

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

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| ROY SPA, LLC, |) | |
| |) | |
| Respondent, |) | |
| and |) | Case No.: 19-CA-83329 |
| |) | |
| INTERNATIONAL BROTHERHOOD OF |) | ORAL ARGUMENT REQUESTED |
| TEAMSTERS LOCAL 2, |) | |
| |) | |
| Charging Party. |) | |

**EXCEPTIONS OF RESPONDENT ROY SPA, LLC
TO THE SUPPLEMENTAL DECISION AND ORDER
OF THE ADMINISTRATIVE LAW JUDGE
DENYING RESPONDENT'S APPLICATION FOR ATTORNEY'S FEES AND
EXPENSES PURSUANT TO THE EQUAL ACCESS TO JUSTICE ACT**

Respectfully submitted by:

ROY SPA, LLC

Michael E. Avakian

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5211 Port Royal Road, Suite 610
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(703) 321-9181

August 29, 2016

**BEFORE THE
NATIONAL LABOR RELATIONS BOARD**

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Comes now Respondent Roy Spa, LLC (“Roy Spa” or “Company”), pursuant to Rule 102.46 and 102.154 of the Board’s Rules and Regulations, and excepts to the Decision of the Administrative Law Judge (JD-66-16) in the above styled case.

Exception 1. Respondent excepts to the ALJ’s failure to find that Roy Spa was the “prevailing party” in the underlying action, that its net worth was less than \$7 million, and that it had less than 500 employees at all relevant times.

Exception 2. Respondent excepts to the ALJ’s failure to find that Roy Spa’s request for attorney’s fees and expenses, were reasonable. ALJD 8 n.9.

Exception 3. Respondent excepts to the ALJ’s failure to find that an attorney’s fee rate for the specialized nature of the case of \$515/hour was warranted.

Exception 4. Respondent excepts to the ALJ’s failure to cite the Equal Access to Justice Act and its terms.

Exception 5. Respondent excepts to the ALJ’s failure to cite the Equal Access to Justice Act applies separate examination to an agency’s preliminary administrative activity and to its litigation activity.

Exception 6. Respondent excepts to the ALJ’s failure to find the General Counsel introduced no evidence to support his Complaint ¶2(e) allegations of

purchases and receipts.

Exception 7. Respondent excepts to the ALJ's failure to find the General Counsel introduced no evidence to support his Complaint ¶2(f) national defense allegation, ¶2(f), and commerce, ¶2(g).

Exception 8. Respondent excepts to the ALJ's failure to find the General Counsel introduced no evidence to support his Complaint's ¶2(g) commerce allegation.

Exception 9. Respondent excepts to the ALJ's failure to apply Fed. R. Civ. Proc. 11(b)(3), where an attorney's signature on a pleading "certifies...the factual contentions have evidentiary support" or will likely have support under Section 102.39 of the Board's Rules and Regulations:

Exception 10. Respondent excepts to the ALJ's failure to find the General Counsel introduced no evidence to support his written amendment to complaint alleging business commerce jurisdiction from Virginia to other states set forth in GC19.

Exception 11. Respondent excepts to the ALJ's failure to find that Roy Spa repudiated all statutory obligations to treat with the Union more than six months before the charge was filed under Section 10(b) of the Act.

Exception 12. Respondent excepts to the ALJ's failure to find that Roy Spa had no obligation to bargain with the Union after repudiation under Section 10(b) of the Act.

Exception 13. Respondent excepts to the ALJ's finding Roy Spa was a successor employer with an obligation to bargain with the Union. ALJD 6 ll.13-15.

Exception 14. Respondent excepts to the ALJ's finding that Roy Spa changed a dress code based solely on "the uncontradicted testimony of two employee witnesses." ALJD 5 l.20.

Exception 15. Respondent excepts to the ALJ's finding Roy Spa had a successorship bargaining obligation after ten months when it moved to a new location and provided new services. ALJD 6 ll.22-23.

Exception 16. Respondent excepts to the ALJ's failure to find that the Union did not represent a majority of cosmetologists working for Roy Spa in July 2012.

