

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 14**

ABB INC.

and

Case 14-CA-099392

**LOCAL 2379, UNITED AUTOMOBILE,
AEROSPACE AND AGRICULTURAL
IMPLEMENT WORKERS OF AMERICA**

**COUNSEL FOR THE GENERAL COUNSEL'S OPPOSITION TO RESPONDENT'S
MOTION FOR SUMMARY JUDGMENT**

Pursuant to Section 102.24(b) of the Board's Rules and Regulations, Counsel for the General Counsel (General Counsel) respectfully files this opposition to Respondent's Motion for Summary Judgment (Motion), filed on July 31, 2013. Contrary to Respondent's contentions, the General Counsel has sufficiently pled claims supporting violations of the Act and has presented genuine issues of material fact which preclude summary judgment.

I. Material Facts in Dispute

Summary judgment is not available to Respondent because Respondent has placed in contention substantial and material issues of fact. In paragraph 6 of the Complaint,¹ the General Counsel alleges that Respondent unilaterally ceased accommodating employees with medical overtime restrictions and placed its employee Ricky Phillips in inactive status pursuant to this change. In its Answer, Respondent denies these allegations. The Respondent also partially denies the commerce information in paragraph 2, and denies the 2(11) supervisory and 2(13) agency status of Matt Boyle, pled in paragraph 4 of the Complaint, who is the individual whose affidavit the Respondent submitted to support its summary judgment motion.

¹ A copy of the Complaint and Notice of Hearing and Respondent's Answer are attached as Exhibits 1 and 2, respectively.

Respondent's version of the facts is in conflict with the Complaint allegations. The Motion contains no admissible facts that establish Respondent had a past practice of not accommodating employees with permanent medical overtime restrictions. Respondent also cites no contract provision that specifically addresses medical overtime restrictions. Further, the Complaint does not allege that Respondent changed "essential job functions", but rather that Respondent changed how it treated employees who could not work overtime. With respect to the Respondent's ADA arguments, none of the cases Respondent cites stand for the proposition the ADA confers a privilege to change established past practices without bargaining with the Union. Thus, whatever Respondent's rights are under the ADA, it is not entitled to a judgment as a matter of law in this case. What, if any, relevance the ADA has to this Complaint is another factual matter in dispute that must be determined at hearing.

II. Standard for Summary Judgment

The Board has held that where allegations in the complaint are denied, summary judgment is inappropriate. *Intersystems Design and Technology Corp.*, 267 NLRB 1310 (1983). Respondent contends that to defeat its summary judgment motion, General Counsel must set forth specific facts, by affidavit or otherwise, showing a genuine issue for trial and may not rest on the denial of the Complaint pleadings. Summary judgment authority, however, is grounded in the Board's Rules and Regulations and not in the Federal Rules of Civil Procedure, as Respondent would argue. *Krieger-Ragsdale & Co., Inc.*, 159 NLRB 490, 495 (1966), *enfd.* 379 F.2d 517 (7th Cir. 1967), *cert. denied* 389 U.S. 1041 (1968); *Clark's Discount Dept. Store*, 175 NLRB 337, 340 (1969). Simply because the Federal Rules contain a summary judgment provision does not make those rules "applicable when a motion is made for summary judgment pursuant to the authority of the Board's Rules and decisions." *Krieger-Ragsdale & Co., Inc.*,

159 NLRB at 495. In fact, the Board has no provision comparable to Rule 56(e) under which a moving party can set forth its version of the facts and the other party must either admit or controvert with specific facts. *KIRO, Inc.*, 311 NLRB 745, 746 (1993). Indeed, the Board has noted “that it would be impracticable for the Board to follow Rule 56(e) because unlike Federal courts, the Board has never allowed prehearing discovery.” *Id.* at 746 n. 4.

Because its rules do not provide for pre-trial discovery, the Board has held that summary judgment proceedings are governed by the Board’s Rules and Regulations, and not by the Federal Rules of Civil Procedure. *Id.* Thus, it is well settled that the General Counsel is not required to set forth precise facts through affidavits or other documentary evidence to show that a genuine issue for hearing exists. *Id.* at 746; *United States Postal Service*, 311 NLRB 254 n. 3 (1993). Instead, the General Counsel can simply rely upon the unfair labor practice allegations in the Complaint, Respondent’s denial of these allegations in its Answer, and general averments that factual issues exist requiring a hearing. *KIRO, Inc.*, *supra* at 745-746, 745 n. 3; *United States Postal Service*, *supra* at 254 n. 3. Accordingly, because Respondent has denied the substantive allegations in the Complaint that it unilaterally ceased accommodating employees with medical overtime restrictions and placed employee Ricky Phillips in inactive status pursuant to this change, genuine issues of material fact exist and summary judgment is inappropriate.

