

**BEFORE THE
NATIONAL LABOR RELATIONS BOARD**

REGENCY HOUSE OF)	
WALLINGFORD, INC.)	CASE NOS. 34-CA-9895
)	34-CA-9915
Respondent)	34-CA-10101
)	34-CA-10075
)	
-and-)	
)	
INTERNATIONAL CHEMICAL)	
WORKERS UNION COUNCIL/)	
UFCW, LOCAL 560C,)	
)	
Charging Party)	

**CHARGING PARTY UNION’S MOTION TO STRIKE CERTAIN OF RESPONDENT’S
EXCEPTIONS TO JUDGE McCARRICK’S SUPPLEMENTAL DECISION AND
ORDER AND CERTAIN PORTIONS OF RESPONDENT’S SUPPORTING
MEMORANDUM OF LAW**

Now comes the Charging Party, the International Chemical Workers Union Council, Local 560C, of the United Food and Commercial Workers (“Union”), by and through the undersigned counsel, and hereby moves and respectfully requests that the Board strike certain of Respondent’s exceptions to Judge McCarrick’s Supplemental Decision and Order and certain portions of Respondent’s memorandum in support of those exceptions, as more fully explained and for the reasons set forth in the accompanying memorandum, which is incorporated into this motion by reference.

MEMORANDUM IN SUPPORT OF MOTION TO STRIKE

- A. Since Respondent did not timely raise, or substantiate, its exceptions and arguments that Judge Edelman was biased based on any previously-alleged adversarial relationship, or based on any “copying” by Judge Edelman from General Counsel’s brief when he drafted his Decision and Order, its related exceptions and memorandum provisions should be stricken.

As a review of “Respondent’s Post-Hearing Brief” to Judge Edelman in this case, as well as the transcript of the hearing before Judge Edelman, establishes, Regency House did *not* raise before Judge Edelman that he should recuse himself from this case based on some alleged bias that Judge Edelman had against Regency House’s attorney and witness, Arthur Kaufman, because they *allegedly* were opposing counsel in a case that led to the Board’s decision in Deblin Manufacturing Corp., 208 NLRB 392 (1974), nearly 33-years ago, nor did Respondent request a continuance of the Edelman hearing, nor attempt an interim appeal to the Board seeking such a recusal.^{1/} However, in Footnote 3 in “Respondent’s Brief in Support of Exceptions to the Administrative Law Judge’s [Edelman’s] Decision” filed with the Board on or about March 7, 2003 (“Decision”), Regency House belatedly somewhat attacked Judge Edelman on that basis, though it filed no exception to the Decision directed to that particular point:

“^{3/} It bears noting that Kaufman, senior partner of Respondent’s Counsel and a witness in this action, was trial counsel for the employer in Deblin. The ALJ in the case at bar, ***believed to be*** Kaufman’s adversary in Deblin was, if not, at the very least a lead trial counsel ***for the Region*** that handled Deblin. Certainly, the ALJ was familiar with Deblin (Respondent also cited to Deblin in its post-hearing brief), yet apparently refused to consider same, failed to explain why he did not consider same and went to great lengths to question Kaufman’s credibility.”

(emphasis added). Obviously, as this passage reflects, even Regency House’s current counsel -- a

^{1/}Since the briefs cited herein previously were filed at various stages of this case, the Board is requested to take administrative notice of those documents. SNE Enterprises, Inc., 348 NLRB No. 69n.6 (2006); Catholic Healthcare Wear, 344 NLRB No. 93 (2005).

member of Kaufman's firm at the time of the Edelman hearing -- still could *not* even **confirm** that Edelman took *any* active part in the Deblin litigation, even though it "believed" that Edelman was Kaufman's "adversary," or at least a lead trial counsel for that Region, even if he wasn't specifically on the Deblin case. Indeed, Regency House failed to support its allegation of Edelman's alleged involvement in Deblin, or his general bias toward Kaufman, with *any* evidence. Significantly, Respondent has not even submitted *evidence* to substantiate that its own counsel and witness, Attorney Kaufman, was an attorney in the Deblin case, let alone substantiate Judge Edelman's involvement, if any, or degree thereof, in the Deblin case. Respondent's failures were promptly pointed out to it by the Union.

