

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION TWENTY-FIVE
SUBREGION THIRTY-THREE

KROGER LIMITED PARTNERSHIP I, a limited partnership, and
KRGP Inc., general partner

and

Case 25-CA-099851

LABORERS INTERNATIONAL UNION OF NORTH AMERICA,
LOCAL UNION NO. 362

GENERAL COUNSEL'S ANSWERING BRIEF TO RESPONDENT'S
EXCEPTIONS TO THE ADMINISTRATIVE LAW JUDGE'S DECISION

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Comes now Counsel for the General Counsel and respectfully submits this Answering Brief to Respondent Kroger Limited Partnership I, a limited partnership, and KRGP Inc., general partner, Exceptions to the Administrative Law Judge's Decision. This Answering Brief addresses each of Respondent's Exceptions numbered 1 through 35. Counsel for the Acting General Counsel hereby requests that Exceptions 1 through 35 be denied and that the Administrative Law Judge's Decision be affirmed. In support of this position, Counsel for the Acting General Counsel offers the following:

I. STATEMENT OF THE CASE

On June 28, 2013, based upon charges filed by Laborers International Union of North America, Local Union No. 362 (the "Union"), the Regional Director for Region 25, Subregion 33 issued a Complaint. The Complaint alleged that Kroger Limited Partnership I ("Respondent") engaged in conduct violative of Section 8(a)(1) of the Act by discriminatorily denying the Union

access to engage in protected activity on its property. A hearing was held on August 13 and September 17, 2013 on the issues raised by the Complaint before Administrative Law Judge Melissa M. Olivero. On February 7, 2014 Judge Olivero issued her Decision in which she recommended, among other things, that Respondent cease and desist from discriminatorily refusing to allow the Union to distribute literature on its premises, or otherwise interfering with, restraining or coercing employees in the exercise of their Section 7 rights. On March 4, 2014, the Respondent filed thirty-five (35) exceptions to various portions of the Judge's Decision. The General Counsel now responds to Respondent's exceptions.

II. RESPONDENT'S EXCEPTIONS FAIL TO COMPLY WITH BOARD RULES AND REGULATIONS AND SHOULD BE STRICKEN

Under Section 102.46(b)(1) of the Boards Rules and Regulations and Statements of Procedures, each exception (i) shall set forth specifically the questions of procedure, fact, law, or policy to which the 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. Section 102.46(b)(2) provides that any exception which fails to comply with the foregoing requirements may be disregarded. Respondent has filed thirty-five (35) exceptions to the Judge's 11-page Decision, all of which should be stricken for failure to comply with the Board's requirements.

Respondent's exceptions take the form of quotations from various portions of the Judge's Decision. Respondent does not make clear whether it is excepting to a finding of fact or a conclusion of law contained in the quoted portion of the Decision. What is more, the exceptions do not contain the grounds upon which they are based, citing only to page numbers in the administrative transcript without further explanation or discussion. Furthermore, in the case of

many of the exceptions, the page numbers cited pertain to testimony on seemingly unrelated matters, or to testimony that supports the Judge's findings and conclusions.

When a party files exceptions without stating the grounds upon which they are based, it places a burden upon the answering party and the Board to guess at the basis of and reasons for the exceptions. The grounds for a party's exceptions are something only it is privy to, unless and until it makes these grounds known. It is impracticable and unjustifiable that either the answering party or the Board should have to guess regarding the grounds for a party's exceptions. Therefore, because Respondent's thirty-five (35) exceptions do not state the grounds upon which they are based, they do not comply with Board's requirements and should be stricken in their entirety.

III. RESPONDENT'S BRIEF IN SUPPORT OF EXCEPTIONS FAILS TO COMPLY WITH BOARD RULES AND REGULATIONS AND SHOULD BE STRICKEN

Under Section 102.46(c) of the Board's Rules and Regulations and Statements of Procedures, 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.

As is the case with Respondent's exceptions, its brief in support of exceptions should

also be stricken for failure to comply with the Board's requirements.