Consequently, Respondent’s Motion for Summary Judgment should be denied.

III. Conclusion

Respondent’s denials of the Complaint allegations are sufficient to preclude summary judgment. Additionally, there are significant factual disputes as General Counsel plans to introduce evidence at trial disputing the assertions set forth in Respondent’s Motion. Based on

the foregoing, the General Counsel respectfully requests Respondent's Motion for Summary Judgment be denied.

Dated: August 7, 2013



BRADLEY A. FINK, COUNSEL FOR THE
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NATIONAL LABOR RELATIONS BOARD
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SAINT LOUIS, MO 63103-2829

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CERTIFICATE OF SERVICE

Pursuant to the National Labor Relations Board's Rules and Regulations, Section 102.114, a true and correct copy of the foregoing Counsel for the General Counsel's Opposition to Respondent's Motion for Summary Judgment was served via electronic mail on this 7th day of August 2013, on the following parties:

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**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 14**

ABB INC.

Case 14-CA-099392

and

**LOCAL 2379, UNITED AUTOMOBILE,
AEROSPACE AND AGRICULTURAL
IMPLEMENT WORKERS OF AMERICA**

COMPLAINT AND NOTICE OF HEARING

This Complaint and Notice of Hearing is based on a charge filed by Local 2379, United Automobile, Aerospace and Agricultural Implement Workers of America (the Union). It is issued pursuant to Section 10(b) of the National Labor Relations Act, 29 U.S.C. § 151 et seq. (the Act), and Section 102.15 of the Rules and Regulations of the National Labor Relations Board (the Board) and alleges that ABB Inc. (Respondent) has violated the Act as described below:

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A. The charge in this proceeding was filed by the Union on February 27, 2013, and a copy was served by regular mail on Respondent on March 1, 2013.

B. The first amended charge in this proceeding was filed by the Union on May 16, 2013, and a copy was served by regular mail on Respondent on May 17, 2013.

C. The second amended charge in this proceeding was filed by the Union on June 18, 2013, and a copy was served by regular mail on Respondent on June 18, 2013.

A. At all material times, Respondent has been a Delaware corporation with an office and place of business in Jefferson City, Missouri, and has been engaged in the manufacture and the nonretail sale of electrical transformers.

B. In conducting its operations during the 12-month period ending May 31, 2013, Respondent sold and shipped from its Jefferson City, Missouri facility goods valued in excess of \$50,000 directly to points outside the State of Missouri.

C. In conducting its operations during the 12-month period ending May 31, 2013, Respondent purchased and received at its Jefferson City, Missouri facility goods valued in excess of \$50,000 directly from points outside the State of Missouri.

D. At all material times, Respondent has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

At all material times, the Union has been a labor organization within the meaning of Section 2(5) of the Act.

At all material times, Matt Boyle held the position of Respondent's Human Resources Director and has been a supervisor of Respondent within the meaning of Section 2(11) of the Act and an agent of Respondent within the meaning of Section 2(13) of the Act.

A. The following employees of Respondent (the Unit) constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

All production and maintenance employees employed by the Respondent at its Jefferson City, Missouri facility, excluding all office clerical and professional employees, technical employees, salaried employees, guards and supervisors as defined in the Act.

B. Since about May 7, 1998, and at all material times, Respondent has recognized the Union as the exclusive collective-bargaining representative of the Unit. This recognition has been embodied in successive collective-bargaining agreements, the most recent of which is effective from February 13, 2012 through February 12, 2016.

C. At all times since May 7, 1998, based on Section 9(a) of the Act, the Union has been the exclusive collective-bargaining representative of the Unit.

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A. About September 17, 2012, Respondent unilaterally ceased accommodating employees with medical overtime restrictions.

B. As a result of Respondent's conduct described above in paragraph 6A, Respondent placed its employee Ricky Phillips in inactive status and refused to allow employee Phillips to work.

