UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

BCI COCA-COLA BOTTLING COMPANY OF LOS ANGELES

and **Case 28-CA-022792**

WAYNE ABREU, an Individual

ACTING GENERAL COUNSEL'S OPPOSITION TO RESPONDENT'S MOTION TO STRIKE EXCEPTIONS

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I. INTRODUCTION

On October 26, 2012, Counsel for the Acting General Counsel (General Counsel) filed Exceptions and a Brief in Support to the decision of Administrative Law Judge William Kocol (ALJ), issued on September 28, 2012 (ALJD), in the above captioned case.[1] On November 9, 2012, Respondent filed a Motion to Strike the General Counsel's Exceptions (Motion), arguing that the General Counsel's Exceptions do not comport with Section 102.46(b)(1) of the Board's Rules and Regulations (the Board's Rules) inasmuch as they allegedly do not provide specific transcript citations, exhibits, or other record evidence. Respondent's arguments ignore the realities of this case, are in error, and are not supported by Board law. As discussed below, Respondent's Motion is without merit and should be denied.

[1] BCI Coca-Cola Bottling Company of Los Angeles is referred to as Respondent. References to the trial exhibits of the Acting General Counsel and the ALJ will be designated as "GC," and "ALJX" respectively, and references to the trial transcripts will be designated as "Tr."

II. BACKGROUND

By way of background, and to provide the framework in which to evaluate Respondent's Motion and this Opposition, the following is summary of the facts and procedural history in this case, as well as of the brief hearing conducted in this matter. As discussed more specifically below, the stated bases for Respondent's Motion ignore the realities, and issues of law, presented by this case.

The Charging Party, Wayne Abreu (Abreu or Charging Party), began working at Respondent's facility in Tempe, Arizona, in 1997. Respondent's Tempe employees were at that time represented by the United Industrial, Service, Transportation, Professional and Government Workers of North America, Seafarers International Union for North America, Atlantic, Gulf, Lakes and Inland Waters (Union). In about 2000, Abreu became an active Union steward. After Respondent opened a new facility in Glendale, Arizona, in approximately 2006, a complaint was issued in June 2007, alleging that Respondent refused to hire 19 employees from its Tempe facility to work at the new Glendale facility, including Abreu. The parties reached a non-board settlement in that matter. Thereafter, Abreu was again rejected for a position at the Glendale facility. The Union filed a charge, and another complaint was issued, again alleging Respondent's refusal to hire Abreu was unlawful. Again the parties reached a non-Board settlement.[2]

In November 2009, Respondent permanently laid off eight Union members who worked at its Tempe facility, including Abreu and another Union steward. Later that month,

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[2] Respondent argues that information regarding the Glendale facility is irrelevant because the ALJ granted, in part, Respondent's petition to revoke a request for subpoenaed documents concerning job openings at the Glendale facility. Respondent completely misses the point as this information concerns the previous union and NLRB activities of Abreu, not whether Respondent had job openings at the Glendale facility after Abreu was laid off in November 2009. (Tr. at 14-15) There was no ruling that Abreu's union and NLRB activity regarding the Glendale facility is irrelevant to the allegations in the Complaint.

the Union filed a grievance on behalf of the discriminatees, and Abreu filed the instant unfair labor practice charge, alleging, in pertinent part, that all eight employees were discriminatorily selected for laid off. (GC. 1(a)) In December 2009, the charge was deferred to the grievance process pursuant to *Dubo Mfg. Corp*., 142 NLRB 431 (1963). In March 2010, the employees voted to decertify the Union. (GC. 4)

On January 31, 2012, without taking the grievances to arbitration, the Union signed a settlement agreement with Respondent, over the unanimous opposition of the discriminatees, resolving the pending grievance involving the permanent layoffs. (Agreement). (GX. 6) Having been notified that the underlying grievance had been resolved, at the request of the Charged Party, in March 2012, the investigation into the charge in the instant case was resumed. (GC. 5) After completing the investigation, which included an analysis of the grievance settlement agreement under the established Board precedent, including *Olin Corp.,* 268 NLRB 573 (1984), *Spielberg Mfg. Co*., 112 NLRB 1080 (1955), and *Alpha-Beta Co*., 273 NLRB 1546 (1984), on May 21, 2012, the Regional Director revoked deferral and issued the Complaint in this matter, concluding that deferral to the grievance settlement was inappropriate, as the settlement was repugnant to the Act. (GC.1(c))

