respondent takes specific issue with the ALJ's conclusion that its agent, Farris, refused to show her the OWL on October 20, 2011 (R. Ex. 7), and that its business manager Stark refused to show her the OWL on November 2, 2012 (R. Ex. 12).

With respect to Farris' refusal of October 20, 2011, contrary to Respondent, the ALJ properly relied on both the relevant recording transcriptions of that incident, found at General Counsel's Exhibit 7, and Loerwald's testimony, which provided important context to the incident. Thus, the transcription makes clear that Loerwald asked to see the OWL. But, her testimony makes clear what could not be captured by audio recording. Upon requesting to see the list from Farris, Farris showed her only the page with her name on it and refused to release the list to her when she attempted to take it for a review. (Tr. 61:9-25; 62:1-12). Respondent would require Loerwald to ask to see more of the list than Farris was willing to reveal, and implies that if she had only done so, he would have complied. But, the evidence, which shows Farris unwilling to let the OWL out of his grasp when Loerwald attempted to take it to review it, suggests otherwise. At trial, Respondent called Farris as a witness, but he did not testify contrary to Loerwald on this point.

With respect to Stark, Respondent's argument boils down to this: the OWL was not Stark's to show, so the Union is not liable for his refusal to show Loerwald the list upon her request. (R. Ex. No. 12). Respondent contends that the business agents, not Stark, "keep" the OWL. In addition to being at odds with common sense, the argument finds no support in the record. Stark is the highest ranking officer in the Union and he supervises the business agents. (218:15-21; 227:9-13). Stark's testimony reflects a familiarity with the OWL and the computer system in which it is stored. (206:17-25; 217:10-21; 223:17-21; 225:4-11). Stark testified that one of his priorities upon taking office in August 2012 was more rigid adherence to rules relating to the OWL. (206:5-8). Yet, Respondent would have the Board believe that Stark was in no position to comply with Loerwald's request, or even ask one of his subordinates to do so. If Stark was so helpless when it came to obtaining the OWL, one would have expected him to cite this in response to Loerwald's November 2, 2011, request. An examination of the transcribed conversation found at GC's Exhibit 8 reveals that he did not. He summed up his basis for refusing Loerwald's request as follows:

You're on the Out-of-Work list and that's all I need to tell you. Go talk to your attorney about it. (GC Ex. 8, p. 8, lines 17-18).

Clearly, Stark could get the list. Clearly, in the case of Loerwald, Stark simply chose not to.

IV. Respondent Unlawfully Removed Loerwald from the OWL on November 7 and Unlawfully Failed to Allow her to Return to the OWL Thereafter.

The ALJ aptly concluded that Respondent's removal of Loerwald from the OWL on November 7, 2011, and subsequent refusal to reinstate her violated 8(b)(1)(A) and (2) of the Act under two independent theories. (ALJD p. 4, lines 18-28). First, Respondent's

conduct was in retaliation for Loerwald's protected activities. Second, Respondent's conduct was arbitrary. In its exceptions, Respondent fails to adequately rebut the ALJ's conclusion as to either theory.

Respondent does not bother refuting the ALJ's conclusion that Loerwald engaged in protected activity and that it had knowledge of such activities. Such activities included joining other employees in suing Respondent and one of its signatory contractors for sex discrimination and vocally criticizing the Union and its agents' operation of the hiring hall. (ALJD p. 15, lines 18-32; p. 16, lines 1-2). Rather, Respondent asserts it had no hostile motive and purged Loerwald from the OWL because she failed to comply with the hiring hall rules requiring her to maintain a working phone number. (R. Ex. Nos. 13

As noted by the ALJ, Respondent's hostility towards these protected activities abound, including Respondent characterizing Loerwald's request to inspect the OWL as "harassment" and the fact that another employee, Weant, was allowed to remain on the OWL for months after the Union identified that he had no working phone number. (ALJD p. 17, lines 12-16). Respondent knew that Loerwald had no working phone number on the OWL as early as October 14³ and purged her from the list on November 7. Respondent, in its exceptions, ignores the fact that it did so within days of Loerwald criticizing the Union and its agents directly to business manager Stark. (ALJD p. 16, lines 11-13). Thus, the timing of Respondent's purge of Loerwald, and its disparate treatment of her compared to Weant, is significant and demonstrates animus.

³ Loerwald removed her phone number from the OWL on October 14, but replaced it with a working fax number. When Loerwald did so, she was not told that she would be removed from the OWL. Loerwald also maintained an email address on file with the Union hall, as Respondent collected email addresses from hiring hall applicants during all relevant time periods.

As suggested by the ALJ, the dominate theory applicable here is whether the Union acted arbitrarily in removing Loerwald from the OWL and thereafter refusing to reinstate her, because the Union operates an exclusive hiring hall. (ALJD p. 14, lines 18-28; p. 5, fn. 18). Under this theory, Respondent's motive is irrelevant. Respondent again fails to make a compelling argument that its conduct towards Loerwald was not arbitrary, as determined by the ALJ.

