

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

ESSENDANT CO.	:	
	:	
and	:	Case No. 05-CA-170845
	:	
TEAMSTERS LOCAL UNION NO. 570,	:	
AFFILIATED WITH INTERNATIONAL	:	
BROTHERHOOD OF TEAMSTERS	:	

**ANSWERING BRIEF OF ESSENDANT CO.
IN OPPOSITION TO THE GENERAL COUNSEL'S EXCEPTIONS
TO THE DECISION OF THE ADMINISTRATIVE LAW JUDGE**

Joseph E. Tilson, Esq.
Alex V. Barbour, Esq.
COZEN O'CONNOR
123 N. Wacker Drive, Suite 1800
Chicago, Illinois 60606
Phone: (312) 474-7900
Fax: (312) 878-2001

*Attorneys for Respondent
Essendant Co.*

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Pursuant to Section 102.46(d)(1) of the National Labor Relations Board’s (“Board” or “NLRB”) Rules and Regulations, Respondent Essendant Co. (“Essendant” or “Respondent”) submits the following answering brief to the General Counsel’s Exceptions to the Decision of the Administrative Law Judge (“Exceptions”). For the reasons explained fully below, Essendant respectfully requests that the Exceptions be overruled and the decision of Administrative Law Judge Arthur J. Amchan be affirmed.

I. INTRODUCTION

This case presents a simple and straightforward matter: Essendant Co. issued a clear and unambiguous “no distribution” policy that is expressly limited to “printed or written literature,” and the General Counsel challenged it solely on the basis that Essendant’s employees would reasonably view the policy as applying to electronic and digital material. But Essendant’s policy is lawful, and the written text of the policy itself forecloses the General Counsel’s interpretation. In addition, the General Counsel offered no evidence that Essendant’s employees (or anyone else) would reasonably read the policy in accordance with his novel interpretation.

After being presented with the policy and the parties’ arguments, Administrative Law Judge Arthur J. Amchan (the “ALJ”) found that the policy was not ambiguous, that employees could not reasonably construe its terms to prohibit any protected activity, and that the General Counsel’s contrary reading was not reasonable. The ALJ’s decision is well-reasoned and his factual findings are supported by the parties’ joint stipulation and should not be disturbed here. Accordingly, Essendant respectfully requests that the General Counsel’s Exceptions be overruled.

II. STATEMENT OF THE CASE

The facts needed to adjudicate this dispute are simple and uncontested, as explained fully in the parties' Stipulation of Facts and Motion to Submit Case on Stipulation to the Administrative Law Judge ("Stipulation"), which was approved by the ALJ on August 29, 2016.

In early 2016, Respondent issued an "Associate Guide" to employees at several facilities in the United States, including its Baltimore locations, and maintained the following rule ("Policy") in that guide:

The Company believes that associates should not be disturbed or disrupted in the performance of their job duties. For this reason, solicitation of any kind by one associate of another associate is prohibited while either associate is on his or her working time. In addition, distribution or posting of advertising material, handbills, or printed or written literature of any kind is prohibited at any time in work areas.

Stipulation at ¶ 3 (amending Complaint at ¶ 5). The General Counsel asserts that Respondent has violated Section 8(a)(1) of the National Labor Relations Act by issuing and maintaining the Policy. Complaint at ¶ 6.

The General Counsel did not allege, and there are no facts to support, any of the following assertions: (a) that any of Respondent's employee actually interpreted the Policy to prohibit them from sending electronic literature or email attachments to their fellow employees or third parties; (b) that Respondent included any language in the Associate Guide that defined "printed or written literature" as including electronic information; (c) that Respondent promulgated the Policy in response to union activity; or (d) that the Policy has been applied to restrict the exercise of the Section 7 rights of Respondent's employees.

After the parties' submitted briefs,¹ the ALJ issued a decision ("ALJD") on October 18, 2016 dismissing the General Counsel's complaint. The ALJ found that Essendant's use of the

¹ After briefing was complete, the General Counsel filed a motion to strike a portion of Respondent's brief. The motion was not ruled on by the ALJ. The General Counsel excepts from the failure to issue a ruling on the motion to strike but does not present any argument in his brief for why the ALJ's decision not to rule on the motion was error.

