

**UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
REGION 28**

**BCI COCA-COLA BOTTLING  
COMPANY OF LOS ANGELES**

**and**

**Case No.: 28-CA-022792**

**WAYNE ABRUE, An Individual,**

**RESPONDENT'S MEMORANDUM IN REPLY TO THE ACTING GENERAL  
COUNSEL'S OPPOSITION TO RESPONDENT'S MOTION TO STRIKE EXCEPTIONS**

Respondent BCI Coca-Cola Bottling Company of Los Angeles<sup>1</sup>, through undersigned Counsel and pursuant to Section 102.46 of the National Labor Relations Board's Rules and Regulations, respectfully submits this Memorandum In Reply To The Acting General Counsel's Opposition To Respondent's Motion To Strike Exceptions. For the reasons discussed below, as well as those advanced in Respondent's Motion filed on November 9, 2012, Respondent's Motion to Strike should be granted and the ALJ's Decision and Order should be adopted by the Board in its entirety.

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<sup>1</sup> For consistency, BCI Coca-Cola will be referred to as Respondent. The Acting General Counsel will be referred to as the AGC. The Brief in Support of the AGC's Exceptions shall be referred to as the AGC's Brief. Respondent BCI Coca-Cola Bottling Company of Los Angeles' Answering Brief To The Acting General Counsel's Exceptions and Brief In Support of Exceptions shall be referred to as Respondent's Answering Brief. The Acting General Counsel's Reply Brief shall be referred to as the AGC's Reply Brief. Respondent BCI Coca-Cola Bottling Company of Los Angeles' Motion To Strike Acting General Counsel's Exceptions to Bench Decision of Administrative Law Judge shall be referred to as Respondent's Motion to Strike. The Acting General Counsel's Opposition To Respondent's Motion To Strike Exceptions shall be referred to as the AGC's Opposition. References to the trial transcript shall be designated as Tr.

**I. THE AGC'S EXCEPTIONS FAIL TO SATISFY THE MINIMUM REQUIREMENTS REQUIRED BY THE BOARD'S RULES AND REGULATIONS**

Respondent demonstrated in its Motion to Strike that the AGC's Exceptions failed to satisfy the minimum requirements of the Board's Rules and Regulations because all of them: (1) failed to identify with specificity the portions of the ALJ decision to which the exception is made; (2) failed to designate any portion of the record relied upon; and (3) failed to concisely state the grounds for the Exceptions. Respondent's Motion to Strike at 4-7 and authorities cited therein.

The AGC's Opposition largely ignores these facts. Rather than deny or explain these fatal defects, the AGC's Opposition simply assumes that the Board's Rules and Regulations do not apply to the AGC's exceptions and that the AGC is entitled as a matter of right (rather than law) to a hearing on the merits of its claims. One need only state these propositions to demonstrate their lack of merit.

The AGC does not deny the complete failure to satisfy the requirements of the Board's Rules and Regulations stating that exceptions must be specific as to the part of the ALJ's decision to which the objection is made and the precise designation of page numbers in the record upon which the excepting party relies. Compare Respondent's Motion at 4, citing inter alia 29 CFR Section 102.46(b)(1) with AGC's Opposition at 3-5. Indeed, no such denial can be made because none of the Exceptions, the AGC's Brief, the AGC's Reply Brief or the AGC's Opposition identify *any portion* of the ALJ's Decision by page and line or ruling on the record by transcript page and line to which AGC takes exception, or the grounds for the exception. This alone is sufficient grounds to strike the Exceptions. See Respondent's Motion at 4-5 and authorities cited therein.

Next, the AGC makes no effort to explain why it should not be held to the same

minimum requirements applicable to every other party filing exceptions.<sup>2</sup> Instead, the AGC vaguely asserts that the ALJ erred because he did not allow the case to proceed to a hearing, because he did not analyze the settlement agreement to determine if it was repugnant to the Act, and because he relied on GC Memorandum 73-31. See AGC Opposition at 3-5. The AGC then argues that these conclusory contentions are sufficient by themselves because the record is “only” 33 pages long and the ALJ decision is only four pages long. Id. at 3. (Tellingly, the AGC avoids mentioning the fact that the record is completely devoid of any attempt it made to submit an offer of proof or similarly introduction of excluded evidence or argument.) The AGC goes on to claim without citation to the record or the ALJ’s Decision that its ambiguous statements offered as “exceptions” do challenge specific rulings in the ALJ’s decision, that the Board need not guess what the AGC believes were errors, and that the reasons for the AGC’s Exceptions can be gleaned from the AGC’s supporting Memorandum. AGC’s Opposition at 5. All of that said, the Exceptions still have no legal or factual support.