C. The subjects set forth above in paragraphs 6A and 6B relate to wages, hours, and other terms and conditions of employment of the Unit and are mandatory subjects for the purposes of collective bargaining.

D. Respondent engaged in the conduct described above in paragraphs 6A and 6B without prior notice to the Union and/or without affording the Union an opportunity to bargain with Respondent with respect to this conduct and/or without first bargaining with the Union to a good-faith impasse.

By the conduct described above in paragraph 6, Respondent has been failing and refusing to bargain collectively and in good faith with the exclusive collective-bargaining representative of its employees in violation of Section 8(a)(1) and (5) of the Act.

The unfair labor practices of Respondent described above affect commerce within the meaning of Section 2(6) and (7) of the Act.

As part of the remedy for the unfair labor practices alleged above in paragraph 6, the Acting General Counsel seeks an order requiring Respondent to reinstate employee Ricky Phillips to active status at his former position and to make Ricky Phillips whole for any loss of earnings and other benefits suffered as a result of the Respondent's placing him in inactive status and refusing to allow him to work.

As part of the remedy for the unfair labor practices alleged above in paragraph 6, the Acting General Counsel further seeks an order requiring reimbursement of amounts equal to the difference in taxes owed upon receipt of a lump-sum payment and taxes that would have been owed had there been no refusal to allow employee Phillips to work.

As part of the remedy for the unfair labor practices alleged above in paragraph 6, the Acting General Counsel further seeks an order that Respondent be required to submit the appropriate documentation to the Social Security Administration so that when backpay is paid, it will be allocated to the appropriate periods. The Acting General Counsel further seeks all other relief as may be just and proper to remedy the unfair labor practices alleged.

ANSWER REQUIREMENT

Respondent is notified that, pursuant to Sections 102.20 and 102.21 of the Board's Rules and Regulations, it must file an answer to the complaint. The answer must be **received by this office on or before July 10, 2013, or postmarked on or before July 9, 2013.** Respondent should file an original and four copies of the answer with this office and serve a copy of the answer on each of the other parties.

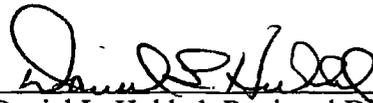
An answer may also be filed electronically through the Agency's website. To file electronically, go to www.nlr.gov, click on **File Case Documents**, enter the NLRB Case Number, and follow the detailed instructions. The responsibility for the receipt and usability of the answer rests exclusively upon the sender. Unless notification on the Agency's website informs users that the Agency's E-Filing system is officially determined to be in technical failure because it is unable to receive documents for a continuous period of more than 2 hours after 12:00 noon (Eastern Time) on the due date for filing, a failure to timely file the answer will not be excused on the basis that the transmission could not be accomplished because the Agency's website was off-line or unavailable for some other reason. The Board's Rules and Regulations require that an answer be signed by counsel or non-attorney representative for represented parties or by the party if not represented. See Section 102.21. If the answer being filed electronically is a pdf document containing the required signature, no paper copies of the answer need to be transmitted to the Regional Office. However, if the electronic version of an answer to a complaint is not a pdf file containing the required signature, then the E-filing rules require that such answer containing the required signature continue to be submitted to the Regional Office by traditional means within three (3) business days after the date of electronic filing. Service of the answer on each of the other parties must still be accomplished by means allowed under the Board's Rules and Regulations. The answer may not be filed by facsimile transmission. If no

answer is filed, or if an answer is filed untimely, the Board may find, pursuant to a Motion for Default Judgment, that the allegations in the complaint are true.

NOTICE OF HEARING

PLEASE TAKE NOTICE THAT on **August 15, 2013**, at **9 a.m.**, or as soon thereafter as you may be heard, and on consecutive days thereafter until concluded, a hearing will be conducted at **1222 Spruce Street, Room 8.302, Saint Louis, Missouri** before an administrative law judge of the National Labor Relations Board. At the hearing, Respondent and any other party to this proceeding have the right to appear and present testimony regarding the allegations in this complaint. The procedures to be followed at the hearing are described in the attached Form NLRB-4668. The procedure to request a postponement of the hearing is described in the attached Form NLRB-4338.

Dated at Saint Louis, Missouri, this 26th day of June, 2013.