phrase “of any kind” in the sentence “In addition, distribution or posting of advertising material, handbills or printed or written literature of any kind is prohibited at any time in work areas” referred to “the kind of literature that may be posted, i.e., charitable, political, commercial, rather than to method of posting,” ALJD at 3:21-22, and that the modifier “of any kind” could not be reasonably read in any other way. *Id.* at 3:23-24. In addition, the ALJ found that even if the phrase “of any kind” was excised from the policy, the policy would still be lawful. *Id.* at 3:34-38. The ALJ did not include any citation to Respondent’s brief in his decision and did not note, claim, or otherwise suggest that he relied upon any specific language from Respondent’s brief in his decision. Instead, the ALJD makes clear that the ALJ interpreted the policy and made factual findings that employees would not construe the policy in a way that would purport to prohibit protected activity. *See id.* at 3:22-26, 34-38. The ALJ then dismissed the complaint. *Id.* at 3:40.

The General Counsel presents eight separate exceptions from the ALJ’s decision, though the brief filed in support of the exceptions (“GC Excp. Br.”) organizes the Exceptions differently. For the reasons discussed below, the Board should overrule the General Counsel’s exceptions and affirm the ALJ decision.

III. ARGUMENT

The General Counsel’s exceptions are insufficient to challenge the ALJ’s well-reasoned decision (which did not need extensive discussion to interpret Respondent’s simple Policy) or to permit the Board to overturn the ALJ’s factual findings that employees would not reasonably interpret the Policy to prohibit electronic communications or other protected activity.

Accordingly, the ALJ concluded that the Policy was lawful, a holding that should be affirmed by the Board.

A. The ALJ Did Not Err In Describing The General Counsel’s Argument And Any Such Error Would Be Insufficient To Overturn The Decision

The General Counsel Brief first assigns as error the ALJ’s “articulation of the General Counsel’s principal argument,” GC Excp. Br. at 3, but this supposed error is nothing more than a disagreement with how the ALJ described part of the General Counsel’s argument that is insufficient to overturn the decision, and, in any event, is supported by the record.

First, the General Counsel’s objection here is simply a disagreement over the words used by the ALJ; thus, the exception is an insufficient legal basis on which to overturn the ALJD because it does not relate to a “procedure, fact, law, or policy” made by the ALJ. *See* Section 102.46(b)(1) (requiring an exception to set forth “the questions of procedure, fact, law, or policy to which exception is taken”). In addition, the central issue in this proceeding (*i.e.*, whether Essendant’s employees could reasonably view the company’s policy as prohibiting legally protected Section 7 activity) was fully addressed by the ALJ, notwithstanding any alleged flaw in his articulation of the General Counsel’s argument. The ALJ identified the policy at issue (ALJD 2:1-5), evaluated the General Counsel’s arguments (ALJD 2:38 – 3:20), considered whether the policy would be lawful if the phrase “of any kind” was removed (ALJD at 3:34-38), and then arrived at his conclusions. There is no indication that the ALJ failed to explore the General Counsel’s arguments or that the ALJ was influenced by the manner in which he summarized the General Counsel’s position in his decision. In short, the ALJ committed no error in “articulati[ng]” the General Counsel’s argument and—even if he did—such an error is not a cognizable basis on which to overturn a decision and would be harmless given the ALJ’s rational conclusion that no employee would reasonably read the Policy to include digital or electronic material.

Second, the General Counsel’s claim that the ALJ “overstates the extent to which the General Counsel’s theory relies on the phrase ‘of any kind’...,” GC Excp. Br. at 3, is again an

insufficient basis to overturn the decision and should be rejected when viewed in light of the record before the ALJ. In the introduction on the very first page of his own brief to the ALJ, the General Counsel made one argument against the Policy: that by “employing the phrase ‘of any kind,’ Respondent has left employees no choice but to believe that they are prohibited from engaging in electronic posting and distribution.” Brief of the General Counsel to the Honorable Arthur J. Amchan (“GC Brief to ALJ”) at 1. No other argument against the policy was presented in that introductory section. Later, when arguing that the policy was ambiguous, the General Counsel argued that the policy was “devoid of clarifying definitions” and that “[b]y failing to mitigate the term ‘of any kind’ with any such qualifying or limiting language, Respondent has presented its employees with a work rule fraught with considerable ambiguity.” GC Brief to ALJ at 9-10. As the General Counsel *himself* stressed the importance of the phrase “of any kind” in his own arguments to the ALJ, the General Counsel cannot now argue the Board that the ALJ “overstate[d]” the extent of his reliance on that phrase. And, even if the ALJ “overstated” the General Counsel’s reliance on the phrase of any kind, such an action would not be sufficient to overturn the decision because it is not a procedural misstep, or a fact, law, or policy that the ALJ misapprehended.

