

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 9**

INTERNATIONAL UNION OF OPERATING
ENGINEERS, LOCAL 18
(Precision Pipeline, LLC)

Respondent,

and

STEPHEN A. WILTSE, AN INDIVIDUAL,
PIPE LINE CONTRACTORS ASSOCIATION,
INTERVENOR.

Case No. 9-CB-109639

INTERNATIONAL UNION OF OPERATING
ENGINEERS, LOCAL 18
(Rockford Corporation)

Respondent,

and

GARY LANOUX, AN INDIVIDUAL
PIPE LINE CONTRACTORS ASSOCIATION,
INTERVENOR.

Case No. 9-CB-118659

**PIPE LINE CONTRACTORS ASSOCIATION MOTION TO
STRIKE AND FOR SANCTIONS AGAINST JONATHAN D. DUFFEY**

Pipe Line Contractors Association (“PLCA”), by and through undersigned counsel, respectfully moves the National Labor Relations Board (the “Board”) to strike Counsel for the General Counsel’s Exceptions to the Administrative Law Judge’s Decision and Brief in Support

of Exceptions to the Administrative Law Judge's Decision as untimely.¹ PLCA further moves the Board for sanctions against Counsel for the General Counsel, Jonathan D. Duffey, for intentionally and repeatedly failing to comply with the Board's rules and regulations.

I. INTRODUCTION

It is a fundamental requirement of the law that a party to an action before a court or administrative body be afforded proper notice of the case against it. The Board expressly adopts this requirement in its own rules and regulations which Counsel for the General Counsel is charged with upholding and enforcing. Despite this, Counsel for the General Counsel failed to serve PLCA with the documents filed in connection with his Exceptions as well as a prior motion for an extension of time in what PLCA can only conclude was an intentional effort to deprive it of its right to be heard before the Board. Because of Counsel for the General Counsel's repeated procedural violations and blatant disregard for the rules and regulations of the Board, whose interests he represents, all of Counsel for the General Counsel's improperly filed papers should be stricken and dismissed with prejudice and this Board should impose sanctions against him.

II. PROCEDURAL HISTORY

On September 26, 2013, the Board issued a complaint against the International Union of Operating Engineers, Local 18 ("IUOE") based on a charge filed in July 2013. On March 6, 2014, the Board filed a consolidated complaint against IUOE following the filing of a second charge. A trial date was set for April 14, 2014.

On April 10, 2014, PLCA filed a motion to intervene in the proceedings. On April 14, 2014, at the commencement of the trial, Administrative Law Judge Goldman orally granted

¹ Hereafter, Counsel for the General Counsel's Exceptions to the Administrative Law Judge's Decision and Brief in Support of Exceptions to the Administrative Law Judge's Decision are collectively referred to as the "Exceptions".

PLCA's motion, and thereafter, counsel for PLCA entered her appearance on the record. *See* Decision of David I. Goldman, Administrative Law Judge, p. 2. PLCA participated fully in the two-day trial and all parties, including PLCA, filed post-hearing briefs. Judge Goldman issued his decision on June 25, 2014 finding in favor of PLCA and IUOE. Throughout the decision, the Judge made extensive references to PLCA's role as intervenor and relied heavily on PLCA's witness to support his decision and order. *See generally id.*

On Wednesday, September 3, 2014, at 5:20 p.m. PLCA was served with the IUOE's answering brief to the Exceptions. PLCA is now aware that Counsel for the General Counsel filed its Motion for Extension of Time to File Exceptions on July 11, 2014 and the Exceptions on August 20, 2014. Counsel for the General Counsel failed to properly serve PLCA with all of these documents, and consequently, PLCA was not able to file any papers in response.² The deadline to answer Counsel for the General Counsel's Exceptions has now passed. As a result, PLCA files the instant motion.

III. ARGUMENT

A. Counsel For The General Counsel's Exceptions And Brief In Support Thereof Should Be Dismissed as Untimely

Board regulations require that all motions filed with the Board must be served on all parties to the proceeding. 29 C.F.R. § 102.24. Filed motions must be accompanied by an affidavit of service on the parties, and the regulations explicitly provide that both motions for an extension of time in which to file exceptions and exceptions "shall [] be served promptly on the other parties." *See id.*; 29 C.F.R. § 102.46(a),(j). Motions filed without proper service on all parties are akin to *ex parte* communications to the Board and are in breach of the Board's

established rules and procedures. 29 C.F.R. §§ 102.126, 102.128; see *Graphic Arts Intern.*, 208 NLRB 37, 37 (1973) (M. Kennedy, concurring). In order to support a variance or deviation from the “clear requirements” of the Board’s rules on service, a party must show “that there has been an honest attempt to substantially comply with the requirements of the [r]ules, or, alternatively, a valid and compelling reason why compliance was not possible.” *Platt Bros.*, 250 NLRB No. 49 (1980) (citing *Alfred Nickles Bakery*, 209 NLRB 1058 (1974)) (dismissing objections to election for failure to properly serve the opposing party).

PLCA has been clearly identified as a party to these proceedings. PLCA participated fully in the trial before the Administrative Law Judge, filed a post-hearing brief, was served post-hearing briefs and other motions filed by the parties (including, notably, papers filed by Counsel for the General Counsel), is listed in the caption of the Administrative Law Judge’s decision, and is identified on the Board’s website as a participant in this case. Despite this, Counsel for the General Counsel failed to serve PLCA with his motion for an extension of time. Such failure was not merely the result of clerical error as PLCA is not even identified as a party to be served on the certificate of service.³ Counsel for the General Counsel obtained the extension of time through an *ex parte* communication with the Board which is unequivocally prohibited by the Board’s rules and regulations. As a result, the Exceptions should be considered untimely as they were filed beyond the original July 23, 2014 deadline. See *Graphic Arts Intern.*, 208 NLRB at 37 (M. Kennedy, concurring) (finding that respondent’s motion to strike exceptions and brief as

² Upon receipt of IUOE’s answering brief, undersigned counsel immediately notified Mr. Duffey that PLCA had not been served a copy of the Exceptions. Finally, on Monday September 8, 2014 at 9:01 a.m., Counsel for the General Counsel sent undersigned counsel a copy of the Exceptions.