First, it is indisputable that neither the AGC’s Exceptions nor the AGC’s Brief identify or challenge any specific rulings made by the ALJ by page and line number of the ALJ Decision or the record as required by the Board’s Rules and Regulations, nor do they state the grounds for each purported “exception.” As previously noted, the ALJ concluded that the underlying unfair labor practice charge should have been deferred under Collyer Insulated Wire, 192 NLRB 837 (1971) rather than Dubo Mfg. Corp., 142 NLRB 431 (1963), that the matter will be deferred under Collyer, and that failure to timely arbitrate the matter after deferral will result in dismissal of the Charge. See Respondent’s Motion at 8 and authorities and citations to the record cited

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<sup>2</sup> Indeed, the minimum requirements set forth in 29 C.F.R. § 102.46 (“Section 102.46”) explicitly apply to “*any party*.” (Emph. added). Thus, it is clear that these minimum requirements are intended to apply to *any* excepting party, including without limitation the AGC.

therein; Respondent's Answering Brief a 3-5 and authorities and record citations cited therein. *None of the AGC's Exceptions address any of these rulings.* Instead, the AGC merely complains about the *consequences* of the ALJ's rulings by contending that there should have been a hearing on the merits and an analysis of the settlement agreement regardless of what the ALJ did. See AGC's Opposition at 3-6; see also infra at 6-7 and n. 3. These are not valid exceptions under the requirements of Section 102.46.

Next, nowhere in the Exceptions, the AGC's Brief, the AGC's Reply or the AGC's Opposition does the AGC cite any authority for the novel theme running through the AGC's arguments that the AGC is entitled as a matter of right to an evidentiary hearing on the merits of the Complaint. This is because no such authority exists.<sup>3</sup> To the contrary, the AGC has no right to a hearing. See e.g. Respondent's Answering Brief at 11-13 citing Dennison National Company, 296 NLRB 169 (1989) (summary judgment granted concluding that arbitrator award was not clearly repugnant to the Act; "The Board's involvement at this stage, however, is not in the nature of an appeal by trial de novo."). As a result, and in the absence of any exception to issues upon which the ALJ actually ruled, the AGC is attempting to require the Board to go on a "fishing expedition" to solve the "mystery" of what the AGC thinks the ALJ did wrong and why, and why these unidentified errors impinge upon some presumed but undefined right of the AGC to a hearing on the merits of the claims in the Complaint. See AGC's Opposition at 5. As explained in the Motion to Strike, the Board has "consistently refused" to engage in such fishing expeditions when faced with deficient and/or non-compliant exceptions like the ones presented

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<sup>3</sup> Additionally, the AGC does not cite anywhere in the record or the ALJ's Decision that it requested and was denied an evidentiary hearing by the ALJ, because this did not occur. Rather, the ALJ is again attempting to use the exception procedure to complain about an *effect* of the ALJ's ruling, as opposed to challenging any specific finding by the ALJ. Complaining about a result of an ALJ ruling is not a proper exception under Section 102.46.

by the AGC. See, e.g., Ditch Witch of Cent. Ill., Inc., 248 NLRB 452 (1980); Worldwide Detective Bureau, 296 NLRB 148 (1989); Troutman & Assoc., 299 NLRB 120, 121 (1990)

Finally, there literally is no support for the naked assertion that the Exceptions are sufficient because “In the General Counsel’s supporting brief, legal arguments and citations to legal authority 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.” See AGC’s Opposition at 5 [no citations supplied by the AGC]. To the contrary, the AGC’s brief does nothing more than improperly argue allegations not supported by evidence in the record (compare AGC’s Brief at 3-5 with Respondent’s Answering Brief at 2 note 3)<sup>4</sup>, claim without persuasive authority that the AGC is entitled to a hearing on its allegations regardless of how the underlying charge was or should have been deferred (compare AGC Brief at 2, 5 and 9-10 with Respondent’s Answering Brief at 4 and 11-13 and authorities cited therein), and declare the AGC entitled to a hearing and a victory on the merits based upon these erroneous contentions and application of the wrong legal standards (compare AGC Brief at 6-11 with Respondent’s Answering Brief at 4-14 and authorities and record citations cited therein). The AGC’s Brief is

