

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

AMALGAMATED TRANSIT UNION LOCAL
NO. 1498 (JEFFERSON PARTNERS L.P.)

Respondent

and

RAYMOND JONES

Charging Party

Case 18-CB-086687

MOTION TO STRIKE RESPONDENT'S
CROSS-EXCEPTIONS AND SUPPORTING BRIEF

General Counsel¹ moves that the National Labor Relations Board strike Respondent Amalgamated Transit Union Local 1498 (“Respondent”) Cross-Exceptions to the Decision of Administrative Law Judge Ira Sandron² and Respondent’s Brief in Support of Local Union’s Cross-Exceptions³ in whole or in part for four reasons. First, Respondent conflates the two documents. Second, the Supporting Brief is too long. Third, both the Cross-Exceptions and

¹ This case was brought on behalf of Acting General Counsel Lafe Solomon, referred to herein as General Counsel.

² Herein referred to as Cross-Exceptions.

³ Herein referred to as Supporting Brief.

Supporting Brief are replete with factual statements not in the record. Finally, the Cross-Exceptions lack specificity and citations to the record, among other things. I will address the reasons supporting the motion separately below.

I. RESPONDENT CONFLATES THE CROSS-EXCEPTIONS AND SUPPORTING BRIEF

Respondent's Cross-Exceptions and Supporting Brief do not substantially comply with Section 102.46(b)(1) of the Board's Rules and Regulations in several respects. Section 102.46(b)(1) states:

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.* [Emphasis added]

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."

The Board has defined argument as "the reasoning of facts that assertedly establish the exception." *Hotel del Coronado*, 344 NLRB 360, 360 (2005). In *Special Touch Home Care Services*, the Board found that where both the exceptions and supporting brief contain argument and the total number of pages for both documents is over the 50 page limit provided for in Section 102.46(j) the submission is not in compliance with either Section of the Board's Rules and Regulations. 349 NLRB 759, 759-60 (2007) (ultimately finding that "it strikes a fairer balance to deny the motion to strike the exceptions and instead strike the brief).

Critically, in this case, Respondent includes argument and factual analysis in both its Cross-Exceptions and Supporting Brief. Respondent's Cross-Exceptions numbers through 8, and

10-2⁴ each include an argument section titled “Basis for Exception.”(CEX pp. 2- 10.)⁵ Here, there is no substantial compliance with either Section 102.46(b)(1) or 102.46(j), as Respondent’s Cross-Exceptions and Supporting Brief make the same mistakes as in *Special Touch*. General Counsel is prejudiced by Respondent’s Supporting Brief because Respondent appears to rely on the more than 400 voluminous transcript pages in its Supporting Brief in support of its Cross-Exceptions thereby denying General Counsel with notice of the particular facts Respondent relies on for each Cross-Exception. Therefore Respondent’s Supporting Brief should be struck in its entirety as it was in *Special Touch*.

Moreover, Respondent’s Supporting Brief does not substantially comply with Section 102.46(c) of the Board’s Rules and Regulations which states:

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 Board has granted a motion to strike to the extent that matters are raised in a supporting brief which are not raised in the exceptions. *Engineered Comfort Systems*, 346 NLRB 661, 661 (2006); *A-1 Door and Building Solutions*, 356 NLRB No. 76, (2011).

Respondent’s Supporting Brief is riddled with matters not included within its Cross-Exceptions as required by Section 102.46(c)(1). For example, Respondent’s Supporting Brief

⁴ Respondent’s Cross-Exceptions include two exceptions that are labeled “10.” All references to Respondent’s Cross-Exceptions are numbered as identified in the document, with the exception of the two tenth exceptions on page 9. The first tenth exception will be referred to as “10-1” and the second “10-2”.