As discussed in the prior section, Respondent's exceptions do not state the grounds upon which they are based, as required by Board rules and regulations. Given this deficiency, it would seem doubly important that Respondent's brief in support specify the questions involved and to be argued, together with a reference the specific exceptions to which they relate, as required by Section 102.46(c). Nowhere in Respondent's brief does it reference which specific exceptions it seeks to address. This, once again, leaves the answering party and the Board in the untenable position of having to guess at which portions of Respondent's brief support which, if any, of its exceptions. Only Respondent is privy to which arguments it intends to raise in support of its exceptions. Neither the answering party nor the Board should have the burden of guessing which parts of Respondent's brief are intended to support which of its thirty-five (35) exceptions. Therefore, because Respondent's brief in support does not specify the questions involved and to be argued, together with a reference to the specific exceptions to which they relate, it does not comply with Board's requirements and should be stricken in its entirety.

IV. RESPONDENT'S EXCEPTIONS SHOULD BE DENIED

Even if Respondent's exceptions and brief in support are not stricken in their entirety, Respondent's exceptions should be denied. Respondent states in the introduction of its brief in support that the Judge's Decision ignores existing case law of the Board, and the courts of appeals. The argument section of Respondent's brief, however, deals almost entirely with courts of appeals cases and makes clear that Respondent's real issue is with current Board law rather than a claim the Judge failed to correctly apply current Board law. This argument fails as, the administrative law judge, bound to apply and uphold Board law, is not at liberty to rely on circuit court rulings which contravene Board law. As the Judge correctly found, where there is a

conflict between court and Board law, the Board's duty to apply uniform policies under the Act, as well as the Act's provisions for review of Board decisions, preclude the Board from acquiescing in contrary decisions by courts of appeals. [ALJD at p. 9, citing *Tim Foley Plumbing Service, Inc.*, 337 NLRB 328 fn. 5 (2001)] Even assuming Respondent's claim is that the Judge failed to correctly apply Board law, such a claim should be rejected since the Judge, in fact, did correctly apply Board law. As to Respondent's other issues, notwithstanding its failure to set forth the grounds for its thirty-five (35) exceptions and/or specifically reference any exceptions in its brief in support, Counsel for the General Counsel offers the following in response.

A. Exception 1¹: KRGP is a Properly Named Respondent

The Judge correctly found and the record reflects that Respondent is a limited partnership, with KRGP Inc., existing to serve as the general partner of Respondent (ALJD at p.2, TR 18). KRGP Inc. is a properly named party in this matter because of the nature of limited partnership liability. The Revised Uniform Limited Partnership Act (RULPA) is the standard used by most states, including Illinois, to define a limited partnership. The RULPA states, *inter alia*, that all general partners are liable for all obligations of the limited partnership unless otherwise provided by law. The RULPA has been adopted as part of Illinois state law. *See* 805 Ill. Comp. Stat. Ann. § 215-403. KRGP Inc., as the general partner of Respondent, is therefore properly named in this matter in order to ensure that the party who can take action and bear responsibility for any remedies is properly put on notice as to its potential obligations.

Therefore, KRGP Inc. is an appropriate Respondent in this proceeding.

¹ This and all following specific references to Respondent exceptions represent Counsel for the General Counsel's best guess as to which portions of Respondent's brief correspond to which of its exceptions.

Respondent maintains that KRGP Inc., Respondent's general partner, is not an appropriate Respondent in this matter. Respondent posits in its brief in support that, while the Complaint does not use the term "single employer," it is evident that this is the basic theory underlying the Complaint and the ALJ's decision. Respondent is incorrect. The basic theory underlying the Complaint was outlined in General Counsel's post-hearing brief and above. If the General Counsel had intended to allege single employer status, it would have done so in the Complaint, during the hearing and in its post-hearing brief to the Judge.

It is without question that the Judge's Decision on this issue is based on the principles articulated in the Decision itself, not on the never-alleged single employer theory Respondent posits. Respondent's reference to and analysis of a non-controlling 5th Circuit case dealing with single employer status is, therefore, irrelevant and should be disregarded. Based on the foregoing, then, the Judge's finding that KRGP Inc. is an appropriate Respondent in this proceeding should be affirmed.