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<sup>4</sup> The AGC makes the same error in the AGC’s Opposition at the second page 1-3 (the AGC’s Opposition starts with an unnumbered cover page and two unnumbered pages followed by a fourth page numbered “2” and then continues sequentially from there). The unsupported contentions should be disregarded for the reasons set out in Respondent’s Answering Brief at 3 note 2. Additionally, the Glendale evidence should be rejected for all purposes because the AGC did not except to the ALJ’s ruling that the Glendale facility was irrelevant to the allegations in the Complaint. Compare Exceptions with Tr. at 4-15. Further, The AGC did not even assert at the hearing that the Glendale evidence related to “previous union and NLRB activity of Abreu” as alleged in the AGC’s Opposition at the second unnumbered page after cover sheet, note 2. The AGC said only, “The purpose of the Glendale facility request is that these eight individuals continue to apply – at least five of them continue to apply for open positions with the Employer at both Tempe and Glendale, and were denied all -- those jobs. And so, I think that goes to the whole issue of whether the layoff was due to a legitimate reason, or whether it was due to the reason we allege in the Complaint.” Compare AGC Opposition at second unnumbered page after cover sheet note 2 with Tr. 14-15.

conspicuously devoid of any reference to specific rulings of the ALJ to which the AGC takes exception. Moreover, Section 102.46 requires the exception document itself to contain this requisite information, and the AGC's failure to include it in its Exceptions warrants them being stricken. See Troutman, supra, 299 NLRB at 121 (granting motion to strike exceptions that did not cite transcript pages or other record evidence and failed to allege with particularity the grounds for overturning the judge's purportedly erroneous findings). Thus, and again, both Respondent and the Board are left to engage in a "fishing expedition" to "decipher" the "mystery" of why the AGC think it is entitled to a hearing and exactly what the ALJ might have done to interfere with this undefined right.

Given the above, and notwithstanding the arguments in the AGC's Opposition, the fact remains that the AGC's Exceptions do not meet the minimum requirements of the Board's Rules and Regulations. The AGC cannot cure this flaw by ignoring it and attempting to proceed as if the AGC should be allowed to operate under a different set of rules than other parties. Accordingly, the Exceptions should be disregarded or stricken.

## **II. THE EXCEPTIONS DO NOT CHALLENGE ANY RULINGS OF THE ALJ**

Respondent has demonstrated that none of the AGC's Exceptions challenge any ruling actually made by the ALJ. See Respondent's Motion at 7-11 and authorities and record citations cited therein. Respondent showed, by citation to the record, that the ALJ's rulings were focused on the identified issues of whether the charge was deferrable under Collyer, whether the charge should have been deferrable under Collyer, and what should happen to the charge after it was deferred under Collyer. Notwithstanding this detailed analysis, the AGC's sole rebuttal is to contend that "Respondent's argument ignores the rulings of the ALJ." AGC Opposition at 6. In fact, it is the AGC that ignores both the ALJ's rulings and its own arguments.

The AGC contends that its first Exception complaining that it is entitled to a hearing as a matter of right challenges the ALJ's decision that the matter should have been deferred under Collyer rather than Dubo. AGC Opposition a 6. It does not. In fact, the AGC's Brief makes clear that the AGC is not challenging the ALJ's decision that the deferral should have been pursuant to Collyer, which the AGC has called an "immaterial" ruling.<sup>5</sup> As mentioned above, this Exception only complains only about the consequences of the decisions actually made by the ALJ. The AGC does not identify the source of its presumed right to a hearing. Cf. Dennison National Company, supra (summary judgment granted without a hearing concluding that arbitrator award was not clearly repugnant to the Act). The AGC never identifies by citation to page and line any portion of the record or ALJ's Decision that sets out any ruling actually made by the ALJ to which the AGC excepts, much less any ruling that the AGC claims impinges on the presumed but undefined right to a hearing. Furthermore, this new contention, raised for the first time in the AGC's Opposition, is inconsistent with the AGC's position stated at least three times that it is "immaterial" and does not matter what the ALJ decided about deferral, because a hearing should have been held regardless of the ALJ's rulings on the deferral issue. See note 5 herein, citing AGC Brief at 2 and 5; AGC's Reply at 2. As a result, the AGC's attempt to