In defending its actions, Respondent places the focus on Loerwald, asserting at exception No. 13 that Loerwald was engaged in a "game of 'gotcha'" by removing her phone number from the OWL on October 14, 2012, and thereafter failing to provide "a working number." The ALJ found that Loerwald's removal of her phone number from the OWL was not sufficient under the circumstances to warrant her removal. But, beyond that, Respondent conveniently ignores the relevant facts demonstrating conclusively that Loerwald did maintain a working phone number at the Union hall as quickly as the day following her removal. Respondent chose to communicate its purge of Loerwald from the OWL by letter to her counsel. Loerwald's counsel responded by providing his office phone as Loerwald's message phone. (GC Ex. 11). Such an act was completely consistent with the Respondent's operation of its hiring hall, as the record is clear that "message phones" have been deemed by Respondent an acceptable way to communicate job referrals. (Tr. 178:16-25; 179:1-18; 180:23-25; 181:1-19; GC Ex. 33; ALJD p. 18, lines 38-46).

Respondent dealt with Loerwald's quick response to comply with Respondent's demands by simply disregarding it. Such conduct is arbitrary on its face, but becomes utterly absurd in view of Respondent's defense, unsupported by any evidence, that its

counsel simply did not give the information to Respondent⁴. Respondent wants the best of both worlds, i.e., it wants to communicate Loerwald's purge from the OWL to her through her counsel, but when she responds through her counsel, it wants grace to ignore the response. Incredibly, Respondent doubled down on this argument, defending its failure to restore Loerwald to the hiring hall on November 18 when Loerwald's counsel provided Respondent with Loerwald's personal *working phone number*. (GC Ex. 14). Respondent, in its exceptions, called this a "feeble attempt." (R. Ex. No. 9). Yet, Respondent cites no evidence on the record that it failed to receive the November 8 or 18 letters and cites no relevant legal authority for its "feeble attempt" theory. Again, it was Respondent who determined that it should communicate its purge of Loerwald to her through its counsel to her counsel, yet it conveniently refused to reciprocate when Loerwald to comply with Respondent's demands through her counsel to Respondent's counsel. Put simply, when Respondent claimed it was simply enforcing its hiring hall rules, Loerwald called Respondent's bluff, and won.

V. Respondent's Refusal to Stamp Loerwald's Unemployment Book was Unlawful

Respondent defends its refusal to "stamp" Loerwald's unemployment book on January 10 and 17, 2012, on the basis that Loerwald did not need Respondent to stamp the book and that, in any case, Loerwald never lost her unemployment as a result. (R. Ex. No. 1 and 2). Respondent misses the point.

As the ALJ found, the record demonstrates that Respondent, in fact, stamped Loerwald's unemployment book prior to January 10, 2012, on approximately a weekly basis to confirm that she was engaged in a search for work as required by the state

⁴ Respondent was represented by different counsel during the relevant time period, and its current counsel of record was not involved during this time period.

unemployment agency. (Tr. 105:2-9; 252:20-25; 253; 1-GC Ex. 23). It was a procedure with which its own witness, clerical employee Rhea Ellen Bobo, a 31 year employee, was quite familiar. (Tr. 1-5). Bobo stopped stamping Loerwald's book on the order of Stark on January 10, 2012. (Tr. 254:1-3). It is self evident that the only reason Loerwald would obtain a stamp for her work search book is to demonstrate to the unemployment office that she, in fact, engaged in a search for work. As Respondent concedes, and as reflected on General Counsel's Exhibit 23, the state requires union members to "contact the hiring hall each week." The salient point, as recognized by the ALJ, is that Respondent refused to provide Loerwald with a service that it had provided her up to that date and that the service was to assist her with unemployment benefit compliance. (ALJD p. 22, lines 1-6). In an effort to honestly comply with unemployment benefit rules, Loerwald even noted Bobo's refusal on her unemployment book, which could have obvious consequences for her search for work compliance. (GC Ex. 23 p. 3). Respondent's refusal to sign her unemployment book on and after January 10, 2012, was based on the same arbitrary and discriminatory basis as had been her related purge from the OWL, and was therefore unlawful.

VI. Conclusion

Based on the foregoing, Respondent's exceptions should be struck and, in the alternative, should be deemed fully insufficient to warrant disagreement with the ALJ's findings and conclusions that Respondent violated Section 8(b)(1)(A) and (2) of the Act, as alleged in the Complaint, as amended.

Respectfully submitted,

/s/ Charles T. Hoskin, Jr.

Dated: November 1, 2011

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STATEMENT OF SERVICE

I hereby certify that I have this date served copies of the Acting General Counsel's Answering Brief to Respondent's Exceptions on all parties listed below by email and filed the document with the Executive Secretary of National Labor Relations Board via the NLRB's electronic filing system

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