On or about April 7, 2003, the Charging Party in the "Union's Brief in Opposition to Respond to Company's Exceptions" at p. 33n.31 challenged the purported underlying basis for Regency House's attack on Judge Edelman:

³¹In Respondent Brief at 9n.3, Respondent implies that Judge Edelman may have been biased since he allegedly was one of the attorneys for General Counsel in a 1974 case. The official report of that case, Deblin Mfg. Corp., 208 NLRB 392 (1974), and the LRRM cite do not identify the parties' attorneys, nor has an FOIA request been able to establish those attorneys. (Appendix B). Consequently, the Respondent has failed to even establish that Judge Edelman was an attorney in that case nearly thirty years ago, nor that such representation necessarily would result in any bias on his part now.

Furthermore, Respondent's accusation that Judge Edelman 'in essence defrauded Respondent,' Respondent Brief at 13, is outrageous. Respondent legitimately may disagree with his legal rulings. But for it to make such an accusation should be unacceptable and it should be strongly admonished for having done so. Respondent did not ask for a continuance, nor attempt an interim appeal to the Board regarding Judge Edelman's evidentiary rulings. Thus, its right to now raise any 'prejudice' that Respondent *may* have suffered (if any) has been waived, particularly since there are no exceptions on the matter."

Despite having been put on notice by the Union's opposition to its exceptions to the Board that it

failed to establish that Judge Edelman had *any* active involvement in the Deblin litigation, Regency House thereafter *continued* to make unsubstantiated factual assertions -- and drew questionable conclusions -- from these underlying unsubstantiated “facts” in its effort to delay final resolution of the pending Complaint through its continued, unsubstantiated denigration of Judge Edelman when it filed its September 28, 2006, letter brief with Judge McCarrick, expanding its argument, now accusing Judge Edelman of a “preconceived and concocted credibility finding with regard to Kaufman, thereby exhibiting a level of partiality and unfairness which warrants the dismissal of General Counsel’s Complaint....,” again referring to an alleged, unsubstantiated “long history” between Judge Edelman and Kaufman in the Deblin case, *i.e.*, Deblin Mfg. Corp., 208 NLRB 392 (1974).^{2/}

Neither the official report of the Deblin case, nor the “LRRM” citation, establish *who* the General Counsel’s (or the employer’s) attorneys were in the Deblin case, either before Judge Joel Harmatz, or before the Board, nor did Regency House submit any documentation to Judge McCarrick, or to opposing counsel (as it would be required to do), from which an appropriate official, administrative, or judicial notice of the involvement, *if any*, of *either* Judge Edelman, *or* Attorney Kaufman, in the Deblin proceedings could be taken. *See, e.g.*, Rule 201(d) of the Federal

^{2/}Curiously, Attorney Kaufman did not appear to challenge, or raise this “long history,” when Judge Edelman found in his client’s favor on one portion of the complaint in Korns Bakery, 326 NLRB 1083, 1088n.2, 1091 (1998), holding that certain discussions were settlement, rather than bargaining, discussions, nor when Judge Edelman praised Attorney Kaufman in this case as being “eminently qualified in all aspects of labor and employment law” and as being “extremely well versed in National Labor Relations Board law.” (T. 501). Nevertheless, this case is not the first time that a judge had credited the General Counsel’s, or union’s witness, over Kaufman. Judge D. Barry Morris, whose credibility determinations were not reversed, though his legal conclusions were, also did not accept Kaufman’s version of a negotiating meeting. *See, AMF Trucking & Warehouse, Inc.*, 342 NLRB No. 116n.1, slip. op. p. 5 (2004). The Union is unaware of any long, adversarial history between Kaufman and Judge Morris.