The hearing opened on September 13, 2012, and lasted for an hour and a half. (Tr. 1-34). After preliminary discussions, without taking any witness testimony, the ALJ decided to defer the allegations in the complaint pursuant to *Collyer Insulated Wire*, 192 NLRB 837 (1971), notwithstanding the fact Respondent and the Union had already entered into a settlement resolving the grievance. (Tr. 31-32; ALJD at 4)

III. EXCEPTIONS

General Counsel filed Exceptions on three points: (1) the ALJ's decision to defer this matter before allowing for a full evidentiary hearing; (2) the ALJ's failure to analyze the existing grievance settlement pursuant to established Board precedent; and (3) the ALJ's reliance upon General Counsel Memorandum 73-31. Respondent argues that the Exceptions do not provide specific transcript citations, exhibits, or other record evidence and do not comport with the Board's Rules, and therefore should be rejected. Respondent's arguments ignore the reality of this case and the significant issues properly presented by the Exceptions and are not supported by Board law.

A. Exceptions Under Section 102.46 (b) (1) of the Board's Rules and Regulations.

The General Counsel filed Exceptions regarding the ALJ's deferral to arbitration before conducting a full evidentiary hearing; the ALJ's failure to analyze the existing grievance settlement agreement; and the ALJ's reliance on GC Memo 73-31. Respondent argues that because the Exceptions document "relies upon the arguments set forth in the accompanying brief in support, the arguments adduced during the hearing and the existing record exhibits," they do not provide specifically the questions of procedure, fact, law or policy to which the exception is taken. Section 102.45 (b) (1) of the Board's Rules and Regulations.

Respondent's argument fails because the very basis of the Exceptions is that the transcript is devoid of record evidence because the ALJ failed to allow a full evidentiary hearing. The purpose of the Board's rule with regard to Exceptions is to allow the Board to focus on the issue that is being appealed, whether it is a finding of fact, procedure or law, or other error. Here, this transcript is only 33 pages, and the ALJD is four pages long. The only

exhibits admitted were the formal papers, the settlement agreement, and four other exhibits including the parties' arguments regarding the trial subpoena. (GC. 1-6; ALJX 1-4). The ALJ's ruling to dismiss and send back for deferral, without a hearing, constitutes the entire ALJD. The General Counsel's Exceptions identify specifically the areas of law and procedure with which the ALJ erred, not only in the Exceptions statement, but in the Brief in Support of Exceptions filed simultaneously.

In the cases cited by Respondent, as well as other Board cases dealing with the issue of insufficiently identified exceptions, the following principle is to be followed: "It must be possible for the Board to understand from a reading of the exceptions why the excepting party believes that the judge erred and what significance the purported error has on the outcome of the case. If the Board is unable to determine the grounds on which a party believes the judge's findings should be overturned, the Board cannot be required to search the record as an advocate for the excepting party." *Troutman & Assoc*., 299 NLRB 120, 121 (1990)

None of the cases cited by Respondent, or any other case where the Board found exceptions to be fatally flawed, are similar <u>in any way</u> to the facts in the instant case, nor do they support Respondent's position. For example, *Troutman & Assoc*, involved a trial that lasted 19 days, wherein respondent filed 215 exceptions without a supporting brief, and provided no argument or citation of authority in support of the exceptions. Id. The Board was unable to determine what the grounds were for the exceptions were, what the respondents believed the facts of the case to be, or what the respondent's legal arguments were. Id. In *Rocket Industries, Inc.*, 304 NLRB 1017 (1991), the respondent failed to state in any way how the administrative law judge had erred and provided no legal authority for its exceptions. In *Howe K. Sipes, Co.*, 319 NLRB 30 (1995), the charging party failed to identify any rulings of

the judge that it thought were in error and simply followed a narrative that never referred to the judge's rulings. In *Bonanza Sirloin Pit*, 275 NLRB 310 (1985), the respondent's exceptions were inadequate because they simply constituted a wholesale listing of each and every finding, conclusion, and recommendation made by the administrative law judge, without a supporting brief or any other document alleging with any degree of particularity what error, mistake, or oversight the judge committed or on what grounds the findings should be overturned. This required the Board to engage in its own attempt to determine what if any problems, errors, or irregularities were possibly presented by the judge's decision.[3]