B. Exceptions 2-4 and 24-25: Community Ambassador Linda Huddleston is an Agent of Respondent and its Community Ambassador Program allows Respondent to Discriminate

The Judge correctly found that Community Ambassador Linda Huddleston is an Agent of Respondent and its Community Ambassador Program allows Respondent to discriminate between which organizations it allows to solicit and which it denies. (ALJD at pp. 4, 8) Respondent's witnesses testified that at each of Respondent's stores, there is an individual appointed to serve as the Community Ambassador. Administrative Manager Linda Huddleston serves in this role at Respondent's facility. As Administrative Manager, Huddleston's primary duties include helping to hire new employees and providing general assistance for Store Manager Mona Alson (TR 127-128). For approximately the past five years, Huddleston has also served in

the collateral role of Community Ambassador for Respondent's facility. As Community Ambassador, she reviews all requests for organizations to solicit on Respondent's property, reviews requests for monetary donations from Respondent, determines whether an organization qualifies for any donations or solicitation permission, and organizes related community events held at the store. Huddleston testified about numerous organizations permitted to solicit on Respondent's property (TR 134-139). She records some, but not all, events and solicitations occurring at the store on a large calendar (TR 140-141, GC Exh. 13).

Huddleston testified that if any organization wishes to solicit on Respondent's property, they need to talk with her. If an organization first spoke with a manager, the manager would typically direct them to Huddleston, because she is the Community Ambassador (TR 149). Huddleston then reviews the organization's letterhead to determine the recipient of Respondent's donation and/or permission to solicit. Next, she sends these letterheads to Director of Community Relations/Public Affairs John Elliott, who works at the corporate offices in Indianapolis, Indiana (TR 150). Huddleston testified there is no application that organizations fill out in order to request permission to solicit at Respondent's facility. She merely requires that the organization send her the name of the organization, the purpose for the donation or solicitation, and on what date the solicitation will take place (TR 150). She testified that she is the person who ultimately approves or denies a request to solicit at Respondent's facility (TR 152).

Finally, Respondent's April 18, 2013 communication to its Community Ambassadors explains that the aim of the Community Ambassador program is to shift local decisions to local decision makers. An attached page explains that Community Ambassadors will need to play a lead role in 10 different programs or events scheduled for 2013. (GC Exh. 12) Based on the

foregoing, the Judge's findings that Community Ambassador Linda Huddleston is an Agent of Respondent and that its Community Ambassador Program allows Respondent to discriminate should be affirmed.

C. Exceptions 5-8: Respondent Has Allowed Solicitation for Numerous Charitable and Non-Charitable Organizations on its Property.

The Judge correctly found that Respondent has allowed solicitation for numerous charitable and non-charitable organizations on its property. (ALJD at pp. 3-4) Respondent's Community Ambassador Huddleston testified that for the past three years during the month of September, volunteers for the Susan G. Komen Race for the Cure have been permitted to solicit at Respondent's facility. They have set up a table inside Respondent's facility and solicited Respondent's customers and employees to participate in the race/walk (TR 136). The solicitation took place over three weekends in September 2013 (TR 136).

Respondent's Community Ambassador Huddleston testified that in August 2012, the Illinois State University Drama Club was permitted to sell candy bars at Respondent's facility (TR 139). They were allowed to solicit just outside in front of the entrance to Respondent's facility (TR 38, 139).

Respondent's Community Ambassador Huddleston also testified that at some point in the past two years, the Twin Cities School of Dance was also allowed to sell candy bars at Respondent's facility (TR 139). They were allowed to solicit just in front of the entrance to Respondent's facility (TR 38, 139).

Finally, Respondent's April 18, 2013 communication to its Community Ambassadors includes an attached page explaining 10 different programs or events scheduled for 2013 in which the Community Ambassadors will need to play a lead role. These programs or events

include: Associate United Way, Scouting for Food, Share Your Feast, cancer events, quarterly coin box programs, and charitable scan efforts for organizations. (GC Exh. 12, TR 136-137)

Based on the foregoing, then, the Judge's finding that Respondent has allowed solicitation for numerous charitable and non-charitable organizations on its property should be affirmed.