Rules of Evidence. The Union, despite its earlier objections, still has been provided with **no** proof that *either* attorney was involved in the Deblin case. Moreover, despite the Union's FOIA request, it has not been able to independently establish who *any* of the attorneys were in the Deblin case. The Union again pointed this out to Respondent in the September 29, 2006, "Charging Party Union's Supplemental Brief" at p. 57-58n.35 and Appendix "B" thereto.^{3/}

Nevertheless, after the Board's remand of this case, Respondent belatedly, but effectively, has excepted to Judge McCarrick's November 21, 2006 Supplemental Decision based in part on an alleged, but again unsubstantiated, adversarial relationship with Attorney Kaufman.^{4/} Respondent continues to contend that this alleged, but unsubstantiated, adversarial relationship establishes actual bias by Judge Edelman and, in turn, establishes that Judge McCarrick erred by accepting Judge Edelman's credibility findings. Respondent also attempts to challenge the Supplemental Decision by belatedly attempting to establish such actual bias by Judge Edelman based on his "copying" from General Counsel's brief when Judge Edelman drafted his Decision and Order, even though

^{3/}Any belated attempt now to submit such "proof" as to who those attorneys were, or request administrative notice of these *alleged* "facts," via a mere affidavit without *official* documentation should be rejected and would be insufficient to support any claim to take administrative notice. *See*, F.R. Ev., Rule 201(d). Nevertheless, if Respondent belatedly makes such an attempt, the Board should reject any such proffer, since it would now deny the Union the right to attempt to challenge such affidavit, either through cross-examination of the affiant, and/or the examination of Howard Edelman, which -- absent reliance on official documents "whose accuracy cannot reasonably be questioned" -- the Union would seek to pursue, either at hearing on via a deposition, and it would so request such right of examination, if necessary, to establish which attorneys were active in the Deblin case. *See*, NLRB Rules 102.30 and 102.118. However, at this late date, the Board should not entertain any proffer on this matter from Respondent, thereby making the Union's request unnecessary and moot.

^{4/}By continuing to make such unsubstantiated allegations, Regency House has contributed to the Board's continued delay in being able to expeditiously finally resolve this case and, as such, the Union's request for fees and costs is appropriate, even if some of the delay is due to the Board's own processes.

Respondent filed no such timely exception in 2003 to Judge Edelman's Decision. *See, e.g.*, "Respondent's Exceptions to the Administrative Law Judge's [McCarrick's] Decision" at Exception Nos. 8, 9, 10, 15, 35, 39.

Throughout its memorandum of law in support of its Exceptions to Judge McCarrick's Supplemental Decision, Respondent continues repeatedly to assert -- without substantiation -- that Judge Edelman was actually biased against Respondent because Judge Edelman *allegedly* was an attorney for the General Counsel nearly 33-years ago in the Deblin case and that Attorney Kaufman was his adversary in that case. Respondent seeks a new trial *de novo* based, in part, on this alleged adversarial relationship. Also, throughout its memorandum, Respondent belatedly seeks a new trial based upon Judge Edelman's "copying" too much from General Counsel's brief when drafting his Decision, even though it filed no timely exception in 2003 to the Edelman Decision.

NLRB Rule 102.46(g) provides that "No matter not included in exceptions or cross-exceptions may thereafter be urged before the Board, or in any *further* proceeding." (emphasis added). Such a "further" proceeding would include the instant appeal. Since Respondent did not timely except to Judge Edelman's Decision based on any purported actual bias by Judge Edelman based on this *purported* adversarial relationship, nor did it establish actual bias based on any such adversarial relationship, nor did it timely except to Judge Edelman's Decision based upon the alleged "copying" from General Counsel's brief, Respondent may not under this Rule urge such arguments now in support of its Exceptions to the Supplemental Decision, particularly since the Board held in its unappealed decision that Judge Edelman conducted his hearing properly. *See, Regency House of Wallingford, Inc.*, 347 NLRB No. 15 (2006). Consequently, any such exception to the Supplemental Decision, or any portion of Respondent's supporting memorandum that raises such

matters, should be stricken as being in violation of this Rule.

Having failed to even establish that Judge Edelman was a trial counsel in the Deblin case for the General Counsel -- or even an attorney for NLRB Region 29 in 1974 -- or that Attorney Kaufman was counsel for that respondent, Regency House should not now be permitted to belatedly -- and repeatedly -- advance those unsubstantiated "facts" to attack Judge Edelman's overall character, allege that he was generally and actually biased against Attorney Kaufman and his clients, even calling him dishonest, or attack how he handled the hearing in this case, particularly given the Board's finding that Judge Edelman conducted the hearing "properly." *Id.*

B. Respondent's accusation that General Counsel's witness, Lori Carver, who remains an incumbent employee, "falsely" testified should be stricken as being unsubstantiated.