The Exceptions and Brief in Support of Exceptions filed in the instant case by General Counsel identify three specific rulings made by the ALJ, in his four-page decision, that constitute error. In the General Counsel's supporting brief, legal arguments and citations to legal authorities are offered as to why General Counsel believes the ALJ erred, questions of procedure are outlined for the Board's consideration, and specific policies are enumerated. Here, the General Counsel's exceptions and supporting brief in no way requires the Board to engage in a fishing expedition or otherwise determine what rulings General Counsel believes are in error. Moreover, the exceptions and brief in support outline exactly what the outcome should be—an overruling of the ALJ's decision to dismiss and defer the case, a remand to the ALJ to conduct a full evidentiary hearing, and a determination made by the ALJ regarding the grievance settlement agreement under the *Olin/Spielberg* standard. There is no mystery for the Board to decipher, and as such Respondent's motion should be denied.

[3] The Board refused to consider exceptions in *Fiesta Printing Co*., 268 NLRB 660 (1984), when the exceptions were merely the respondent's attempt to recant the testimony given by its two principal witnesses at the hearing and asks the Board to accept new testimony. As the "exceptions" did not put into issue any findings of the judge but rather sought to introduce new evidence, the Board granted the General Counsel's motion to strike the respondent's exceptions. In *Ditch Witch, Inc*., 248 NLRB 452 (1980), the respondent merely submitted its post hearing brief submitted to the ALJ with a cover sheet that purported to be exceptions, not identifying any errors made by the administrative law judge.

B. Exceptions Do Put In Issue the Findings of the ALJ.

Respondent argues in its Motion that the exceptions fail to put in issue any of the findings made by the ALJ. Respondent's argument ignores the rulings of the ALJ.

In his ALJD, the ALJ specifically holds that the Region erred in deferring the charge under *Dubo* instead of *Collyer*, and dismisses the complaint to allow the parties another opportunity to handle the matter under the *Collyer* doctrine. (ALJD at 4) The General Counsel's first exception specifically argues that this decision constitutes error, as the ALJ made his decision to defer before allowing for a full evidentiary hearing on the matter. Accordingly, Respondent's argument regarding the General Counsel's first exception is in error.

The ALJ failed to hold an evidentiary hearing on the grievance settlement agreement, and then, as set forth in the General Counsel's second exception, failed to properly analyze the grievance settlement pursuant to Board precedent. Accordingly, Respondent's argument regarding this exception is also in error.

Finally, the ALJ specifically cites General Counsel Memorandum 73-31, arguing that the policy for nearly four decades as described in this memorandum is that this case should have been deferred under *Collyer*, and that if the Union failed to submit the case to arbitration, as was done here, the charge is dismissed. (ALJD at 3) The General Counsel's third exception specifically excepts to the ALJ's reliance on GC Memo 73-31 in his decision. Accordingly, Respondent's argument regarding the General Counsel's third exception is in plainly wrong.

IV. CONCLUSION

It is respectfully requested that Respondent's Motion to Strike General Counsel's Exceptions be denied and that the Exceptions filed in this case be given full consideration by the Board.

Dated at Phoenix, Arizona, this 21st day of November 2012.

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CERTIFICATE OF SERVICE

I hereby certify that a copy of ACTING GENERAL COUNSEL'S OPPOSITION TO RESPONDENT'S MOTION TO STRIKE EXCEPTIONS in BCI Coca-Cola Bottling Company of Los Angeles, Case 28-CA-022792 were served by E-Gov, E-Filing and by E-mail, on this 21st day of November 2012, on the following:

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