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Momentum Autogroup, and Momentum Toyota of
Fairfield

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

REGION 20

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| FAIRFIELD IMPORTS, LLC DBA |) | CASE NOS. | 20-CA-035259 |
| FAIRFIELD TOYOTA, MOMENTUM |) | | 20-CA-070368 |
| AUTOGROUP, and MOMENTUM |) | | 20-CA-088332 |
| TOYOTA OF FAIRFIELD |) | | 20-CA-106248 |
| |) | | |
| Respondent, |) | | |
| |) | | |
| and |) | RESPONDENT'S ANSWERING BRIEF | |
| |) | TO AUTOMOTIVE MACHINISTS | |
| |) | LODGE 1173'S EXCEPTIONS TO | |
| AUTOMOTIVE MACHINISTS LOCAL |) | DECISION BY ADMINISTRATIVE LAW | |
| LODGE NO. 1173, DISTRICT LODGE 190, |) | JUDGE | |
| INTERNATIONAL ASSOCIATION OF |) | | |
| MACHINISTS AND AEROSPACE |) | | |
| WORKERS, AFL-CIO |) | | |
| |) | | |
| Union. |) | | |
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I. INTRODUCTION

Charging Party, Automotive Machinists Local Lodge No. 1173's ("Union") 44 exceptions to Administrative Law Judge John J. McCarrick's Decision ("ALJ Dec.") reads more like a general rant than bona fide exceptions. The exceptions themselves are bereft of citations to the record as required by the Board's Rules and Regulations leaving both Respondent, Fairfield Imports, LLC ("Fairfield"), and the Board to guess whether evidence exists to support the Union's position. About half of the exceptions relate to the remedies ordered, with the Union demanding that the Board impose remedies never sought by Counsel for the General Counsel ("GC"). In one exception, the Union asks that the notice to be read five times; in another the Union argues that the notice to be read ten times. (Exception Nos. 28, 39) Although Board procedures are supposedly formal, it is hard to take the Union seriously when its presentation is so sloppy.

Indeed, the Union's opening argument urges the Board to return to a previously overruled Decision, yet the argument does not relate to any accompanying exception. More problematic, several of the exceptions the Union urges the Board to expand on many of its 2012 decisions; decisions that are no longer viable due to the Supreme Court's decision in N.L.R.B. v. Noel Canning, 134 S. Ct. 2550, 199 LRRM 3685 (2014). The Union's exceptions to the two instances in which the ALJ dismissed GC's allegations fail to cite to any supporting Board law and the facts cited support the ALJ Dec.

For these reasons, as more fully discussed below, Fairfield asks the Board to dismiss each and every one of the Union exceptions.

II. RESPONSE TO EXCEPTIONS

A. The Union's Exceptions to the ALJ's Remedial Findings are Beyond the Scope of General Counsel's Complaint

Twenty-six of the Union's 44 exceptions request remedies that the ALJ did not order. (Exception Nos. 1, 16-18, 20-22, 24-32, 34-35, 37, 38-44) Some are both duplicative and inconsistent: e.g. one exception asks that notice be read five times (Exception No. 28) another asks for ten readings (No. 39); one exceptions asks for more than one year of additional bargaining and another asks for more than two years. (Exception Nos. 30, 40) The Union further asks the Board to require posting the notice "on any Internet which is available to the public," "reimburse the Union for negotiating expenses," pay additional wages as a result of the change in work schedules and unilateral pay increases, pay employees for their time while the notice is being read and provide copies of the ALJ's decision to each employee, using UPS to deliver the decision. (Exception Nos. 16-18, 29, 32, 38, 42) The Union even excepts to the ALJ's failure to find Fairfield in contempt. (Exception No. 1) The common denominator to these exceptions is that GC never asked for any of this relief.

"It is well settled that a charging party cannot enlarge upon of change the General Counsel's theory." See Kitmuss Corporation 305 NLRB 710, 711 (1991); accord Zurn/N.E.P.C.O 329 NLRB 484 (1999). Even General Counsel may not enlarge upon the allegations made in its own complaint that have not been fully litigated as it would "violate fundamental principles of procedural due process." Lamar Central Outdoor 343 NLRB 261 (2004).

Here the requested remedies in GC's Amended and Consolidated Complaint seeks: (1) one meeting where the Remedial Notice is read before management, the employees

and a Board Agent; (2) bargaining on a set schedule with regular reports; and (3) reimbursement of certain taxes owed. GC's brief to the ALJ seeks only the reading and a one-year extension of bargaining and abandons its request for bargaining on a set schedule. (See GC Brief at 64-65) Except for ordering a set schedule for bargaining, the ALJ granted all relief requested by GC and additionally ordered the notices to be delivered to the employees by electronic means. (ALJ Dec. at 31:13-33:29) Accordingly, Exception Nos. 1, 16-18, 24-32, 38-44 should be dismissed as beyond the scope of what GC requested.¹

B. Union Arguments that Make No Reference to Exceptions Should Be Ignored

The Union's Brief in support of its exceptions ("Union Brief") begins with three pages of argument, urging the Board to overrule Lutheran Heritage Village-Livonia, 343 NLRB 646 (2004). (Union Brief at 1:6-4:3) Although the ALJ made findings based on Lutheran Heritage, see ALJ Dec. at 3:41-4:9, none of the Union's exceptions reference this part of the of the ALJ Dec.