In the March 7, 2003, "Respondent's Brief in Support of Exceptions to the Administrative Law Judge's [Edelman's] Decision" at p. 45, Respondent accused the Union's Unit Vice President and still-incumbent employee, Lori Carver, of "falsely" testifying about the Union's September 14, 2001, information request and Respondent's "response" thereto, effectively accusing Carver of lying:

"Carver's testimony that Respondent never responded to her September 14, letter is false. (Tr. 152). The testimony demonstrates that Respondent put forth an 'honest effort to provide whatever information is requested as promptly as circumstances allow.'"

Respondent has continued nearly 4-years later to make those same accusations that Carver essentially lied and gave "false" testimony in its January 3, 2007, "Memorandum of Law in Support of Respondent's Exceptions to the Administrative Law Judge's [McCarrick's] Decision" at 42.

Contrary to Respondent's accusation, a review of the transcript pages relied on by Respondent clearly establishes that Carver did **not** testify that Regency House did **not** "respond" to the Union's September 14, information request. Instead, Carver testified to just the opposite:

“Q. Okay. Okay. You now have [General Counsel] 27(a) in front of you [the Company’s response to her September 14 information request]. Did you receive that document?”

Carver: *Yes, I did.*

Q: Did Regency House ever *supply* to you or anyone else from the Union any of the information referenced in either 27 or 27(a)?

Carver: No.

Q: Did they ever explain to you why not?

Carver: No.”

(T. 151-52)(bracketed material and emphasis added). Clearly then, Carver did *not* testify that Respondent failed to “**respond**” to the September 14 information request; she testified that Regency House did not “**supply**” the information requested in that letter. Indeed, Carver clearly and truthfully readily acknowledged receiving General Counsel Exhibit 27(a) -- the October 11, 2001, so-called “partial response” from Respondent to Carver’s September 14 information request. (GC-27A; T. 151-52). Even a quick review of Respondent’s “partial response” (GC-27A) shows that this “response” did not “supply” the information requested. Significantly, “responding” and “supplying” are two different concepts.

Curiously, Respondent failed to cite to *any* portions of the transcript to support its contention that the testimony demonstrated that it put forth an “honest effort to provide whatever information is requested as promptly as circumstances allow.” Nevertheless, regardless of whatever efforts were made by Respondent to “supply” the requested-information, it is undisputed that Respondent *never* “**supplied**” any of the information requested in the September 14th letter. (T. 151-52). That is what Carver was asked about and that is what her testimony addressed.

Respondent has seriously mischaracterized the Record and misled this Board regarding Carver's testimony, when it *again* repeatedly slanders and accuses her of providing "false" testimony; she provided no such "false" testimony and the Record is clear on that matter. Given Respondent's unlawful denigration of the Union throughout 2001, as found by both Judges Edelman and McCarrick, the Board should not permit Respondent to continue to slander the Union's highest-ranking official at the Facility, Lori Carver, and, therefore, it should strike such denigrating and slanderous accusations from Respondent's memoranda.

C. Additional portions of Respondent's memorandum in support of its exceptions to Judge McCarrick's Supplemental Decision regarding Carver's testimony should be stricken.

In its memorandum in support of its exceptions to the Supplemental Decision at 42, Respondent contended, regarding Carver's request for verbal and written warnings issued to unit employees at the Facility (GC-30), that:

"Carver admitted her request was not tailored to the information she truly needed, indicating that the request was unreasonable (Tr.: 359)."

However, a careful review of this portion of Carver's testimony does *not* reflect any such admission by Carver; indeed, as with her other testimony discussed above, her testimony also reflects the opposite of what Respondent accuses her of saying:

“Q: BY MR. HOWARD: In about December, 2001, a request was made for every verbal and written warning made in the facility since 1999, correct?

Carver: I don't think it was December.

Q No, whatever it is exactly. I don't want to mischaracterize it. It was the November 4th letter, GC-30, every verbal and written warning given in the last two years.