- Exception 17. Respondent excepts to the ALJ's failure to find Roy Spa's Employee Manual, R15, established initial terms and conditions of employment in September 2011.
- Exception 18. Respondent excepts to the ALJ's failure to find Roy Spa's Employee Manual, R15, was provided to and signed for by all employees in September 2011. Tr. 132:9-14.
- Exception 19. Respondent excepts to the ALJ's finding Roy Spa had not shown the Union's representation of only 3 of 9 cosmetologists in July 2012 was not evidence to show the Union lacked majority support. ALJD 6 ll/24-25.
- Exception 20. Respondent excepts to the ALJ's failure to find the Union had not demonstrated any majority support of employees at the time it filed its charge in June 2012.
- Exception 21. Respondent excepts to the ALJ's finding the successorship law supported "the General Counsel's theory of violation." ALJD 1. 26.
- Exception 22. Respondent excepts to the ALJ's misreading of former ALJ Marchionese's remarks in his Decision, by declaring Judge Marchionese, "suggested in his decision, the violations would probably have been established had the General Counsel succeeded on the jurisdictional issue." ALJD 6 ll.29-32.
- Exception 23. Respondent excepts to the ALJ's failure to find that the General Counsel *could not establish* successorship or a general refusal to bargain in the underlying case as ALJ Marchionese so found, because it was not alleged in the Complaint: "the complaint only alleges a refusal to bargain regarding two discrete subjects, *i.e.*, the change in commission rate and the adoption of a dress code." JD(ATL)-18-13 (June 28, 2013) at 6 ll.33-34.
- Exception 24. Respondent excepts to the ALJ's failure to find that the General Counsel *did not establish* a "general refusal to recognize and bargain" with the Union in his litigation case.
- Exception 25. Respondent excepts to the ALJ's failure to find Judge Marchionese ruled the General Counsel *did not establish* successorship or a general refusal to bargain by Roy Spa because the claims were not alleged in the Complaint, JD(ATL)-18-13 at 6 ll.33-34. as such alleged conduct "occurred more than 6 months before the Union filed its charge on June 18, 2012.. JD(ATL)-18-

13 (June 28, 2013) at 6 ll.36-37.

- Exception 26. Respondent excepts to the ALJ's failure to find Judge Marchionese ruled the General Counsel *did not establish* successorship or a general refusal to bargain by Roy Spa because such alleged conduct "occurred more than 6 months before the Union filed its charge on June 18, 2012. JD(ATL)-18-13 (June 28, 2013) at 6 ll.36-37.
- Exception 27. Respondent excepts to the ALJ's finding that the complete change in operations as a family hair salon in July 2012 wherein it employed no persons within the work jurisdiction of the Union contract established a continuity of the enterprise's operation. ALJD 7 ll.10-11.
- Exception 28. Respondent excepts to the ALJ's failure to find that Roy Spa was barred from recognizing any representative under Section 8(a)(2) of the Act until it reached a representative complement of employees in July 2012. *Hilton Inn Albany*, 270 NLRB 1364, 1365 (1984) .
- Exception 29. Respondent excepts to the ALJ's speculative finding that in July 2012 it employed nine persons and hired only an additional two persons: "Kept the 5 employees of the predecessor, plus 2 supervisors." ALJD 7 ll.22-23.
- Exception 30. Respondent excepts to the ALJ's failure to find only three employees Marcella MacDonald, Patricia Schildt, and Lucinda Williamson hired in August 2011 changed over to the family hair salon in July 2012. Tr. 305 l.1.
- Exception 31. Respondent excepts to the ALJ's failure to find the nine cosmetologists at the new facility were Jolene Bass, Ali Cook, Andrea Dostie, Susan Ehnes, Terilee Ehnes, Marcella MacDonald, Mickey Mellinger, Patricia Schildt, and Lucinda Williamson. Tr. 303 ll.17-19, 25-303 l.2.
- Exception 32. Respondent excepts to the ALJ's failure to find Roy Spa's two managers, Dustin Robinson and Shiloh Holcomb, tr. 157 l.9, were not employed after the changeover. Tr. 305.
- Exception 33. Respondent excepts to the ALJ's assumptions and inferences from evidence he did not hear or witness about the complement of employees. ALJD 7. ll.20-29.

- Exception 34. Respondent excepts to the ALJ's failure to call or hearing or further briefing on evidence about the Roy Spa's complement of employees.
- Exception 35. Respondent excepts to the ALJ's finding that Roy Spa's Section 10(b) defense to the Complaint allegations "is without merit." ALJD 7 ll.32-33.
- Exception 36. Respondent excepts to the ALJ's failure to find that no unfair labor practice allegation can exist outside the Section 10(b) limitations period.
- Exception 37. Respondent excepts to the ALJ's finding that the two alleged violations of a duty to bargain in the complaint were filed within six months, ALJD 7 l.39.
- Exception 38. Respondent excepts to the ALJ's determination that the General Counsel relied on a continuing bargaining obligation "at the time of the takeover and continuing thereafter" as "background evidence to show the existing bargaining obligation", ALJD 7 ll.42-45, when the obligation had been repudiated more than six months before the charge was filed.
- Exception 39. Respondent excepts to the ALJ's finding Roy Spa had an obligation to bargain with the union regarding AAFES dress codes, Montana hygiene law, commission rates for cosmetologists. ALJD 6 ll.17-19.
- Exception 40. Respondent excepts to the ALJ's finding that two employee witnesses' testimony regarding dress codes was "established" when their claims are contrary to Montana hygiene law for barbers and cosmetologists. ALJD 6 ll.19-21.
- Exception 41. Respondent excepts to the ALJ's failure to find that the General Counsel litigation position introduced no evidence at the hearing to establish that hair salon services provided by Roy Spa to AAFES was vital to national defense under the national defense standard.
- Exception 42. Respondent excepts to the ALJ's failure to find that the General Counsel's litigation position introduced no evidence at hearing from military personnel that the hair salon services provided by Roy Spa to AAFES was vital to national defense under the national defense standard.