Daniel L. Hubbel, Regional Director
National Labor Relations Board, Region 14
1222 Spruce Street, Room 8.302
Saint Louis, MO 63103-2829

Attachments

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 14**

ABB INC.,

Case No.: 14-CA-099392

Respondent,

and

LOCAL 2379, UNITED AUTOMOBILE,
AEROSPACE AND AGRICULTURAL
IMPLEMENT WORKERS OF AMERICA,

Charging Party.

ANSWER TO COMPLAINT

Respondent ABB, Inc. (“Respondent” or “ABB”), as and for its Answer to the Complaint and Notice of Hearing (“Complaint”) and Affirmative and Additional Defenses regarding United Automobile Aerospace and Agricultural Implement Workers of America, Local 2379 (“UAW” or the “Union”), denies every thing, matter and allegation in the Complaint, except as specifically admitted, and further states and alleges as follows:

1. In answering paragraph 1 of the Complaint, Respondent states that:
 - A. Respondent admits the allegations contained in paragraph 1(A) of the Complaint.
 - B. Respondent admits the allegations contained in paragraph 1(B) of the Complaint.
 - C. Respondent admits the allegations contained in paragraph 1(C) of the Complaint.

2. In answering paragraph 2 of the Complaint, Respondent states that:
- A. With respect to the allegations contained in paragraph 2(A) of the Complaint, Respondent admits it is a Delaware corporation and maintains an office and place of business in Jefferson City, Missouri where it engages in, among other things, the manufacture and nonretail sale of electrical transformers. Respondent denies each and every remaining allegation contained in paragraph 2(A) of the Complaint.
 - B. With respect to the allegations contained in paragraph 2(B) of the Complaint, Respondent states it has sold and shipped goods valued in excess of \$50,000 to customers located outside of the State of Missouri in the 12-month period ending May 31, 2013. Respondent denies each and every remaining allegation contained in paragraph 2(B) of the Complaint.
 - C. With respect to the allegations contained in paragraph 2(C) of the Complaint, Respondent admits it has purchased and received goods valued in excess of \$50,000 from suppliers located outside of the State of Missouri. Respondent denies each and every remaining allegation contained in Paragraph 2(C) of the Complaint.
 - D. The allegations contained in paragraph 2(D) of the Complaint call for a legal conclusion and require no response from Respondent. To the extent a response is required, Respondent admits the allegations contained in paragraph 2(D) of the Complaint.

3. The allegations contained in paragraph 3 of the Complaint call for a legal conclusion and require no response from Respondent. To the extent a response is required, Respondent admits the allegations contained in paragraph 3 of the Complaint.

4. The allegations contained in paragraph 4 of the Complaint call for a legal conclusion and require no response from Respondent. To the extent a response is required, Respondent states Matt Boyle is employed as the Human Resources Manager at the Jefferson City facility. Respondent denies any and all remaining allegations contained in paragraph 4 and puts the Charging Party and General Counsel to their strictest proof thereof.

5. In answering paragraph 5 of the Complaint, Respondent states that:

A. The allegations contained in paragraph 5(A) of the Complaint call for a legal conclusion and require no response from Respondent. To the extent a response is required, Respondent denies the allegations contained in paragraph 5(A) and specifically directs the Region to Article I of the collective bargaining agreement between Respondent and the Union.

B. The allegations contained in paragraph 5(B) of the Complaint call for a legal conclusion and require no response from Respondent. To the extent a response is required, Respondent admits Respondent and the Union are parties to the Agreement and further avers the Agreement speaks for itself. Respondent denies any and all remaining allegations contained in paragraph 5(B).

C. The allegations contained in paragraph 5(C) of the Complaint call for a legal conclusion and require no response from Respondent. To the extent a response is required, Respondent admits Respondent and the Union are

parties to the Agreement and further avers the Agreement speaks for itself.

Respondent denies any and all remaining allegations contained in paragraph 5(C).

6. Respondent denies the allegations contained in paragraph 6 of the Complaint and puts the Charging Party and General Counsel to their strictest proof thereof. In answering the remaining subparts of paragraph 6 of the Complaint, Respondent states that:

- A. Respondent denies the allegations contained in paragraph 6(A) of the Complaint.
- B. Respondent denies the allegations contained in paragraph 6(B) of the Complaint.
- C. The allegations contained in paragraph 6(C) of the Complaint call for a legal conclusion and require no response from Respondent. To the extent a response is required, Respondent denies the allegations contained in paragraph 6(C) of the Complaint.
- D. Respondent denies the allegations contained in paragraph 6(D) of the Complaint.