⁵ References to the Respondent’s Cross-Exceptions will be designated as “CEX p. __,” references to Respondent’s Supporting Brief will be cited as “RSB p. __,” the Administrative Law Judge’s Decision will be designated as “ALJD p. __, lines __.”

repeatedly raises credibility issues yet its Cross-Exceptions do not include any reference to the judge's decisions on credibility. (RSB p. 15 ¶2 - p. 17 ¶6.) Additionally, Respondent's Supporting Brief questions the investigation conducted by the Region in this case, which is completely outside its Cross-Exceptions, never previously raised by Respondent, and is irrelevant. (RSB p. 24-26.) Next, Respondent's Supporting Brief questions why complaint issued and makes several wholly inappropriate allegations related to issues discussed during settlement conference calls with Administrative Law Judge Sandron. (RSB p. 27-28.) In addition, the Supporting Brief includes a discussion of issues which are more appropriately raised in the compliance stage as well as several other matters not included in its Cross-Exceptions. (RSB p. 2-3 (¶3, ¶6, ¶7, ¶8).) Even if the Board were not inclined to strike Respondent's Supporting Brief in its entirety, General Counsel requests that *at least* all of the above cited portions of the Supporting Brief be struck as they are not within Respondent's Cross Exceptions.

Respondent's Supporting Brief also fails to comply with Section 102.46(c)(2) because the entire Supporting Brief makes no reference to the Cross-Exceptions or the Judge's Decision . In *Unifirst Corp.* General Counsel resubmitted its posthearing brief as its brief in support of the judge's decision and the Board disregarded arguments in General Counsel's supporting brief to the extent they were no longer relevant. 341 NLRB 1 (2004). In this case, Respondent's Supporting Brief appears to have been drafted prior to the issuance of the judge's decision in this case.⁶ Therefore, the brief provides no analysis or discussion regarding the basis for its exceptions, errors Respondent alleges the judge made, or facts that specifically support its Cross-Exceptions. In addition, the Supporting Brief also fails to comply with Section 102.46(c)(3) as it

⁶ Respondent failed to submit a post trial brief to the Administrative Law Judge despite being granted an extension. (ALJD p. 5, lines 8-9.)

largely fails to cite to any evidence in the entire Argument section. (RSB pp. 18 - 31.) Both of these failures significantly prejudice General Counsel because it requires General Counsel to attempt to respond to general unsupported statements in anticipation of Respondent's arguments that the judge erred and the facts it relies on to establish the same. General Counsel requests that for all of the above reasons Respondent's Supporting Brief be struck in its entirety.

II. RESPONDENT'S SUPPORTING BRIEF IS TOO LONG

Section 104.46(j) of the Board's Rules and Regulations provides that briefs "shall not exceed 50 pages in length" unless the party obtains permission from the Board by filing a motion at least ten days before briefs are due. It also states that briefs longer than 20 pages have "a subject index with page references and an alphabetical table of cases and other authorities cited." In *Hotel del Coronado*, the Board granted General Counsel's motion to strike because respondent's exceptions were 131 pages and supporting brief was 49 ½ pages and had not substantially complied with Section 102.46 (j). 344 NLRB at 360.

Respondent's Support Brief is 467 pages in length. Respondent failed to request or receive permission to exceed the 50 page limit by filing a timely motion with the Board as required. Respondent's Supporting Brief primarily consists of snippets and whole pages of the transcript copied and pasted into the document. (RSB pp. 42-476.) In addition, Respondent's Supporting Brief is also devoid of a subject index or table of cases and other authorities as required in Section 102.46(j). Even if the Board were not inclined to strike Respondent's Supporting Brief in its entirety, General Counsel requests that *at least* pages 42 to 476 of the Supporting Brief be struck as it apparently a cut and paste of transcript pages.

III. BOTH RESPONDENT'S CROSS-EXCEPTIONS AND SUPPORTING BRIEF MAKE FACTUAL STATEMENTS NOT IN EVIDENCE

Respondent's Cross-Exceptions and Supporting Brief is replete with factual statements which are outside of the record evidence in this case and therefore the motion to strike in whole or in part should be granted. Section 102.45(b) of the Board's Rules and Regulations states:

The charge upon which the complaint was issued and any amendments thereto, the complaint and any amendments thereto, notice of hearing, answer and any amendments thereto, motions, rulings, orders, the stenographic report of the hearing, stipulations, exhibits, documentary evidence, and depositions, together with the administrative law judge's decision and exceptions, and any cross-exceptions or answering briefs as provided in section 102.46, shall constitute the record in the case.

