

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

REGION 20, SUBREGION 37

ENDO PAINTING SERVICES, INC.) CASE 20-CA-080565
)
 Employer,)
)
 and)
)
INTERNATIONAL UNION OF)
PAINTERS AND ALLIED TRADE,)
PAINTERS UNION LOCAL 1791 (2012-)
004),)
)
 Union.)
)

(154:59)

**MOTION TO STRIKE RESPONDENTS' EXCEPTIONS TO THE DECISION
OF THE ADMINISTRATIVE LAW JUDGE, FILED FEBRUARY 22, 2013**

CERTIFICATE OF SERVICE

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PAINTERS UNION LOCAL 1791

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Counsel for the International Union of Painters and Allied Trades, Painters Local Union 1797 ("Painters," "Local 1791," or "Union") move that the National Labor Relations Board ("Board") strike Exceptions to the Decision of the Administrative Law Judge ("ALJ") filed by Endo Painting Service ("Endo" or "Respondents"), because the Respondents failed to comply with Section 102.46(b)(1) of the Board's Rules and Regulations, 29 C.F.R. §102.46 (b)(1).

**I.
PROCEDURAL HISTORY**

On February 22, 2013, Administrative Law Judge Gerald A. Wacknov issued his decision in the above-captioned matter. On that same date, an order was issued transferring the proceedings to the National Labor Relations Board pursuant to Section

102.45 of its Rules and Regulations. On March 22, 2013, the Respondents filed Exceptions to the February 22, 2013 Decision of ALJ Wacknov that failed to comply with Section 102.46(b)(1) of the Board's Rules and Regulation. On March 26, 2013, Respondent filed their Table of Contents, Table of Authorities, and Amended Certificate of Service for their Exceptions to the Decision of the ALJ pursuant to the instruction of the National Labor Relations Board, Office of the Executive Secretary.

II. **ARGUMENT**

Section 102.46(b)(1) of the Board's Rules and Regulations, 29 C.F.R. § 102.46(b)(1), provides that:

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.

Furthermore, Section 102.46(b)(2) of the Board's Rules and Regulations states that: "Any exception which fails to comply with the foregoing requirements may be disregarded."

To be read with this, Section 102.46(c) also provides that:

(c) Any brief in support of exceptions shall contain no matter not included within the scope of the exceptions and shall contain, in the order indicated, the following:

(1) A clear and concise statement of the case containing all that is material to the consideration of the questions presented.

(2) A specification of the questions involved and to be argued, together with a reference to the specific exceptions to which they relate.

(3) The argument, presenting clearly the points of fact and law relied on in support of the position taken on each question, with specific page reference to the record and the legal or other material relied on.

The interplay between §102.46(b) and (c) provide an option to the party filing exceptions to simply file exceptions, or to also file a separate brief in support of exceptions.

Here, Respondents' Exceptions in fact recycles nearly its entire 25-page post-hearing brief to the ALJ without citing to facts or law to support their conclusory remarks that the ALJ erred in his overall finding they violated Sections 8(a)(1) and 8(a)(5) of the Act, or even identifying whether it is a question of procedure, fact, law, or policy to which exception is taken. For example, on page 28 of its Exceptions, Endo asserts that the finding by the ALJ that the Union replied by letter dated April 5, 2012 and attached a list of names of current and former bargaining unit employees is erroneous because the ALJ fails to acknowledge the Union did not properly respond to Endo's request for information about which employees were aggrieved. Respondents fail to refer to any citation in the record to support its exception to this finding and the basis upon which it should be overturned. The entire submission is replete with similarly conclusory declarations of alleged errors without reference to supporting evidence or law (for example, a page citation to the record to refute a finding and support the alleged error). The purpose of the exceptions clearly are not simply to allow a party to resubmit their post-hearing briefing and it is inappropriate for the Respondents to expect the Board to

comb through the record to determine whether there is any support for its claims and to determine the propriety of its exceptions. This is the responsibility of the Respondents alone. Moreover, nowhere in its briefing did it cite to any portion of the transcript of proceedings and simply relied on the Stipulated Facts and Joint Exhibits which only emphasize how few factual disputes existed in this matter. By disregarding the minimal requirements under the Board's Rules and Regulations, the exceptions filed by the Respondents should be disregarded.

The Board has previously held that an exception should be disregarded because the party filing the exception failed to provide the precise citations to the portions of the record relied upon. See Stagehands Referral Service LLC, 356 NLRB No. 152, at *1 (2011) (exceptions that are not stated with sufficient particularity fail to give fair notice to Charging Party or to permit review by the Board); BCE Construction, Inc., 350 NLRB 1047, 1047 (2007) (adopting finding of administrative law judge, pro forma, because exception failed to conform to Section 102.46, including not designating precise citation of page to the portion of the record relied upon); In re Tri-Tech Services, Inc., 340 NLRB 894, 896 (2003) (exceptions that do not comport with the requirements of Section 102.46(b)(1) are not properly before the Board and are to be disregarded).

Because of Respondent's failure to meet the requirements of 102.46(b)(1), it necessarily follows that the brief fails. Sec. 102.46 (b)(2); Holsum de Puerto Rico, 344 NLRB 694, fn.1 (2005) (failure to state, either in its exceptions or its supporting brief, on what grounds the purportedly erroneous findings should be overturned warranted

disregarding the Respondent's exceptions to the unfair labor practice findings); Conley Trucking, 349 NLRB 308 fn. 2 (2007), enfd. 520 F.3d 629 (6th Cir. 2008) (noting in accordance with Sec. 102.46(b)(2) the Respondent's exception could be disregarded where it failed to allege with any degree of particularity the error the it contended the judge committed, or on what grounds it believed the judge's decision should be overturned).

The point of these rules is that the other party, as well as the Board, needs to know exactly what is being taken exception to and why. Regurgitation of its brief to ALJ simply does not suffice nor does it meet the Board's requirements which place the burden on the Respondent to clearly present its objections and state all the points of fact and law relied on in support of its position. By completely disregarding the requirements of Section 102.46 of the Board's Rules and Regulations, the exceptions filed by the Respondents should be disregarded and the Union respectfully requests that the Board grant the its Motion to Strike Respondent's Brief in Support of Exceptions.

DATED: Honolulu, Hawaii, April 5, 2013.

Respectfully submitted,

/s/ Davina W. Lam
DAVINA W. LAM
REBECCA L. COVERT
Attorneys for Union

CERTIFICATE OF SERVICE

I hereby certify that one copy of the foregoing document was duly served upon the following persons by filing in the NLRB e-Room before midnight Pacific time and by email where so indicated on this date:

Judge Gerald A. Wacknov

Administrative Law Judge
Division of Judges
National Labor Relations Board
901 Market St., Ste. 300
San Francisco, CA 94103-1735

Administrative Law Judge

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Attorney for Employer

DATED: Honolulu, Hawaii, April 5, 2013.

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