Section 102.46(c) of the Board's Rules and Regulations provides: "Any brief in support of exceptions shall contain no matter not included within the scope of the exceptions" Based on the foregoing, the Board should disregard the first three pages of the Union Brief and Fairfield hereby moves to strike these pages.

C. Many of the Union's Objections Are Based on Expansive Readings of Board Decisions That Are Not Currently Viable

With the Supreme Court's decision in N.L.R.B. v. Noel Canning, *supra*,

¹ Exception No. 31 relates to the ALJ's declination to order bargaining on a set schedule. (ALJ Dec. at 33:14-23) The Union provides neither evidence nor legal support to counter the ALJ's findings and should be disregarded on that ground alone. See Board Rules and Regulations § 102.46(b).

many of the Board decisions cited by the ALJ are no longer viable at this time. Therefore, all exceptions based on these decisions should be dismissed.

Exception Nos. 2 through 6, which relate to Fairfield's confidentiality agreement, take the ALJ to task for failing to apply Flex Frac Logistics, LLC, 358 NLRB No. 127(2012), to the fullest extent possible. (ALJ Dec. at 6:18-40) In its brief supporting these exceptions, the Union cites to Stephens Media, 359 NLRB No. 39 (2012) and Piedmont Gardens, 359 NLRB No. 46 (2012). (Union Brief at 10:9-10) None of these decisions remain good law at this point and the Union fails to cite any good law in support of its contentions that Fairfield should be required to provide the Union with information on product specifications, customer names and addresses and sales information. Nor is there record evidence to support a finding that Fairfield's policy restricting dissemination of customer contact, specifications and business plans would violate section 8(a)(1) of the Act. The ALJ has already found that the confidentiality provision violated section 8(a)(1) of the Act and ordered that the policy be revised or rescinded. (ALJ Dec. 6:32-40, 29:32-30:6, 31:13-28) For these reasons, Fairfield requests that Exception Nos. 2 through 6 be dismissed.

Similarly, Exception Nos. 21, and 22 derive from the Board's decision in Alan Ritchey, Inc. 359 NLRB No. 40 (2012) and American Baptist Home of the West, 359 NLRB No. 46 (2012). (ALJ Dec. at 26:24-28:36) In Alan Ritchey the Board acknowledged that it was creating a new obligation for the employer to bargain over discipline before imposing it. 359 NLRB No. 40 at p. 1. In American Baptist Home, the Board specifically overruled prior Board precedent that had previously held that an employer was not obligated to produce witness statements regarding the discipline of an employee. 359 NLRB No. 46 at 1. As there is now no

law requiring Fairfield to bargain over its decision to terminate an employee before doing so or to produce witness statements, these exceptions should be dismissed.

Finally, Exception Nos. 7-13 relate to the Board's decision in D.R. Horton 357 NLRB No. 184 (2012), another Board Decision decided, in part, by a recess appointee. (Union Brief at 4-6) To be sure, the Fifth Circuit, ruling on cross-petitions, explicitly declined to rule on whether Member Becker's appointment was constitutional. See D.R. Horton, Inc. v. N.L.R.B., 737 F.3d 344, 350-52 (5th Cir. 2013) But in reaching the merits of the matter, the Fifth Circuit found that the Board's action invalidating the collective action portion of the employer's arbitration agreement failed to give due deference to the Federal Arbitration Act ("FAA"). 737 F.3d at 348, 358-62. As a result the Court granted the employer's petition for review. 737 F.3d at 364.

As it now stands, the Board's decision in D.R. Horton, supra, hangs by a thread, if at all. The Union's brief fully supports the ALJ's adoption of D.R. Horton to find Fairfield's arbitration agreement unlawful. (Union Brief at 4:5-6) However, it uses "exceptions" as a forum to argue recent California Supreme Court decisions, hypothesize about situations where the arbitration agreement could lack mutuality and make a full throated argument that the FAA does not preempt the Act. (Union Brief at 4:4-8:24) This hypothesizing only reinforces the fact that the underlying Board trial did not include any evidence that a group of employees had actually been injured as a result of Fairfield's application of the arbitration agreement. Additionally, the Union's requested remedy, that employees should be allowed to file class actions with the statute of limitations being tolled, was never requested by GC and therefore should be dismissed. (See supra at 2-3) In the end, the Union's exceptions add nothing to the ALJ's general finding that the

agreement's "mandatory waiver of employee's Section 7 rights" and therefore violates the Act. (ALJ Dec. at 8:16-17) For these reasons they should be dismissed.