B. The ALJ Properly Found That Essendant’s Policy Would Not Reasonably Be Read By Employees To Restrict Their Section 7 Activity, Was Not Overbroad Or Ambiguous, And Was Lawful

The General Counsel’s Brief addresses Exceptions 2 through 7 in two different areas, variously asserting supposed failures of the ALJ to find the Policy unreasonably restricts employees’ Section 7 rights to send electronic communications or to find the Policy was overbroad and ambiguous, GC Excp. Br. at 4-5, 10-14, and assigning as error the ALJ’s conclusion that reasonable employees could read only a lawful meaning from the Policy. GC Excep. Br. at 5, 11. But the ALJ’s factual findings that no reasonable employee would construe

the Policy to include a prohibition on protected activity is properly supported by record, especially in light of the plain text of the Policy itself. The General Counsel provided no evidence below to support the findings he now urges the Board to adopt. In addition, the ALJ's conclusion that the Policy is lawful is further supported by decades of Board law (including recent decisions) where similar policies were upheld. The General Counsel's exceptions should be overruled.

1. The ALJ properly found that the Policy is not overbroad or ambiguous, even with the phrase "of any kind."(Exceptions 2, 3, & 4)

The ALJ's finding that the Policy is not overbroad or ambiguous is properly supported by the record and should not be disturbed.

First, the plain text of the Policy strongly supports the ALJ's factual finding that there is no overbreadth or ambiguity. The Policy reads:

The Company believes that associates should not be disturbed or disrupted in the performance of their job duties. For this reason, solicitation of any kind by one associate of another associate is prohibited while either associate is on his or her working time. In addition, distribution or posting of advertising material, handbills or printed or written literature of any kind is prohibited at any time in work areas.

ALJD 2:1-6. The Policy is thus expressly limited to "advertising materials, handbills, or printed or written literature." *Id.* Nowhere does the Policy mention—much less, prohibit—electronic communications or emails, nor are there any examples or suggestions that would cause an employee to construe "printed or written literature" to be the same as unprinted, unwritten, digital messages that can be sent from a computer, tablet or mobile phone. The series of prohibitions in the last sentence ("distribution or posting of advertising material, handbills or printed or written literature of any kind") help make clear that the focus of the policy is on paper distribution or paper materials that can be "posted" or "printed" or are "written literature," and those phrases cannot

reasonably be construed to include digital or electronic data. Thus, the ALJ's conclusion that there is no ambiguity is well-supported by the record and should not be disturbed.

Second, the General Counsel offered the ALJ no evidence for his position that undefined words in the Policy are so vague that they create an ambiguity. There is no need for Respondent to create specific definitions for words and phrases highlighted by the General Counsel ("posting," "distribution," and "printed or written literature") because those are precisely the sort of common words that employees know and understand. In fact, as even the General Counsel has acknowledged, the Board's well-established principle is that employees "do not generally carry lawbooks to work or apply legal analysis to company rules as do lawyers..." and will not be expected to apply precise legal definitions to otherwise common words. GC Excp. Br. at 11-12 (quoting Solarcity, 363 NLRB No. 83 at 6 (2015)). Respondent's Policy, therefore, does not add a layer of complexity to the definition of common words and phrases, and the Board does not require that such common words be re-defined by an employer's policy.

Finally, the phrase "of any kind" is expressly limited by the Policy to prohibit "printed or written literature of any kind" and the phrase does not amplify or create any ambiguity. The ALJ properly found that the phrase "refers to the kind of literature that may be posted," ALJD 3:22-23, a conclusion that reads the phrase in context and in light of the prior phrases in the series (advertising materials, handbills). See Lutheran Heritage Village-Livonia, 343 NLRB 646, 646 (2004) (when evaluating a rule, the Board "must...give the rule a reasonable reading. It must refrain from reading particular phrases in isolation, and it must not presume improper interference with employee rights."); Fiesta Hotel Corporation, 344 NLRB 1363, 1368 (2005); Aroostook County Regional Ophthalmology Center v. NLRB, 81 F.3d 209 (D.C. Cir. 1996).

2. The ALJ properly found that no reasonable employee would construe the Policy to prohibit protected activity. (Exceptions 1, 5)

The record here is devoid of any evidence from the General Counsel that Respondent's employees would reasonably construe the Policy to prohibit Section 7 activity; therefore, the ALJ properly found that the Policy was lawful.