Carver: That's right.

Q: Weren't you specifically interested in tardiness, absenteeism, things of that nature?

Carver: *For the most part*, that's what I was looking for, yes.

Carver: But you didn't restrict the request in that fashion?

Carver: No.

Q: Did you care if people were disciplined for abuse of patients, the theft of patient property?

Carver: *Yes. If it meant a further grievance coming up the road.*

Carver: Do you think there would be a grievance from 1999 for abuse of a patient, on November 4th, 2001?

Carver: No.

Carver: Did you ever offer to tailor the request a little bit, to make it more reasonable to the facility?

JUDGE EDELMAN: This is when?

MR. HOWARD: November 4th, 2001.

CARVER: I was never called and asked if I could, you know, Bill could have called me and said, you know, can I just give you the warnings from this or that, you know. He didn't ask if he could simple it."

(T. 359-60)(emphasis added).^{5/} Under the then-current CBA, Article 31, Section D, a record of disciplinary action shall be removed from an employee's personnel file 18 months after being issued, provided no further disciplinary action has been taken during those 18 months. A record of disciplinary action due to resident abuse shall not be removed at any time from the personnel file.

^{5/}Carver more-fully explained her request for this information elsewhere in her testimony, none of which supported Respondent's contention. (T. 156-58). Unit employee Linda Cox corroborated Carver's testimony. (T. 249-50). As a review of these portions of the transcript reflect, the justification for seeking the verbal and written warnings included ascertaining whether the attendance rule was being applied uniformly.

(GC-2 at 26). Under that CBA, even verbal warnings were documented. (T. 267). Thus, when Carver testified that she was requesting information regarding verbal and written warnings for the past two years, because of her concern about possible discipline “up the road” and also since she needed to ascertain whether the attendance policy was being applied uniformly, it is obvious that she was concerned in part about the use of past discipline for *any* infraction that could be used to possibly increase the *degree* of possible future discipline “up the road;” whether such past discipline had, or had not, been properly removed from the personnel file as required; and whether the Union might grieve future discipline based on past, discriminatory application of the Company’s policy.

Nevertheless, it is clear that, contrary to Respondent’s accusations, Carver did not admit that her information request was not tailored to what she really needed, nor did she admit that her information request was unreasonable. Consequently, the portion of Respondent’s memorandum, where it *again* seriously and improperly mischaracterizes Carver’s testimony, should be stricken. Seen in context with all of its other improper actions, Respondent’s misrepresentation of Carver’s testimony crosses-the-line and constitutes something more than just an acceptable lawyer’s “spin” on the evidence.

CONCLUSION

For the reasons stated above, the Charging Party’s motion to strike should be granted and the Board should take this matter into account when considering the Union’s request for expenses in its cross-exceptions.

Respectfully submitted,

s/Randall Vehar

Randall Vehar (Ohio Bar No. 0008177)
UFCW Assistant General Counsel/
Counsel for ICWUC Local 560C
1799 Akron Peninsula Road
Akron, OH 44313
330/926-1444 Ext. 146
330/926-0950 FAX
RVehar@UFCW.org

Robert W. Lowrey (Ohio Bar No. 0030843)
UFCW Assistant General Counsel/
Counsel for ICWUC Local 560C
1799 Akron Peninsula Road
Akron, OH 44313
330/926-1444 Ext. 138
330/926-0950 FAX
RLowrey@UFCW.org

Attorneys for the Charging Party

CERTIFICATE OF SERVICE

I hereby certify that on January 25, 2007, two copies of the foregoing, having been properly addressed, have been sent by regular U.S. mail:

Richard M. Howard, Esq.
Jeffrey A. Meyer, Esq.
KAUFMAN DOLOWICH SCHNEIDER BIANCO & VOLUCK, LLP
135 Crossways Park Drive, Suite 201
Woodbury, NY 11797

Counsel for Respondent

Margaret A. Lareau, Esq.
Queslyah S. Ali, Esq.
National Labor Relations Board
Region 34
280 Trumbull Street
21st Floor
Hartford, CT 06103-3599

Counsel for the General Counsel

s/Randall Vehar
Randall Vehar, Esquire