D. Exceptions 9-13: The Judge Properly Discredited Fjelde's and Smith's Testimony regarding Respondent's non-employee solicitation policy

To the extent Respondent is challenging the Judge's credibility findings, there is no basis for such a challenge as they are well-founded and based on the record. Regarding Fjelde's testimony, Counsel for the General Counsel issued two subpoenas *duces tecum* to Respondent seeking its policies regarding solicitation on Respondent's property. When Counsel for the General Counsel asked Respondent's custodian of records and labor relations specialist Mark Fjelde to confirm no such policy was produced, he was evasive and non-responsive. His attempts to obfuscate the truth were apparent when he answered that the question was objectionable, that whatever documents produced spoke for themselves and that he had produced the documents his counsel had instructed him to produce. It was only after extensive examination that Fjelde finally admitted no such written policy existed. (TR 20-25)

As the Judge correctly found in her Decision, Fjelde was the only one of Respondent's witnesses that testified that Respondent does not allow solicitations in which people distribute literature or documents that "espouse a cause or protest something." (ALJD at p. 4, TR 97) However, due to the lack of supporting documentary evidence, the Judge correctly did not credit Fjelde's self-serving testimony on this point. (ALJD at p. 4 fn. 7) The Judge was likewise unpersuaded by Store Manager Bonnie Smith's testimony on a related issue. The Judge correctly found that, in response to a leading question by Respondent's counsel, Smith testified

that she was not aware of any group being allowed to distribute literature or proselytize for or against any cause on Respondent's property. (ALJD at pp 4-5, TR 111) For the same reason that the Judge did not credit Fjelde's testimony, including lack of supporting documentation and self-serving nature of testimony, she did not credit Smith on this point. (ALJD at p. 5 fn.8)

The Board has repeatedly held that it will not overrule an administrative law judge's credibility resolutions unless the clear preponderance of the evidence convinces it that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), *enfd.* 188 F.2d 362 (P Cir. 1951). The record in this case, in particular the lack of supporting documentation, varying witness descriptions of the policy and self-serving and/or evasive testimony by Respondent's witnesses, clearly supports the Judge's findings. There is no basis for overturning her credibility findings, therefore her conclusions regarding Respondent's witness' testimony relative to its non-employee solicitation policy, and all credibility findings, should be affirmed.

E. Exceptions 14-23 and 25-35: Respondent discriminatorily prohibited the Union from engaging in peaceful handbilling in violation of Section 8(a)(1) of the Act

The Judge correctly found that Respondent discriminatorily prohibited the Union from engaging in peaceful handbilling in violation of Section 8(a)(1) of the Act. (ALJD at pp. 7-10) The evidence demonstrates that Respondent unlawfully discriminated regarding the Union handbilling by denying the Union the same right to handbill/solicit at its facility that they granted to multiple organizations. As discussed above, Respondent has an established practice of allowing several charitable and non-charitable organizations to solicit at its facility multiple times throughout the year. However, when the Union attempted to engage in lawfully protected solicitation activity at Respondent's facility, Respondent unlawfully denied the Union permission to do so.

1. Legal Framework

In general, an employer may prohibit nonemployee solicitation on the employer's property. However, the U.S. Supreme Court has recognized two exceptions to this rule. *National Labor Relations Bd. v. Babcock & Wilcox Co.*, 351 U.S. 105 (1956). First, an employer violates Section 8(a)(1) of the Act if it denies a union access to its property and the union has no other reasonable means of communicating its organizational message to the employees. Second, an employer violates the Act by prohibiting nonemployee distribution of union literature if its actions discriminate against the union by allowing other distribution. *Id.* at 112. It is the application of this second "discrimination exception" that is at issue in the instant case.