The burden to show that a rule is unlawful rests on the General Counsel. Lafayette Park Hotel, 326 NLRB 824, 826 (1998), enforced mem. 203 F.3d 52 (D.C. Cir. 1999). In this case, where the General Counsel has conceded that the rule does not expressly prohibit Section 7 rights and was not promulgated as a response to union activity, the General Counsel must prove that "Respondent's employees would reasonably construe the...rule[] to prohibit Section 7 activity." Hyundai Am. Shipping Agency, Inc., 357 NLRB 860, 861 (2011), enforcement granted in non-relevant part and denied in non-relevant part, 805 F.3d 309 (D.C. Cir. 2015).

The General Counsel failed to offer into the record any evidence that would help him to satisfy his burden. For example, the General Counsel did not place into the stipulated record any evidence that any person interpreted the Policy to cover electronic distribution of messages that would be protected under Section 7. Although Respondent is mindful that lack of evidence relating to employees' actual interpretation of a rule "is not dispositive" of the General Counsel's burden to prove that employees would reasonably construe a rule to restrict their Section 7 rights, such evidence may nevertheless "be instructive" on that point. Cintas Corp. v. N.L.R.B., 482 F.3d 463, 467 (D.C. Cir. 2007), enforcing 344 NLRB 943 (2005). But the record offered the ALJ no "instructive" evidence of any kind—or even a Board decision where the Board previously found that the phrases used in the Policy would reasonably be construed in a manner to prohibit Section 7 activity.

The General Counsel's failure to offer any evidence regarding how the Policy was interpreted highlights the weaknesses of his arguments against the decision. For example, the

General Counsel argues that “it is not plausible to assume that employees today consider ‘printed or written’ and ‘electronic’ to be mutually exclusive.” GC Excp. Br. at 13. But the General Counsel has offered *no evidence* to support his position that employees would consider the terms “printed or written literature” to be equal to “electronic” messages. Nor has he offered any cases where the Board found the equivalence he argues for here. At the same time that the General Counsel argues that the ALJ made an “unwarranted assumption that employees would not understand ‘printed or written literature’ to include electronic communications,” GC Excp. Br. at 14, the General Counsel urges the Board to make the same assumption in the opposite direction. Without offering any evidence of how employees generally or how Respondent’s employees interpret the phrases “printed or written literature” or “electronic communications,” the General Counsel appears to argue that his bare assertion some employees might construe it in a particular way is sufficient to meet his burden to show that Essendant’s employees “would reasonably construe” the Policy to prohibit their ability to engage in protected activity using electronic messages. But the General Counsel’s lone assertion is not sufficient evidence to carry his burden.

In light of the lack of any evidence for the General Counsel’s reading of the Policy, and mindful that the General Counsel had the burden to show that employees would reasonably construe the Policy to cover protected activity, the ALJ had sufficient support for his conclusion that no reasonable employee could construe the Policy to cover protected activity.

3. The ALJ properly concluded that the Policy was lawful.
(Exceptions 6, 7)

In addition to the foregoing, the ALJ had legal support for his conclusion that the Policy was lawful in light of several recent Board decisions that have upheld similar policies without any suggestion that a the policy implicated employees’ Section 7 rights.

The Board has never before found a violation of the type of language found in the Policy, both before and after *Purple Communications*. See, e.g., Casino Pauma, 363 NLRB No.

60 (2015) (rule prohibiting the distribution of literature “of any kind” in guest or working areas held invalid only to the extent it prohibited the distribution of literature in guest areas); DHL Express, Inc., 360 NLRB No. 87 (2014) (rule prohibiting employees from “distributing advertising materials, handbills, or printed and written literature of any kind in work areas” not alleged to interfere with Section 7 rights); Austral USA, 356 NLRB No. 65 (2010) (although the ALJ, affirmed by the Board, found that the respondent disparately enforced its no solicitation/no distribution policy, there was no challenge to the facial validity of the policy that prohibited the distribution of “literature or printed material of any kind in working areas at any time). Therefore, the ALJ had ample legal authority on which to conclude that the Policy was lawful and, notably, the General Counsel did not discuss these authorities in his brief to the ALJ or in his Exceptions Brief.

C. The General Counsel’s Other Assertions Of Error Are Based Solely On His Speculation And Are An Insufficient Basis To Overturn The ALJ’s Decision

Although not tied to a specific exception, the General Counsel’s brief advances several assertions of error that are based solely on the General Counsel’s speculation or on his reading of *Purple Communications*, a case which has no applicability here and which was not the focus of the General Counsel’s briefing below. These assertions in the Brief are meritless and, in any event, provide an insufficient basis on which to overturn the ALJ decision.