- Exception 43. Respondent excepts to the ALJ's failure to find that the General Counsel litigation position never explained what the national defense standard in fact, is.
- Exception 44. Respondent excepts to the ALJ's failure to find the national defense standard requires engagement in an activity "vital" to national defense.
- Exception 45. Respondent excepts to the ALJ's finding at 3 ll.29-31, that the Board had found jurisdiction over barber shops on military bases primarily under the national defense standard rather than the discretionary retail standard.
- Exception 46. Respondent excepts to the ALJ's failure to find the national defense standard was not applied in Fort Houston Barber Shop, 255 N.L.R.B. 1248 (1981), and Pentagon Barber Shop, 255 N.L.R.B. 1248 (1981).
- Exception 47. Respondent excepts to the ALJ's failure to find that in no case has the Board exercised national defense standard jurisdiction over a hair care facility on a military installation that did not meet the discretionary commerce sales standard.
- Exception 48. Respondent excepts to the ALJ's failure to finding that "reasonable minds" could not differ on whether haircuts are vital to the national defense.
- Exception 49. Respondent excepts to the ALJ's failure to consider that the temporary maintenance of an old business operation during a transition to a new business does not result in a finding of successorship.
- Exception 50. Respondent excepts to the ALJ's finding that Roy Spa "dealt with the Union to a certain degree." ALJD 6 l.9.
- Exception 51. Respondent excepts to the ALJ's failure to find that Roy Spa repudiated all relations with the Union.
- Exception 52. Respondent excepts to the ALJ's finding Roy Spa only "declined to adopt the old contract or formally recognize the Union." ALJD 6 l.10.
- Exception 53. Respondent excepts to the ALJ's finding Roy Spa had an obligation to bargain with the Union after repudiation of any such obligation to bargain.

- Exception 54. Respondent excepts to the ALJ's failure to find the General Counsel introduced no evidence to show why the national defense standard could apply to the facts involving Roy Spa.
- Exception 55. Respondent excepts to the ALJ's failure to find the General Counsel identified no facts to show why the law under the national defense standard should be applied differently to the facts in this case than in all other cases.
- Exception 56. Respondent excepts to the ALJ's failure to find the General Counsel never argued that his position sought to extract a new legal ground for national defense jurisdiction.
- Exception 57. Respondent excepts to the ALJ's failure to find the General Counsel never introduced any evidence that a labor dispute at Malmstrom Air Force base would impact any activity on the base.
- Exception 58. Respondent excepts to the ALJ's failure to find the question of national defense jurisdiction was challenged at all times by Respondent, and upon which Roy Spa prevailed on in both law and fact.
- Exception 59. Respondent excepts to the ALJ's failure to find that even if the General Counsel was substantially justified in issuing a complaint relying upon national defense jurisdiction, his litigating the issue of national defense jurisdiction upon no evidence to sustain national defense jurisdiction, was not substantially justified.
- Exception 60. Respondent excepts to the ALJ's finding at 6 l.28 that the General Counsel was "substantially justified in litigating this matter."
- Exception 61. Respondent excepts to the ALJ's recommendation that the Application for an Award of Fees under the EAJA be dismissed
- Exception 62. Respondent excepts to the ALJ's failure to find that a cost of living increase in attorneys' fees is necessary under the Board's Rules and Regulations.
- Exception 63. Respondent excepts to the failure of the ALJ to find no reasonable person would assert that haircuts and women's hair styling services are vital to national defense.

Exception 64. Respondent excepts to the failure of the ALJ to there was no continuity of operations between the Old Fashioned Barber and Respondent.

ORAL ARGUMENT REQUESTED

Respondent requests oral argument of this matter pursuant to 102.46(i) of the Board's Rule and Regulations. This case presents significant questions under the Equal Access to Justice Act. In the unusual circumstance of the retirement of the ALJ hearing the underlying case, speculation by following reviewers may cause the case to become a major piece of secondary litigation case if speculation surrounding the facts and inferences are allowed to be indulged in. Oral argument can ensure that the Board considers the circumstances of the case under the case as presented by the parties.

CONCLUSION

For the foregoing reasons, Respondent Roy Spa, LLC respectfully requests that the Board grant these Exceptions to the Supplemental Decision of the Administrative Law Judge.

Respectfully submitted,

ROY SPA, LLC

Dated: August 29, 2016

BY: /s/ Michael E. Avakian
Michael E. Avakian

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the RESPONDENT'S EXCEPTIONS TO SUPPLEMENTAL DECISION OF THE ADMINISTRATIVE LAW JUDGE was mailed to the following persons on this the 29th day of August 2016:

Ryan Connelly, Esq.
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