In applying the rationale of *Babcock & Wilcox*, the Board has consistently found an employer unlawfully discriminates against union solicitation when it denies a union access to its property while regularly allowing other individuals, groups, and organizations to use its premises for various activities. *See Sandusky Mall Co.*, 329 NLRB 618 (1999), enf. denied 242 F.3d 682 (6th Cir. 2001); *Davis Supermarket, Inc.*, 306 NLRB 426 (1992); *Albertson's, Inc.*, 332 NLRB 1132 (2000), enf. denied 301 F.3d 441 (6th Cir. 2002). To determine whether an employer has engaged in disparate treatment by denying nonemployee union agents permission to engage in protected activity on its property, the Board looks to whether the employer permits, "by rule or practice," similar activity by other outside organizations in similar circumstances. *Food Lion, Inc.*, 304 NLRB 602, 604 (1991). However, the Board has determined that it is not discriminatory treatment to deny union solicitation if the only nonunion solicitations permitted are "a small number of isolated 'beneficent acts,'" constituting narrow exceptions to the employer's otherwise absolute policy against solicitation. *Sandusky Mall* at 621. In *Albertson's*, the Board specifically considered but declined to expand this narrow exception to hold that "an

employer may lawfully justify the restriction of union solicitation on the grounds that it permits only charitable solicitation.” *Albertson’s Inc.*, at 1136.

2. The Discrimination Exception Applies to the Instant Case

The discrimination exception will be found by the Board when the employer has treated like activity by different entities differently. In *Sandusky Mall*, the Board found that an employer had violated the Act by engaging in the same type of conduct as Respondent. The employer, a shopping mall company, had denied access to union representatives who were handbilling at entrances to the mall. *Id.* The handbills urged customers not to patronize a store in the mall because the store was “undermining construction wage and benefit standards” in the area by hiring a certain contractor. *Id.* The employer argued that it was not discriminating against union solicitation because it only allowed solicitations that enhanced the public image of the mall and provided a valuable service to the community. *Id.* at 620. The employer urged the Board to adopt the definition of discrimination used by the Sixth Circuit, which interpreted the *Babcock & Wilcox* standard (described above) to mean “favoring one union over another, or allowing employer-related information while barring similar union-related information.” *Id.*, citing to *Cleveland Real Estate Partners v. NLRB*, 95 F.3d 457, 465 (6th Cir. 1996). However, the Board declined to apply the Sixth Circuit’s reasoning, instead maintaining Board precedent that an employer who denies a union access while regularly allowing nonunion organizations to solicit and distribute engages in unlawful discrimination against union solicitation. *Id.* at 620.

A parallel situation exists in the instant case, and the judge correctly found that the Board’s decision in *Sandusky Mall Co.* 329 NLRB 618 (1999) is controlling in this case. (ALJD at p. 8) In the instant case, Respondent has an established practice of allowing yearly solicitations on its property by multiple organizations, including the Girl Scouts of America, Boy

Scouts of America, and the Salvation Army. Respondent does not maintain a written record of its solicitation policies or guidelines (TR 23). Instead, Respondent purportedly maintains a general practice, understood by management, of allowing only the above-mentioned three organizations to sell products as fundraisers on its properties (TR 24). Respondent claims that generally, the three organizations named above are the only organizations permitted to solicit on its property (TR 24). However, the record reflects that, and the Judge correctly found that, in addition to these organizations Respondent also permits other organizations to solicit at its facility. Organizations that have received such permission in the past two years include the Susan G. Komen Race for the Cure, Illinois State University Drama Club, and the Twin Cities School of Dance. (ALJD at p.4, TR 136-140, GC Exh. 12)