1. The General Counsel’s claims that the ALJ failed or refused to consider facts or law is based on nothing more than speculation.

First, the General Counsel baselessly argues that the ALJ’s conclusion that the Policy would not be reasonably construed to cover protected activity could “only have followed from the ALJ’s failure to consider whether employees in the modern workplace might construe terms...differently than employees from previous generations.” GC Excp. Br. at 5. The General Counsel does not cite to any fact or law relied upon despite making such a breathtaking claim,

and there is nothing in the ALJ's decision that would support the General Counsel's speculation that the ALJ "failed to consider" how employees in the "modern workplace" would construe the Policy. Instead, the ALJ appears simply to have disagreed with what the General Counsel asserted a reasonable employee would have done—such a disagreement does not amount to a "failure to consider" how employees today might construe terms "differently than employees from previous generations."

Next, the General Counsel devotes two pages to another similarly baseless argument that the ALJ "fail[ed] to consider whether traditional rules permitting employers to restrict paper distribution...are still relevant to employees in the modern workplace." GC Excp. Br. at 5-7. But, again, the General Counsel cites nothing in the ALJ's decision to support his assertion. The ALJ decision shows that he considered and reviewed the applicable law in this area. ALJD 2:17-36 (citing Stoddard-Quirk Mfg. Co., 138 NLRB 615 (1962); Lafayette Park Hotel, 326 NLRB 824, 825 (1998); Lutheran Heritage Village-Livonia, 343 NLRB 646, 647 (2004); and Purple Communications, Inc., 361 NLRB No. 126 (2014)). That is his obligation under Board law, and the ALJ has no authority to disregard the "traditional rules" or to determine that prior Board decisions are no longer "relevant to employees in the modern workplace."

The General Counsel also argues that it is unclear whether the ALJ relied upon Stoddard-Quirk, GC Excp. Br. at 6-7, and argues that "to the extent the ALJ dismissed the complaint in reliance on Stoddard-Quirk, he did so in error." GC Excp. Br. at 7. But, in the same section, the General Counsel himself resolves this apparent concern by acknowledging that the ALJ's "final analysis seems to be predicated solely on the Board's Lutheran Heritage-Livonia test." GC Excp. Br. at 6. And, indeed, Lutheran Heritage-Livonia was the decision that the General Counsel urged the ALJ to apply. GC Brief to ALJ at 1 ("The General Counsel respectfully urges the Administrative Law Judge to analyze Respondent's policy under Lutheran Heritage Village and

find that employees in the modern workplace would reasonably believe that Respondent’s rule applies to Section 7 conduct that employers may not lawfully prohibit.”). Thus, the General Counsel’s concern about Stoddard-Quirk is misplaced and, in any event, the General Counsel has no basis to argue that the ALJ should *not* have relied on Stoddard-Quirk, which remains good law.

2. The ALJ did not commit error in how he addressed Purple Communications and the General Counsel’s various arguments that attack the ALJ’s refusal to read Purple Communications in the same way are unsupported by law.
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The General Counsel advances several complaints tied to Purple Communications but none of them have any merit. First, even the General Counsel admits that the holding in Purple Communications does not apply here and the ALJ properly noted that there is nothing in the record about the access for Essendant’s employees to email at work. Second, the General Counsel’s broad view of Purple Communications has no support in the law and it was not error for the ALJ to refuse to discuss the decision at length.

The General Counsel readily admits that Purple Communications does not compel the result he seeks. “It is true that the holding in Purple Communications applies narrowly to rules not at issue here...” GC Excp. Br. at 7. In addition, the ALJ noted that “the stipulation is silent as to whether Essendant employees have access to the company’s email system.” ALJD 2:36 n.1. As all parties agree that Purple Communications does not control the outcome here, the ALJ’s abbreviated discussion of it is of no consequence and the General Counsel’s reliance on it is misplaced.

The General Counsel then argues at length for his view that Purple Communications “remade the landscape” for employer rules and that an employer’s work rules can only be “properly analyzed” through the prism of his reading of Purple Communications. GC Excp. Br.

at 8. But the General Counsel has no legal support for this argument, and it was not error for the ALJ to not address this assertion.

