UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

Ralphs Grocery Company **and** **UNITED FOOD AND COMMERCIAL WORKERS UNION, LOCAL 324**	**Case No. 21-CA-039867**

Ralphs Grocery Company's Answering Brief to Charging Party's Exceptions

Timothy F. Ryan, Esq.
Aurora V. Kaiser, Esq.
Morrison & Foerster LLP
707 Wilshire Blvd., Suite 6000
Los Angeles, CA 90017-3543
(213) 892-5388 (phone)
(213) 892-5454 (fax)

Attorneys for the Respondent
Ralphs Grocery Company

la-1216032

I.
INTRODUCTION

United Food and Commercial Workers Union, Local 324 (the "Union" or the "Charging Party") filed exceptions to the decision of the administrative law judge (ALJ), arguing that Ralphs Grocery Company ("Ralphs") should reimburse it for fees it paid to the arbitrator and court reporter in the underlying arbitration. The Union makes a single argument: The Retail Food, Meat, Bakery, Candy and General Merchandise Agreement between the Union and Ralphs, among others (hereinafter, the "CBA") requires the "loser in a grievance" to pay the arbitrator's fees and since the ALJ did not defer to the Arbitrator, the Union is "no longer the losing party." (Brief In Support Of Charging Party's Exceptions to Administrative Law Judge's Decision, at 2 (hereinafter "Charging Party Brief").) The Union bases this argument on the following language that it quotes from the CBA: "The mediator/arbitrator's fees shall be borne by the loser in a grievance in which he is required to render a final and binding arbitral decision." (*Id.*) The Union seeks a total of $5,935.65, made up of "$4,535.20 in arbitrator fees and $1,400.45 in court reporter fees." (*Id.*) But this issue was not included in the Statement of Position required by section 102.35(a)(9) of the Board's Rules and Regulations and only raised before the ALJ for the first time in the Conclusion section of the Charging Party's brief to the ALJ.

Under the applicable CBA, the "loser" of the arbitration bears the costs of arbitration. The Union lost the arbitration. Under the plain interpretation of this provision, the Union should bear the fees of arbitration, notwithstanding the fact that the ALJ later refused to defer to the Arbitrator's Award. Although the Respondent has never had the opportunity to respond to this argument because it was never raised before the ALJ, he Union has a different interpretation of the provision than the Respondent. This dispute over the meaning and interpretation of the CBA is a matter for the parties agreed-upon dispute resolution provisions in their CBA and is not a

matter for the Board to resolve. Further, were the Board to consider the Union's last minute argument, which is not supported by the General Counsel, it would violate Ralphs' due process rights in the absence of a fair hearing establishing the facts upon which the proper interpretation of the relevant section of the CBA could be made.

II.
RELEVANT FACTS

The CBA requires the "loser" in an arbitration involving discharge to bear the costs of arbitration. The Union bases its argument on the following language: "The mediator/arbitrator's fees shall be borne by the loser in a grievance in which he is required to render a final and binding arbitral decision."

Ralphs' terminated Mr. Razi in May, 2011. The Union filed a Charge on July 1, 2011. The matter of Mr. Razi's termination was arbitrated, and a hearing was held on February 1, 2012, before Arbitrator Charles A. Askin. The Union lost the arbitration, with Arbitrator Askin concluding that Ralphs had just cause under the CBA to terminate Mr. Razi. (*See generally* Joint Stipulation of Facts ("Stip."), Exh. 11.) The arbitration fees issue was not before the Arbitrator and the Arbitrator took no testimony or evidence on the appropriate allocation of fees. (*Id.*, Exhibit 11 (including attached exhibits).) The only evidence in the record on the issue of arbitration fees is the section of the CBA. (*Id.*) The parties stipulated to the facts before the ALJ, rather than holding an evidentiary hearing. (*See* Stip.) The Union did not reveal its intent to seek arbitration fees under the terms of the CBA or to have the ALJ interpret the terms of its CBA in its Statement of Position or otherwise. Indeed, as the ALJ explained, "In its brief the Union requests, *for the first time*, that the Company also be ordered to pay its ... costs for the arbitration of Razi's grievance." (ALJ Decision at 11:19-23.) Nor did the Union present, or even seek to present, any evidence on the fee issue before the ALJ. (*See id.*)

Ultimately, the Arbitrator did not order any party to pay the arbitrator's fees. (*Id.*, Ex. 11). Nor did the Administrative Law Judge decide the fees issues, concluding instead that the matter was best left to be addressed by the Board "after a full briefing by all parties". (*Id.*)

The Union has filed an exception to the ALJ's conclusion that the matter was best left to be addressed by the Board.

III.
ARGUMENT

A. Even if the Board Were to Base its Ruling Solely on the Language Quoted in the Union's Brief, it Should Not Order Ralphs to Pay Arbitration Fees.

The Union quotes only one sentence from the CBA: "The mediator/arbitrator's fees shall be borne by the loser in a grievance in which he is required to render a final and binding arbitral decision." (Charging Party Br. at 2 (quoting CBA Art. 12, Section C(1)(a)).) The CBA is silent on what happens if an ALJ later declines to defer to the arbitrator's decision.

The Union concludes that "now the that the ALJ has ruled that the Company committed unfair labor practices and ordered reinstatement and backpay for the affected employee, the Union is no longer the losing party." (Charging Party Br. at 2.) But that language from the CBA does not—by its own terms—support this conclusion. The CBA requires the loser *of the arbitration* to pay the expenses. The Union lost the Arbitration and is still "the loser in a grievance in which [the Arbitrator was] required to render a final and binding arbitral decision." Under the plain language of the CBA, the Union's exceptions should be denied.