In the instant case, Respondent has engaged in unlawful discrimination by denying the Union permission to engage in lawfully protected solicitation at its facility while granting permission to other organizations to solicit at its facility. Since this case does not involve the *Babcock* “access exception”, it is immaterial that the Union may, ultimately, be able to communicate its message from another location. Rather, since the second *Babcock* “discrimination exception” is at issue, what is material is that the Union, unlike other charitable and non-charitable organizations, was denied permission to distribute Union literature at Respondent’s facility. Here, as discussed above, and as the Judge correctly found, the Union attempted to convey a lawfully protected message. (ALJD at p. 7) The Union was protesting the fact that Respondent refused to use local area employees to perform a construction repair project at Respondent’s facility. Thus, as the Judge finds, the second exception in *Babcock & Wilcox* is applicable to the instant case and Respondent violated the Act by discriminatorily refusing to permit the Union to engage in such lawful handbilling activity at its facility. (ALJD at. p. 7-10)

Not only was the Union unlawfully denied access to solicit at Respondent's facility, but Respondent's purported effort to provide the Union with a mechanism to request permission to solicit was a sham. The record shows that the Union asked for information in order to receive permission to distribute handbills at Respondent's facility. Since the evidence establishes that Community Ambassador Huddleston was authorized to and is the Respondent's representative who grants permission to organizations to solicit on Respondent's property, under Respondent's own procedures, it was not necessary for the Union to communicate with anyone other than Huddleston to seek such permission. However, instead of directing the Union to Community Ambassador Huddleston, Respondent, through its Co-Manager Bonnie Smith, gave the Union a 1-800 number which, by Smith's own admission, was not part of the typical approval process (TR 39-42). Furthermore, use of this 1-800 number by the Union would have been futile in view of Respondent's purported policy of only allowing charitable organizations to solicit at its facility.

An employer may also be found to violate the Act if the evidence demonstrates that the employer's refusal to grant a union permission to solicit on its property was motivated by anti-union animus, which may be shown if its asserted justifications for its actions are mere pretext. *See Salmon Run Shopping Center, LLC*, 348 NLRB 658, 659 (2006), enf. denied 534 F.3d 108 (2nd Cir. 2008). In *Salmon Run*, the Board found that the employer's stated justification for refusing the union permission to solicit was a false justification. *Id.* In that case, the employer asserted that it had a policy of refusing permission to solicit to organizations that would negatively affect the employer's mall or tenants or that were for-profit organizations *Id.* at 658-659. However, the evidence showed that the employer had permitted organizations to solicit that it knew were for-profit entities. *Id.* at 659. As such, the Board found a compelling inference that

the employer's decision to deny the union access to its property was not based on a determination that the activity would negatively affect the employer, but solely on the basis that the union was a labor organization and desired to engaged in labor-related speech. *Id.*

Similarly, in the instant case Respondent has repeatedly stated that it only allows three charitable organizations to solicit at its facility. However, as the judge finds, and the record reflects, not only has at least one other charity been granted permission to solicit, but also *at least two?* non-charitable organizations were allowed to solicit Respondent's customers and employees at its facility. (ALJD at p.4, TR 136-140, GC Exh. 12) Respondent's stated justification for denying the Union access to its facility is clearly pretextual and should be rejected. Like the employer in *Salmon Run*, Respondent's decision to deny the Union access to engage in lawfully protected solicitation at its facility should be found to be motivated by the Union's status as a labor organization and its desire to engage in labor-related speech. This type of discriminatory exclusion is unlawful under the above-mentioned discrimination exception.

Therefore, in light of all of the foregoing, the Judge's finding that Respondent discriminatorily prohibited the Union from engaging in peaceful handbilling in violation of Section 8(a)(1) of the Act should be affirmed.

V. CONCLUSION

For all the above reasons, Counsel for the General Counsel hereby requests that Exceptions 1 through 35 be denied and that the Administrative Law Judge's Decision be affirmed.

DATED at Peoria, IL, this 21st day of March 2014.

Respectfully submitted,

/s/ Ahavaha Pyrtel

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CERTIFICATE OF SERVICE

I hereby certify that service of a true and correct copy of GENERAL COUNSEL'S ANSWERING BRIEF TO RESPONDENT'S EXCEPTIONS TO THE ADMINISTRATIVE LAW JUDGE'S DECISION was served electronically on the following parties on March 24, 2014:

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And was also e-filed on March 24, 2014 with:

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DATED at Peoria, Illinois this 24th day of March 2014.

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