

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 15**

OZBURN-HESSEY LOGISTICS, LLC)	
)	
and)	
)	
UNITED STEEL, PAPER AND FORESTRY,)	Case 26-CA-023497, et al.
RUBBER, MANUFACTURING, ENERGY,)	
ALLIED INDUSTRIAL AND SERVICE)	
WORKERS aka UNITED STEELWORKERS)	
UNION)	

**RESPONDENT’S EXPEDITED MOTION TO DISQUALIFY
ADMINISTRATIVE LAW JUDGE**

I. INTRODUCTION

Before hearing any evidence whatsoever, the Administrative Law Judge ("ALJ") has summarily labeled the upcoming compliance hearing a waste of time and taxpayer money. Therefore, Respondent Ozburn-Hessey Logistics, LLC ("Respondent" or "OHL") respectfully submits this Expedited Motion to Disqualify the Administrative Law Judge. As grounds for this Motion, OHL asserts that the ALJ has: (1) prejudged the outcome of this case before the trial; (2) verbally expressed animus for the Respondent that demonstrates a lack of impartiality; and (3) attempted to dissuade the Respondent from pursuing its legal right to have a hearing on this matter. Respondent therefore respectfully moves the ALJ to disqualify herself from presiding over this case. Respondent asks for expedited relief on this Motion because the trial is set to take place on August 29, 2016, which is five days from the date this Motion was filed.¹

¹ Respondent respectfully requests a ruling on this Motion prior to the trial so that Respondent can request for special permission to appeal to the Board pursuant to NLRB Rules and Regulations § 102.26 if this Motion is denied.

II. BACKGROUND

This is an unfair labor practice case that has reached the compliance stage. The parties are scheduled to litigate the proper amount of backpay owed to five employees at a trial beginning on August 29, 2016. On August 23, 2016, the ALJ, Donna Dawson (“Judge Dawson”) conducted a telephonic pre-trial conference with the parties. Aff. of Ben Bodzy at ¶ 3. At the pre-trial conference, the Respondent declined to engage in settlement discussions regarding the backpay owed to the employees in this case, and articulated some of its reasons for declining to do so. Aff. of Ben Bodzy at ¶ 4. Upon hearing the Respondent’s position regarding settlement, the ALJ became extremely upset, and in a raised voice twice stated that the Respondent’s position regarding settlement was “ridiculous.” Aff. of Ben Bodzy at ¶ 5. The ALJ stated that the Respondent’s insistence on trying this case, rather than settling, was a “wast[e] of taxpayer dollars.” Aff. of Ben Bodzy at ¶ 6. The ALJ stated that the Respondent was in “a serious case of denial” about this case and that the Respondent was “wasting time” by trying this case, rather than settling this case. Aff. of Ben Bodzy at ¶¶ 7, 8. The ALJ also stated that it is a “shame” that “there is nothing that can be done” to punish companies that take the position regarding settlement that the Respondent has taken. Aff. of Ben Bodzy at ¶ 9.

III. LEGAL STANDARD

“The functions of all administrative law judges” should be “conducted in an impartial manner.” NLRB Statements of Procedure, § 101.10(b). An ALJ “may at any time withdraw if he or she deems himself or herself disqualified because of bias or prejudice.” *Id.*

Any party may request the administrative law judge, at any time following his designation and before filing of his decision, to withdraw on grounds of personal bias or disqualification, by filing with him promptly upon the discovery of the alleged facts a timely affidavit setting forth in detail the matters alleged to constitute grounds for disqualification. If, in the opinion of the

administrative law judge, the affidavit is filed with due diligence and is sufficient on its face, he shall forthwith disqualify himself and withdraw from the proceeding.

NLRB Rules and Regulations, § 102.37. An ALJ who denies a motion to disqualify must state the grounds for their ruling. *Id.*

IV. ARGUMENT

The ALJ's comments at the August 23, 2016 pretrial conference indicate either a bias, or, at the very least, the appearance of a bias. Because an ALJ's bias or appearance of a bias are grounds for disqualification, the ALJ should disqualify herself from this case to ensure the parties receive both: (1) a fair hearing; and (2) the appearance of a fair hearing.

A. The ALJ has Impermissibly Prejudged the Outcome of this Case

The ALJ's comments at the August 23, 2016 pre-trial conference indicate that the ALJ has impermissibly prejudged the outcome of this case before the trial has even taken place. As set forth above, at the August 23, 2016 pre-trial conference, the ALJ stated that OHL was "wasting taxpayer dollars" and "wasting time" by insisting on having a hearing rather than settling this case, and that OHL's declining to settle showed that OHL was in "a serious case of denial." Aff. of Ben Bodzy at ¶¶ 6-9. These comments show the ALJ has already made a pre-trial determination regarding the outcome of this matter, without the benefit of the evidence that will be presented at the trial or the credibility determinations that will flow from the proof at trial. The ALJ's statement that a trial is a "waste of time" can only be interpreted to mean that the ALJ has already determined that OHL's position has no merit. Furthermore, the Board has previously held that comments indicating an ALJ's prejudgment of a case shows bias that creates grounds for disqualification. *Reading Anthracite Co.*, 273 NLRB 1502, 1502 (1985) (judge's statements creating "the impression that he had prejudged the ultimate issue in the case" indicated bias).