The Board has granted General Counsel's motions to strike when it alleges that the exceptions or supporting brief contain statements or documents not included in the record. *B.C. Hawk Chevrolet, Inc.*, 226 NLRB 527, 527 fn. 1 (1976) (striking documentary attachments to respondent's supporting brief which were outside the record); *Bink's Coca-Cola Bottling Company*, 257 NLRB 592, 592 fn. 1 (1981) (striking portions of respondent's brief referencing settlement discussions as "not part of the formal record before the Board"); *Miami Foundry Corp.*, 252 NLRB 2, 2 fn. 1 (1980) (striking portions of respondent's brief which attack a regional attorney and counsel for the general counsel because they contain material outside of the record and are irrelevant to the exceptions).

From the last paragraph on page 19 to the bottom of the page 21 (including footnote 1), Respondent makes statements about the Union's processing of Charging Party Raymond Jones' grievance, statements about other grievances being processed at that time, about contract negotiations, a "pay grievance," and statements regarding his October 2012 audit all of which are not in the record. (RSB p. 19-21.) Other examples of statements or assertions not in the record include statements about the investigation of the case by the Region, settlement, other irrelevant

charges filed in the Region, Respondent's attorney's "personal" thoughts, and baseless allegations regarding the Region's reasons for issuing complaint. (RSB p. 3 ¶5, p.p 21-22, 24-28, including fn. 2.) There is no evidence in the record to support these assertions. General Counsel requests that all of the above portions of Respondent's Supporting Brief be struck.

Respondent's Cross-Exceptions 1 and 2 include statements not included in the record as defined in Section 102.45(b) and should therefore be struck. In the "Basis for Exceptions" section of Cross-Exception 1, Respondent states, "Might it be that he [Charging Party Raymond Jones] went to the region to complain about his discharge and, after learning there was no violation with regard to that matter, turned his attention to the old pay grievance? The Charged Party is, of course, not allowed to see those records." (CEX p. 3.) As stated above, this statement is argument and therefore not properly included in the Cross-Exceptions as Respondent also filed a Supporting Brief. In addition, this statement is wholly without support in the record, is pure speculation on the part of Respondent and should therefore be struck

In the "Basis for Exceptions" section of Cross-Exception 2, Respondent states, "Jefferson Lines violated the CBA and/or the law every day. (I have not a minute's hesitation making that statement because I know it to be absolutely true[)]." (CEX p. 6.) It goes on to state Respondent's attorney Weston Moore's ("Respondent's attorney") billing rate, that Respondent's attorney and Union President Davis have never said "no" to a case, that Davis worked for the Employer 60 hours per week, and that, "the Union's counsel was dealing taking care of his wife who learned she was pregnant and going for all-day chemotherapy treatments twice per week and counsel had to close his office and begin working from home to care for his infant son and six year old son and wife, and work during their naps or after." (CEX p. 6.) Despite

Respondent's attorney and Davis testifying at the hearing, none of the above is contained in the record.

IV. RESPONDENT'S CROSS-EXCEPTIONS LACK SPECIFICITY

Finally, Respondent's Cross-Exceptions numbers 1, 2, 10-1, and 14 fail to identify with particularity the portions of Administrative Law Judge Ira Sandron's decision to which Respondent objects as they lack any citation to the decision, transcript, or exhibits and therefore do not comply with Section 102.46(b)(1) (quoted above). (CEX pp. 1, 2, 10) In assessing motions to strike, the Board is specifically concerned with whether a party's failure to comply with Section 102.46(b)(1) resulted in prejudice to a party. *Local 6, Longshoremen's Union*, 210 NLRB 666, 666 fn. 1 (1974). General Counsel is prejudiced by Cross-Exception 10-1 as it is too general for General Counsel to determine what portion of the judge's decision Respondent alleges is in error and to determine which facts would support the judge's decision with respect to that issue. In addition, Respondent's Supporting Brief provides no information on Cross-Exception 10-1. General Counsel requests that Cross-Exception 10-1 be struck from the record.

V. CONCLUSION

For the reasons stated above, General Counsel respectfully requests that the Board grant its motion to strike Respondent's Cross-Exceptions and Supporting Brief in whole or in part.

Dated: May 24, 2013

Respectfully submitted,

/s/ Chinyere C. Ohaeri

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CERTIFICATE OF SERVICE

The undersigned certifies that the foregoing Motion To Strike Respondent's Cross-Exceptions and Supporting Brief was filed via e-filing and served on May 24, 2013, by the methods indicated, on the parties whose names and addresses appear below.

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