7. The allegations contained in paragraph 7 of the Complaint call for a legal conclusion and require no response from Respondent. To the extent a response is required, Respondent denies the allegations contained in paragraph 7 of the Complaint and puts the Charging Party and General Counsel to their strictest proof thereof.

PRAYER FOR RELIEF: PARAGRAPH 8

8. The Complaint's paragraph 8 is a Prayer for Relief provision and contains allegations to which a response is not required. To the extent a response is required, Respondent denies the allegations contained in paragraph 8 of the Complaint, denies that Charging Party is entitled to any relief whatsoever, and further denies that it has committed any unlawful or wrongful act with respect to Charging Party.

AFFIRMATIVE AND ADDITIONAL DEFENSES

1. The Complaint fails to state a claim upon which relief may be granted.
2. The Complaint is barred due to the Regional Director's failure to effectuate proper service of the Complaint upon the Respondent.
3. The claims alleged in the Complaint are barred in whole or in part because the allegations upon which they are based are insufficient to state any violations of the Act.
4. The claims alleged in the Complaint are beyond the Regional Director's authority, jurisdiction and power and are therefore barred in whole or in part because the claims do not comport with the Collective Bargaining Agreement, are against public policy, and they manifestly disregard the law.
5. The claims alleged in the Complaint are barred in whole or in part under the equitable doctrines of waiver and estoppel.
6. The claims alleged in the Complaint are barred in whole or in part under the equitable doctrine of unclean hands in that they arise out of frivolous charges filed by the Union without foundation in law or fact and for vexatious and improper purposes.
7. The claims alleged in the Complaint are barred in whole or in part because the allegations upon which they are based are expressly permitted under federal law.

8. The claims alleged in the Complaint are barred in whole or in part by Section 8(c) of the Act.

9. The claims alleged in the Complaint are barred in whole or in part because they were not encompassed within the underlying charges and any amendments thereto.

10. The claims alleged in the Complaint are barred in whole or in part because they purport to allege what would amount to *de minimis* violations of the Act that would be, if proven, without a remedy that would further the purposes of the Act.

11. The Complaint has been issued, in whole or in part, without substantial justification.

12. Respondent alleges that the relief requested in the Complaint is inappropriate as a matter of law.

13. The employment decisions about which the General Counsel complains were based on reasonable factors and not discriminatory or retaliatory animus.

14. Respondent, at all times relevant to this action, has acted in good faith toward the Union and acted in compliance with all applicable laws.

15. Any action taken by Respondent was reasonably necessary for the normal operation of its business and was based on legitimate business reasons and not discriminatory or retaliatory animus.

16. The claims alleged in the Complaint are barred in whole or in part because the parties were actively engaged in bargaining.

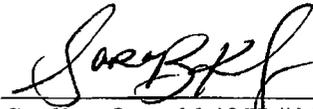
17. Pending the conclusion of further discovery and investigation, Respondent respectfully reserves the right to add such further or supplemental defenses as may be warranted by the information developed through discovery and proper to the full defense of this litigation.

WHEREFORE, Respondent respectfully requests the Court grant the following relief:

18. Judgment be entered dismissing the Complaint on the merits and with prejudice in its entirety; and

19. Directing such other relief as the Board deems just and equitable.

Date: July 10, 2013



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**ATTORNEYS FOR RESPONDENT,
ABB, INC.**

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 14**

ABB INC.,

Case No.: 14-CA-099392

Respondent,

and

LOCAL 2379, UNITED AUTOMOBILE,
AEROSPACE AND AGRICULTURAL
IMPLEMENT WORKERS OF AMERICA,

Charging Party.

CERTIFICATE OF SERVICE

I hereby certify that on the 10th day of July, 2013, I electronically filed the foregoing **ANSWER TO COMPLAINT** with the National Labor Relations Board using the agency's website (www.nlr.gov). I also certify that I have served said **ANSWER TO COMPLAINT** via e-mail to the following party to this action:

Gerald Kretmar
kretmar@sbcglobal.net
Counsel for Local 2379

Dated: July 10, 2013



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