D. The Union's Exception to the ALJ's Findings and Conclusion Regarding Fairfield's Used Tire Policy is Devoid of References to the Record and Citations to Legal Authority

Board Rules and Regulation Section 102.46(b) requires exceptions to "designate by precise citation of page the portions of record relied on." Union Exception No. 20 fails to cite to any part of the record to support the exception and does not specifically cite to the portion of the ALJ Dec. that finds Fairfield's used part policy had always required an employee to obtain his or her supervisor's approval before taking a part. (ALJ Dec. 24:22-25:8) Therefore, the ALJ's factual findings must stand.

Board Rules further requires briefs in support of exceptions to include the "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." Rules and Regulations § 102.46(c)(3). While the Union claimed the ALJ ignores "consistent Board law" that would have found Fairfield had made an unlawful unilateral change, the Union fails to include even one citation to precedent. (Union Brief at 12:13-18) Without a single citation to either the record or Board precedent the Union has left Fairfield in the dark, not knowing whether the Union is arguing that policies that specifically allow for supervisory discretion are unlawful whenever a new supervisor decides to exercise discretion, whether the Union contends that past practice can trump a policy permitting discretion or whether the Union contends that discretionary policies are suspect as a matter of Board law. By failing to apprise Fairfield of its theory behind the exception, the Union has put

Fairfield at an unfair disadvantage in formulating a response. For this reason Exception No. 20 should be dismissed.

Moreover, Exception 20 seeks a remedy, that current and former employees be allowed to take home as many used parts and tires as they desire, not requested by GC. (Union Brief at 12:19-28) For the reasons stated at pp. 2-3, supra, this part of the exception should be dismissed.

E. The ALJ's Findings and Conclusion Regarding the Alternative Workweek Should Stand

Although the Union's only citation to record testimony occurs with regard to the alternative workweek allegation, the actual record does not support the Union's claims that Fairfield must have engaged in direct dealing. Witness Frank Bartolomucci ("Bartolomucci") testified that sometime during the fall of 2010 the employees voted "to go back to five eights." (Tr. 185-86) In advance of the vote Bartolomucci recalled that two other technicians, Darnell Moore and Jesse Kobert passed out ballots and, after the technicians voted "we went back to five eights." (Tr. 187) During cross-examination, Bartolomucci re-iterated that fellow technicians handed out the ballots, rather than Fairfield, and that the return was something the employees wanted. (Tr. 284) There is no testimony that Fairfield held meetings in advance of the employees' vote and there is no evidence that Fairfield instigated the return to "five eights."

The Union references California's Industrial Wage ("IWC") Order 4-2001, section 3(C) as setting forth the procedures by which employees may choose to adopt an alternative four-day-ten-hour workweek as opposed to the typical five-day-eight-hour workweek. While it is true that an Employer proposes an alternative workweek, the employees themselves have the prerogative to repeal the alternative workweek by presenting a petition signed by 1/3 of

the affected employees. See IWC Order 4-2001 § 3(C)(5). Bartolomucci’s testimony is consistent with an employee-instigated effort to repeal an alternative workweek previously set in place by the employer. Compare Tr. 185-87, 284 with IWC Order 4-2001 § 3(C)(5). There is simply no evidence that Fairfield instigated, approved, promoted or spoke in favor of returning to “five eights.” Accordingly, the ALJ’s findings and conclusion should stand and Exception Nos. 14-19 should be dismissed.

III. CONCLUSION

For all of the foregoing reasons each and every one of the Union’s exceptions should be dismissed.²

DATED: July 14, 2014

Respectfully submitted,

By: /s/ Nanette Joslyn

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² Exception Nos. 23 and 36 simply except to the ALJ Dec. to the extent it does not encompass the content of the Union’s other objections.

CERTIFICATE OF SERVICE

I am a citizen of the United States and an employee in the County of Marin, State of California. I am over the age of eighteen years and not a party to the withing action; my business address is 1010 B Street, Suite 320, San Rafael, CA. I certify that on July 4,2014, the RESPONDENT’S ANSWERING BRIEF TO AUTOMOTIVE MACHINISTS LODGE 1173’S EXCEPTIONS TO DECISION BY ADMINISTRATIVE LAW JUDGE document was served on the following parties as addressed below via E-Filing, E-Mail and U.S. Mail:

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I declare under penalty of perjury of the laws of the state of California that the above is true and correct. Executed at San Rafael, California, on July 14, 2014.

/s/ Christopher J. Ohlsen
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