

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

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

Respondents,

and

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

Charging Party.

CASE 25-CA-099851

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

Kroger Limited Partnership I and KRGP, Inc. (Collectively "Respondent"), by Howard and Howard Attorneys PLLC, file this Reply to the General Counsel's Answering Brief.

INTRODUCTION

This is a relatively straightforward case, tried over approximately one and a half days on August 13 and September 17, 2013. The basic issue is whether Respondent violated the Act by denying the union the right to distribute handbills at the entrance to its grocery store located on College Avenue in Normal, Illinois. A subsidiary issue is whether KRGP, Inc. should have been dismissed as a respondent.

Counsel for the General Counsel initially argues that Respondent's 35 Exceptions failed to comply with the Board rules and therefore should be stricken. Respondent's Exceptions identified precisely those aspects of the ALJ's decision as which exceptions were taken, with page references to the Decision. Counsel for the General Counsel argue that Respondent failed

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to indicate whether each exception was to a finding of fact or a conclusion of law and that it did not state the grounds on which the exceptions were based. Despite Counsels' protest, it is evident that they had no genuine problem responding to Respondent's Exceptions or Brief.

Cases ought to be decided on the merits and not technicalities. Accordingly, the Board has not always required precise conformity with Section 102.46(b) of the Board's Rules and Regulations. *Monarch Machine Tool Co.*, 227 NLRB 1265 fn. 2 (1977); cf. *James Troutman & Associates*, 299 NLRB 120 (1990) (Board states, "If the exceptions suffered merely from technical deficiencies, the Board might well proceed to the merits..." but concludes 100 pages containing 218 exceptions to be "so deficient as to warrant striking," particularly when not accompanied by a brief).

To avoid any ambiguity, Respondent provides the following additional information as to each Exception.

Exception 1 is a mixed finding of fact and law. There was no evidence in the record that KRGP, Inc. was involved in any decisions or actions in the case, that it could provide any remedy, that it has any employees, or that it is involved in human resources or labor relations policies.

Exceptions 2-4 are based on mixed findings of fact and law, as to whether or not Huddleston was an agent of Respondent. The evidence showed that Huddleston could make low level decisions on donations to outside entities. The evidence, including the policy quoted in Exception 2, showed Huddleston acted subject to the direction of the store manager and that she further consulted with John Elliot, Kroger's Public Affairs Manager.

Exceptions 5-8 are based on mixed findings of fact and law. The only plausible interpretation of the evidence is that Twin Cities School of Dance and Illinois State University Drama Club were allowed to sell candy bars on one occasion within the last two years, and this

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is not evidence that Respondent regularly allows these entities to be on its property. Additionally, these entities did not engage in any solicitation. With regard to the Susan G. Komen organization, the evidence showed that Respondent allowed its employees to help sign up individuals who wished to race in the Susan G. Komen for the Cure Race. This also did not involve any solicitation. With regard to the community ambassador program, food drives, the quarterly coin box and charitable scan efforts, there was again no solicitation, nor was there evidence about how frequently these events occurred.

Exception 9 is based on a finding of fact. Smith was asked about the existence of the policy.

Exception 10 is based on a question of law. There is no legal requirement to have documentary evidence of a policy, nor did the ALJ cite any law or cases.

Exceptions 11-13 are based on findings of fact, and the exception is based on the ALJ's refusal to credit Fjelde and Smith because there was not documentary evidence of the policy. This was the only stated basis for the ALJ's credibility finding.

Exception 14 is based on a finding of fact. There is no evidence that the store manager or district manager had any knowledge of the contents of the handbill, and the ALJ's conclusion that Smith knew the handbillers were union representatives does not logically follow.

Exceptions 15-17 are based on mixed questions of fact and law. While Smith did not direct Penn to contact the community ambassador, she did give him the 1-800-KROGER number. Contrary to the ALJ's finding as to Exception 16, Huddleston testified she did not know what would have happened if Penn had called that number. With regard to Exception 17, as indicated above, the other groups either did not engage in solicitation or in any event, advocate any position on Kroger's property.

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Exception 18 is based on a conclusion of law and a policy decision. As argued in Respondent's Brief, as a matter of policy, and as has been noted by a number of courts of appeals, one does not lose control of its private property by allowing activities by charities.

Exceptions 19-28 are based on mixed findings of fact and law. As argued in Respondent's Brief, the weight of judicial authority allows a business to exclude union handbillers from its property, even if it has allowed charities or non-profits to be present on the property.

Exception 29 is based on a question of law. *The Oakland Mall Ltd.* case remains good law and is applicable to this case as well.

Exceptions 30 and 33 are based on questions of law, and as argued in Respondent's Brief, it is relevant whether the Union had alternative means to distribute its message.

Exception 31 is based on a conclusion of law. Respondent's position is that the Board's case law is out of step with the courts of appeals that have squarely addressed the issue.

Exception 32 is based on mixed findings of fact and law. As noted above, most other activity which Respondent allowed did not involve solicitation, and in any event, with the exception of Boy Scouts, Girl Scouts, and Salvation Army, such other activities were contrary to Respondent's policy, were irregular and were de minimis.

Finally, Exceptions 34 and 35 are based on conclusions of law. Judicial authority permits a property owner to allow charitable and other non profit activities, even if it prohibits union handbilling.

The Board should deny Counsel for the General Counsel's request to strike Respondent's Exceptions.

Counsel for the General Counsel next argues that Respondent's Brief should be stricken.

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Again, Counsel disingenuously argue that they are placed in the “untenable position” of having to guess which portion of Respondent’s Brief support which, if any, of its exceptions. This is hard to credit with regard to a 16 page brief. Respondent submits that the Brief adequately allows the Board to determine the factual and legal basis for Respondent’s Exceptions and its arguments. Again, this case should be decided on merits, and it is not particularly complex. The request to strike the Brief should be denied.

Counsel for the General Counsel next argues that even if not stricken, Respondent’s Exceptions should be denied. The argument is based on the ALJ applying current Board law. While this may be accurate, Respondent’s argument is that current Board law is wrong, as has been demonstrated by several courts of appeals.

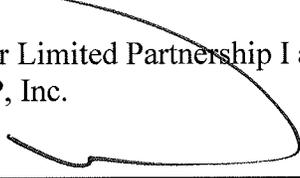
Respondent submits that its Brief in Support of Exceptions has adequately addressed the other arguments set forth in the Counsel for the General Counsel’s Answering Brief.

CONCLUSION

Respondent prays the request to strike or disregard its Exceptions and Brief be denied, and that enforcement of the ALJ’s Decision be denied.

Respectfully submitted,

Kroger Limited Partnership I and
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By: 

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CERTIFICATE OF SERVICE

The undersigned certifies that he served copies of the foregoing upon the following via electronic filing and by depositing copies of the same in an envelope addressed as follows:

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