B. Under Due Process, Ralphs Cannot Be Required to Pay the Fees Absent a Fair Hearing.

Under due process, "the Board may not make findings or order remedies on violations not charged in the General Counsel's complaint or litigated in the subsequent

hearing." *NLRB v. Blake Constr. Co.*, 663 F.2d 272, 279 (D.C. Cir. 1981). Due process only allows the Board to decide an issue that was "fairly tried by all the parties" before the Administrative Law Judge. *McClatchy Newspapers v. NLRB*, 131 F.3d 1026, 1036 (D.C. Cir. 1997). Further, "in all circumstances, a respondent has a basic right to adequate notice of the material issues to be tried and to full and fair litigation of those issues." *Castaways Hotel and Casino*, 284 N.L.R.B. 612, 614 (1987).

There are two reasons that the Board should deny the Union's exceptions: *First,* Ralphs did not have notice of the Union's claim. *Second*, there has been no evidentiary hearing on the meaning of the CBA in this context.

1. The General Counsel Did Not Seek this Remedy and Ralphs Had No Notice of the Remedy.

The General Counsel did not seek this remedy on behalf of the Union, but sought only remedies on behalf of Mr. Razi, including reinstatement and back wages. And the Union did not give Ralphs any advance notice that it intended to seek reimbursement of arbitration expenses. Ralphs had no fair notice that the Union would seek reimbursement under a theory based on the terms of the CBA or otherwise. The Board should reject the Union's Exception on this basis alone. Anything less would violate Ralphs' due process rights. *See, e.g., Blake Constr. Co.*, 663 F.2d at 279; *McClatchy Newspapers v. NLRB*, 131 F.3d at 1036.

2. There Has Been No Evidence on the Meaning of the Term "loser" Under the CBA.

Further, to the extent that the Union argues that the CBA means anything different than its plain meaning, then Ralphs is entitled to a hearing on the factual question of the meaning of the governing language. This would require resolution of an important and untried factual question: What is the meaning of the term "loser" as it is used in the CBA? Ralphs never had an opportunity to present evidence on this question before the Arbitrator or the ALJ, as it was not raised until the Union raised the

issue in the Conclusion to its brief before the ALJ "for the first time." (ALJ Decision at 11:19.)

According to the Union, the CBA states that the fees "shall be borne by the loser in a grievance." (Charging Party Br. at 2 (quoting CBA).) The Union argues that because "the ALJ has ruled that the Company committed unfair labor practices..., the Union is no longer the losing party." (*Id.*)

This question was not "fairly tried by all the parties." First, the issue simply was not litigated at the hearing before the Arbitrator or tried, let alone fairly tried, before either the Arbitrator or the ALJ. Neither the ALJ nor the Arbitrator decided which party should pay the fees of the arbitration. Nor did either one consider the meaning of the term "loser" or the applicability of the CBA to a situation where one party *loses* an arbitration to which an ALJ later does not defer. Second, there was no evidence entered before the ALJ on this issue of the meaning of the CBA under these unique circumstances and there is likewise no evidence on the issue before the Board. No party entered any evidence at any point on how the language of the CBA has been treated by the parties, what the past practice and custom of the parties has been, or what the history of the bargaining over this provision has been. This is truly a matter of contact interpretation that should be left to the parties

In short, the meaning of the CBA in these circumstances has not been fairly tried. It would be unjust and a violation of Ralphs' due process rights for the Board to decide in the first instance based on the Union's proffered interpretation of the CBA.

C. There Is Also No Basis Independent of the CBA on Which to Order Repayment of the Fees.

The Union's only argument is that it is entitled to arbitration fees pursuant to the CBA. There is no basis in law for the Union to argue that it is entitled to the fees, and the Union cites no authority that there is. The Union cited only one case, *Northwest Engineering Co.*, 158 NLRB 624, 629 (1966), and it does not address the issue here.

The Union has not established any legal basis on which it may obtain fees, and Ralphs is not aware of any such basis.

IV.
CONCLUSION

This dispute is best resolved through the normal dispute resolution procedures agreed to by the Union and Ralphs under the CBA. If the Board does consider this argument, the plain language of the CBA required the Union to pay the arbitrator's fees, and did not contain a provision to the contrary in the event an ALJ later declined to defer to the arbitrator's decision.. To the extent that the Union argues a different meaning or agreement between the parties, Ralphs is entitled to an evidentiary hearing. The Union did not raise the issue of the Arbitrator's fees until its brief before the ALJ, and no party presented evidence on the appropriate allocation of the Arbitrator's fees. The Board cannot decide this issue as it does not have a sufficient factual basis to do so. Further, it would violate Ralphs' due process rights to decide the issue without giving Ralphs reasonable notice and the ability to present its case.

The Union's Exception should be denied.

Respectfully submitted,

Dated: July 11, 2013

MORRISON & FOERSTER LLP

By: Timothy F. Ryan

Timothy F. Ryan
Attorneys for the Employer
RALPHS GROCERY COMPANY

STATEMENT OF SERVICE

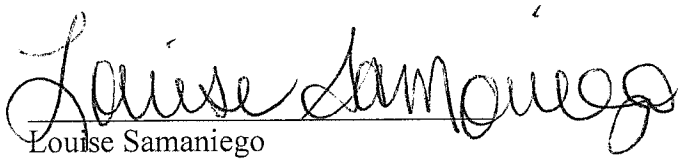
I hereby certify that a copy of

Ralphs Grocery Company's Answering Brief to Charging Party's Exceptions

was served by electronic mail on July 11, 2013:

Joshua F. Young, Esq.
Gilbert & Sackman
jyoung@gslaw.org

Ami Silverman
Counsel for the Acting General Counsel
National Labor Relations Board
Ami.Silverman@nlrb.gov



Louise Samaniego

Dated at Los Angeles, California this 11th day of July 2013