It is impossible for OHL to receive a fair hearing where the judge has, as in this case, pre-determined the outcome of a case before the trial has even occurred. The ALJ should therefore disqualify herself from presiding over this case.

B. The ALJ's Comments Show a Bias Against the Respondent

The ALJ's intemperate comments not only indicate that she has prejudged the outcome of this case, but that she has a "predisposition so extreme as to display a clear inability to render a fair judgment." *Liteky v. United States*, 510 U.S. 540, 551 (1994). The ALJ's comments and her characterization of the Respondent's desire to have a trial as "ridiculous" and a "waste of time," "reveal such a high degree of favoritism or antagonism as to make fair judgment impossible." *Id.* at 555. These comments demonstrate antagonism towards OHL and therefore warrant disqualification because the ALJ's displays of impartiality raise doubts as to the "integrity of the Board's decision-making processes." *Victor's Café 52, Inc.*, 338 NLRB 753, 756-57 (2002). The ALJ's comments about the "ridiculousness" of Respondent's desire to have a trial further show impartiality because these comments indicate the ALJ's belief that Respondent is abusing the Board's processes by asserting their right to a hearing rather than acquiescing to a settlement. An unfounded accusation that Respondent is abusing the Board's processes by asserting its legal rights is grounds for disqualification. *New York Times Co.*, 265 NLRB 353, 353 (1982). Because the ALJ has displayed antagonism towards the Respondent, the ALJ should disqualify herself from presiding over this case.

C. The Appearance of Bias Warrants Disqualification

Even if the ALJ is not actually biased, her comments showing prejudgment and antagonism towards the Respondent warrant disqualification because they create the appearance of bias. The Board has held numerous times that "it is essential not only to avoid actual

partiality and prejudgment . . . in the conduct of Board proceedings, but also to avoid even the appearance of a partisan tribunal.” *Reading Anthracite Co.*, 273 NLRB 1502, 1502 (1985) (quoting *Indianapolis Glove Co.* 88 NLRB 986, 987 (1950)). Furthermore, even if the ALJ believes that she is not actually prejudiced despite her antagonistic comments, the Board has held that “intemperate language” “undermines the confidence of parties, representatives, and the public in the overall fairness and equity of the Board’s treatment of parties, and in the Board’s ability to establish accurate factual records, draw unbiased conclusions and . . . render fair judgment.” *Id.* at 757. In this case, the ALJ’s antagonistic comments have undermined the confidence of Respondent in the fairness and equity of this proceeding. Because the ALJ’s comments show, at the very least, the appearance of a partisan tribunal, the ALJ should disqualify herself from presiding over this case.

D. The Comments Regarding Settlement Indicate Bias

At the August 23, 2016 pre-trial conference, the ALJ stated twice that the Respondent’s declining to settle was “ridiculous,” that the Respondent was “wasting taxpayer dollars” by not settling this case, that the Respondent is in a “serious case of denial” about this case, and that the Respondent was “wasting [its] time” by insisting on a hearing for this case. Aff. of Ben Bodzy at ¶¶ 5-8. The ALJ’s comments suggest that the ALJ would not rule in favor of the Respondent no matter what happens at trial, and that the Respondent should therefore settle this case. This attempt to limit the Respondent’s right to have a full hearing on the issue of backpay in this case is impermissible. *Indianapolis Glove Co.*, 88 NLRB 986, 987 (1950) (an ALJ must not “limit[] either party in the full development of its case.”) Furthermore, although the ALJ can “encourage and seek to facilitate settlement,” the ALJ “should not act in a manner that coerces any party into surrendering the right to have the controversy resolved by the courts.” Code of Conduct for

United States Judges Canon 3A(4). Coercion generally occurs where, as here, a judge “threatens to penalize a party that refuses to settle.” *Smith v. ABN AMRO Mortg. Grp., Inc.*, 434 Fed. App’x 454, 462 (6th Cir. 2011). The ALJ’s statements that a trial was a “waste of time” amounts to a threat that, if the Respondent does not settle, the ALJ will rule against the Respondent no matter what the evidence shows at trial. The ALJ’s statements regarding the futility of a trial in this case demonstrate a lack of impartiality, and the ALJ should therefore recuse herself from these proceedings.

V. CONCLUSION

The ALJ’s ill-advised and intemperate comments at the August 23, 2016 pre-trial conference indicated either an actual bias against OHL, or (at the very least) the appearance of bias against OHL. For the foregoing reasons, the Respondent respectfully requests that the ALJ disqualify herself from presiding over this case.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing *Expedited Motion for Disqualification* has been emailed and mailed, postage prepaid, to:

Mr. William T. Hearne
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Benjamin Brandon
United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied
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this 24th day of August, 2016.


Ben H. Bodzy