

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

**ERICKSON TRUCKING SERVICE, INC.,
d/b/a ERICKSON'S, INC.,**

Respondent,

Case No. 07-CA-178824

and

**LOCAL 324, INTERNATIONAL UNION
OF OPERATING ENGINEERS, AFL-CIO,**

Charging Party.

**RESPONDENT ERICKSON TRUCKING SERVICE, INC.'S RESPONSE BRIEF IN
OPPOSITION TO THE COUNSEL FOR THE GENERAL COUNSEL'S MOTION TO
STRIKE**

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I. THE BOARD SHOULD DENY THE COUNSEL FOR THE GENERAL COUNSEL'S MOTION TO STRIKE EXHIBITS A AND B TO ERICKSON'S BRIEF IN SUPPORT OF EXCEPTIONS.

The Counsel for the General Counsel moved to strike Exhibits A and B attached to Erickson's Brief in Support of Exceptions to the ALJ's Proposed Findings and Decision and argues that Erickson's did not file the "appropriate motion to reopen the record." (Response Br. at 3). Section 102.48(c) of the Board's Rules and Regulations states in relevant part:

A party to a proceeding before the Board may, because of extraordinary circumstances, move for reconsideration, rehearing, or reopening of the record after the Board decision or order.

29 C.F.R. § 102.48(c) (emphasis added). Thus, Erickson's cannot yet move to reopen the record, and it cannot move to reopen the record until the Board issues a decision or order.

As explained below, Erickson's included Exhibits A and B with its Brief in Support of Exceptions because the exhibits illustrate the ALJ's erroneous evidentiary decisions and conclusions. The Board should deny the motion and consider the evidence so that it can make a well-informed and factually correct decision. In the alternative, the Board should consider this response brief as Erickson's Motion to Reopen the Record, and it should grant the motion and consider Exhibits A and B.

A. The Board should deny the Counsel for the General Counsel's motion as to Exhibit A because it illustrates the egregious effect of the ALJ's incorrect evidentiary decision.

As explained in Erickson's Brief in Support, the ALJ improperly prohibited Erickson's from asking Erin Baerman if he was terminated from his prior job at the North Muskegon Police Department. (TR 322-30). The ALJ stated on the record that he would not allow Erickson's to ask the question because he did not "see the relevance," and he stated in his Decision that the question was improper under Fed. R. Evid. 611(a). (Dec. at 3:40-4:6).

The question was directly relevant because Mr. Baerman was terminated from the North Muskegon Police Department for dishonestly falsifying time cards. Thus, the circumstances of the termination of his employment were directly probative of his credibility and his propensity for truthfulness or untruthfulness. The ALJ's error is all the more egregious because he found that "Erin provided the most detailed account [of the June 20 meeting], and I believe that his depiction was most likely the most complete. His great attention to details is not suspect in light of his training as a police officer." (Dec. 16:32-34).

The Board should be aware of the circumstances underlying Erickson's exception when it considers the ALJ's evidentiary decision. Erickson's exception not just to the ALJ's erroneous evidentiary decision that prohibited Erickson's from questioning Mr. Baerman about the circumstances of the termination of his employment; it also excepted to the ALJ's credibility findings, factual holdings, and legal conclusions, all of which were based on Mr. Baerman's credited testimony. That is, the ALJ's decision in this case can be traced, *inter alia*, to his erroneous decision that prevented Erickson's from impeaching Mr. Baerman. Because Mr. Baerman's testimony played such a central role in the ALJ's decision, the Board should understand all of the circumstances surrounding the ALJ's evidentiary decision that allowed Mr. Baerman's testimony to go unimpeached.

- B. The Board should deny the Counsel for the General Counsel's motion as to Exhibit B because the evidence is relevant and because the Counsel for the General Counsel has used the absence of the evidence presented in Exhibit B to mislead the Board.**

Second, the Board should consider Exhibit B – evidence that Erickson's sold the four small cranes at issue in this case. The Counsel for the General Counsel claims that the Board should not consider this evidence because Erickson's did not file a motion to reopen the record, and because: "[T]he evidence is not relevant. Whether Respondent sold equipment a

year after the discharges sheds no light upon its motivations to terminate six of its employees a year earlier.” (Response Br. at 6). The Counsel for the General Counsel is wrong. The sale of the four small cranes is further evidence that supports the legitimacy of Erickson’s business reasons for the layoffs – that it was exiting the small crane business, selling the small cranes, and focusing on larger and more profitable cranes.

Further, the Counsel for the General Counsel apparently considered the sale of the cranes to be relevant when she argued that “the small cranes were never sold,” *id.* at 35, and that they “[c]ontinued to be [r]egularly [u]sed by Respondent.” *Id.* at 34. That is, the Counsel for the General Counsel argued that “[w]hether Respondent sold equipment a year after the discharges” actually does “shed[] light upon its motivations to terminate six of its employees a year earlier.” (Response Br. at 6).

This argument is factually misleading and contradicts the Counsel for the General Counsel’s previous argument that Exhibit B is irrelevant. The Counsel for the General Counsel cannot have her cake and eat it too; she cannot argue that the sale of the cranes is irrelevant when such evidence would weaken her case and also argue that the evidence is relevant when it allegedly supports her case.

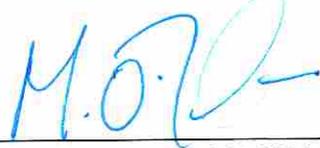
Exhibit B is therefore directly relevant, and the Board’s consideration of Exhibit B will prevent the Counsel for the General Counsel from misleading the Board.

II. CONCLUSION

For the reasons stated above, the Board should deny the Counsel for the General Counsel’s Motion to Strike. In the alternative, if the Board permits a motion before a Board order, the Board should accept Erickson’s Response as a Motion to Reopen the Record, should grant the motion, and should consider Exhibits A and B that were attached to Erickson’s Brief in Support of Exceptions.

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Dated: January 3, 2018

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