The General Counsel asserts that “[t]he sole employer restriction thus permitted by the Purple Communications presumption regarding communications sent via an employer-provided e-mail system is that communications are confined to non-working time,” GC Exp. Br. at 10 (quoting Purple Communications, 361 NLRB No. 126, at 15) and then claims that “[t]his same limitation must also apply to rules that prohibit—or that employees would reasonably construe to prohibit—electronic distribution.” GC Exp. Br. at 10. But, again, the General Counsel has no legal support for this broad assertion of the meaning of Purple Communications. And even if the General Counsel’s broad reading of Purple Communications could be credited, the ALJ’s factual findings in *this* case that no employee could reasonably construe the Policy to apply to electronic messages would *still* result in a dismissal of the complaint. The Policy itself is expressly limited to printed or written literature and there is no basis to disturb the ALJ’s findings that no reasonably employee would construe the Policy to apply to sending electronic messages. And even though the ALJ did not discuss in the decision every aspect of the General Counsel’s bold argument, it is evident from his decision that the factual findings he made would render any such discussion dicta.

D. The General Counsel Does Not Provide Argument Or Law Regarding The Failure Of The ALJ To Rule On The Motion to Strike And, Therefore, That Exception Is Waived. (Exception 8)

The General Counsel excepts from the failure of the ALJ to rule on his motion to strike. But the General Counsel’s Brief offers nothing more than a mention of this issue in a footnote. The General Counsel does not offer any case law to show that the failure to rule on the motion to strike was an abuse of the ALJ’s discretion or offer any citation to the decision of the ALJ that to suggest that the ALJ relied upon the sections of the Respondent’s brief which was the subject of

the General Counsel's motion. It is incumbent upon the party advancing exceptions to set forth the argument upon which they rely, with specific references to legal or other material relied upon in support. Sec. 102.46(c)(3). The General Counsel's failure to do so here constitutes a waiver of his exception to the ALJ's decision.

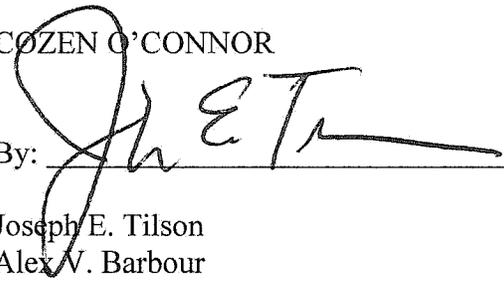
Even if the General Counsel's exception is held not waived, it has no merit. There is nothing in the ALJ decision that suggests that the portions of Respondent's brief that the General Counsel objected to played a role in his analysis and Respondent's inclusion of a citation and definition found in a Wikipedia entry is a proper use of *argument* and not an improper assertion of a fact outside of the stipulated record.

IV. CONCLUSION

For any and all of the reasons stated herein, the General Counsel's Exceptions should be overruled and the decision of Administrative Law Judge Arthur J. Amchan should be affirmed.

Respectfully submitted,

COZEN O'CONNOR

By: 

Joseph E. Tilson
Alex V. Barbour

COZEN O'CONNOR
123 N. Wacker Drive, Suite 1800
Chicago, Illinois 60606
(312) 474-7900 (p)
(312) 878-2001 (f)
Attorneys for Essendant Co.

Dated: December 13, 2016

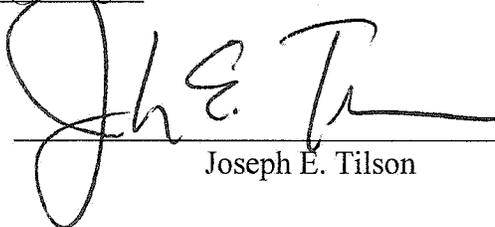
CERTIFICATE OF SERVICE

I, Joseph E. Tilson, hereby certify that on December 13, 2016, I caused to be served a copy of the foregoing **Answering Brief of Essendant Co. In Opposition To The General Counsel's Exceptions To The Decision Of The Administrative Law Judge** on:

Arthur Amchan
Administrative Law Judge
National Labor Relations Board
Division of Judges
1015 Half Street SE
Washington DC 20570-0001

James R. Rosenberg
Abato Rubenstein and Abato, P.A.
809 Gleneagles Court, Suite 320
Baltimore, MD 21286
jrosenberg@abato.com

Andrew Andela
National Labor Relations Board
Region 5
Bank of America Center, Tower II
100 South Charles Street, Suite 600
Baltimore, MD 21201
andrew.andela@nlrb.gov



Joseph E. Tilson