³ The Associate Executive Secretary’s order granting the extension of time was not served on PLCA, presumably as a result of Counsel for the General Counsel’s failure to include PLCA in its certificate of service. It is unclear why the motion was not rejected at the time of filing for failure to serve all parties or, at a minimum, why Counsel for the General Counsel was not instructed to cure the service error at that time.

untimely should be granted based on petitioner's failure to serve respondent with the motion for extension of time). As Counsel for the General Counsel, Mr. Duffey should be intimately familiar with the rules and regulations of the Board and should be held to a standard that reflects the same.

Any possible argument that Counsel for the General Counsel's failure to properly serve PLCA was an oversight was eliminated when he failed to serve PLCA with the Exceptions. Just as before, Counsel for the General Counsel simply chose not to include PLCA on his affidavit of service filed concurrently with the Exceptions – essentially eliminating PLCA from the proceedings. *See* Certificate of Service, Aug. 20, 2014. It was only through the proper service of IUOE's answering brief to the Exceptions that counsel for PLCA even became aware of Counsel for the General Counsel's motion for an extension of time and subsequent filings with the Board. Counsel for the General Counsel made no attempt to comply with the requirements of the Board's rules. Furthermore, there is no reason, much less a compelling reason, as to why service on PLCA by Counsel for the General Counsel was not possible – particularly given Counsel for the General Counsel's demonstrated ability to serve PLCA earlier in the proceedings. Counsel for the General Counsel's repeated omissions with respect to PLCA clearly demonstrate that he had no intention of serving PLCA with any of the documents filed with the Board and that he intentionally excluded PLCA from the proceedings. Counsel for the General Counsel's *ex parte* communications to the Board and intentional and inexcusable failure to serve PLCA with the motion for an extension of time requires that the Board dismiss with prejudice as untimely Counsel for the General Counsel's Exceptions.

B. PLCA Has Suffered Prejudice From Counsel For the General Counsel's Failure to Serve

Counsel for the General Counsel did not make any attempt to substantially comply with the rules on service and PLCA was prejudiced as a result. PLCA was not afforded an opportunity to state its position in response to Counsel for the General Counsel's motion for an extension of time and, as such, the Board was unable to consider whether PLCA had a compelling reason for the Board to deny the motion. PLCA was further prejudiced by the failure to be served with the Exceptions as it had believed its rights had been fully and finally protected by Judge Goldman's decision when the original July 23, 2014 deadline to file exceptions had passed. Such prejudice is undeniable and highly relevant. *Cf. Auto Chevrolet*, 249 NLRB No. 70 (1980) (holding that the questions of prejudice is irrelevant when the Board's inquiry is whether the non-complying party made a genuine attempt to substantially comply with the rules of service).

Counsel for the General Counsel has entirely excluded PLCA from multiple stages of the proceedings before the Board and deprived PLCA of its right to notice of and participation in the proceedings against it. PLCA was not even aware that Counsel for the General Counsel intended to seek an appeal of the Administrative Law Judge's decision, and as a result, has not been able to develop its defense, coordinate its resources, consider the impact of such issues on bargaining, or exercise its rights in the administrative process. An order allowing PLCA additional time in which to respond to Counsel for the General Counsel's Exceptions will not remedy the prejudice that has been and will be caused by its exclusion from the proceedings thus far.

C. Sanctions Are Appropriate

Counsel for the General Counsel must be sanctioned given the flagrant disregard for the Board's rules at issue here. This is not a case of inadvertent clerical error or a failure to serve that was immediately redressed. PLCA was repeatedly and intentionally excluded from

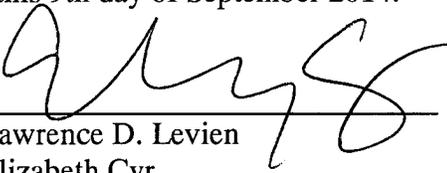
proceedings being conducted against its interests. Such conduct is unacceptable by any party but is simply outrageous when perpetrated by Counsel for the General Counsel. Moreover, PLCA has now been forced to expend resources to file this motion to restore its rights that were trampled by Mr. Duffey's intentional and repeated failure to comply with the Board's rules. As a result, Mr. Duffey must be sanctioned by the Board including but not limited to the cost expended by PLCA in preparing and filing this brief.

IV. CONCLUSION

For the reasons set out above, PLCA's motion to strike Counsel for the General Counsel's Exceptions and its motion for sanctions against Jonathan D. Duffey should be granted.

Respectfully submitted this 9th day of September 2014.

By:



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CERTIFICATE OF SERVICE

I hereby certify that on this 9th day of September 2014, a copy of the foregoing was electronically filed with the Executive Secretary and served via email to the following:

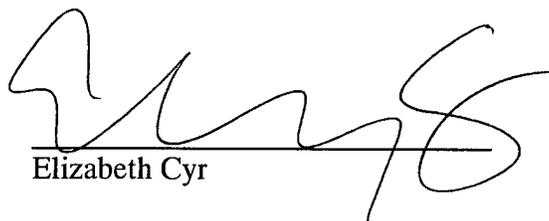
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