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<sup>5</sup> This is what the AGC has argued verbatim. "*As argued in the General Counsel's exceptions, it is immaterial whether the grievance was deferred under Collyer Insulated Wire or Dubo Mfg. Corp., 142 NLRB 431 (1963); the ALJ had an obligation to allow evidence, to analyze the grievance settlement reached prior to arbitration pursuant to that evidence, under Spielberg/Olin standards, and reject the settlement if deferral to it was repugnant to the policies of the Act."* AGC Reply at 2 (emph. added). "Here, regardless of whether the grievance was deferred under Dubo Mfg. Corp., 142 NLRB 431 (1963) or Collyer Insulated Wire, 192 NLRB 837 (1971), the ALJ should have analyzed the grievance settlement, reached prior to arbitration. [sic] under Olin/Spielberg standards, and rejected the settlement if deferral to it was repugnant to the policies of the Act, as the General Counsel asserts." AGC Brief at 2-3. "Regardless of whether the grievance was deferred under Collyer Insulated Wire or Dubo Mfg. Corp., the ALJ should have analyzed the Agreement under Spielberg/Olin standards and deferred to the Agreement only if it is not repugnant to the policies of the Act." AGC Brief at 5.

mischaracterize its prior Exception as challenging the ALJ's decision to defer pursuant to Collyer is disingenuous and conflicts with its own statements that the deferral ruling is "immaterial." Rather, the AGC is in fact attempting to present a *new exception* challenging the ALJ's ruling on deferral for the first time in its Reply and Opposition to Respondent's Motion to Strike which is not specified within any timely-filed Exception and is therefore *waived*. See 29 C.F.R. § 102.48(a) (findings not made part of a timely exception "shall be deemed waived for all purposes"). See also note 5; see also Dish Network Corp., 358 NLRB No. 29, 2012 NLRB LEXIS 189, \*1 (2012) (raising issue for the first time in reply brief violates 29 CFR Sec. 102.46(h); "Our Rules state, however, that a reply brief "shall be limited to matters raised in the brief to which it is replying".)

The second Exception claiming that the ALJ failed to properly analyze the settlement agreement reached by the parties is defective for similar reasons. See AGC Opposition at 6. nothing more than the AGC complaining about the consequences of the rulings actually made by the ALJ. The AGC has no right to a hearing on this issue. See Dennison National Company, supra.

Finally, the AGC's third Exception complaining about the ALJ's reliance on GC Memorandum 73-31 is also deficient. The AGC's Exceptions and filings are devoid of any citation to the record or the ALJ Decision identifying what mistake the AGC contends the ALJ made in relying on this Memorandum, how it was made and what the correct ruling should have been and why. See e.g. AGC Opposition at 6.<sup>6</sup>

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<sup>6</sup> As demonstrated by Respondent, the AGC's vague references to Roadway Express, 246 NLRB 174 (1979) as a basis for objecting to the ALJ's reliance on GC Memo 73-31 is baffling. See AGC brief at 10-11; Respondent's Answering Brief at 13-14; and AGC's Reply Brief at 4-5. The ALJ relied on a portion of the memo that discussed the relationship between Collyer and

Thus, it is clear that it is the AGC that ignores the rulings of the ALJ and its own arguments. Because the exceptions do not address any of the rulings actually made by the ALJ, or explain why the AGC is entitled to a hearing regardless of how the ALJ ruled, they should be struck for these reasons as well.

**III. CONCLUSION**

In conclusion, the AGC’s Opposition to the Motion to Strike and its Reply Brief underscore the deficiencies of the AGC’s Exceptions, and there is absolutely no reason for the Board to excuse the AGC’s non-compliance and consider these vague, deficient and improper “exceptions”. For this and all of the reasons set forth above, as well as those detailed in Respondent’s Motion, the Motion to Strike should be granted.

Respectfully submitted this 29<sup>th</sup> day of November, 2012,

/s/ Douglas M. Topolski

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Dubo deferrals. The AGC did not and does not except to this ruling (which it deems “immaterial”), nor does the AGC argue for a change in the policy GC Memo 73-31 upon which the ALJ relied. The AGC’s failures to make specific objections by page and line number, coupled with its cryptic and irrelevant discussion of Roadway Express, *supra*, presents nothing more than a deficient exception that requires the Respondent and the Board to engage in yet another “fishing expedition” to decipher the “mystery” of exactly to what the AGC excepts and why. As discussed above, this is not the duty of the Board.

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that this **RESPONDENT’S MEMORANDUM IN REPLY TO THE ACTING GENERAL COUNSEL’S OPPOSITION TO RESPONDENT’S MOTION TO STRIKE EXCEPTIONS** was filed electronically and that an original was sent on November 29th, 2012 by Federal Express to the National Labor Relations Board, 1099 14<sup>th</sup> Street N.W., Washington, D.C., 20570-0001, and service copies were sent by E-Mail and Federal Express to:

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