

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 01**

**INTERNATIONAL BROTHERHOOD OF
TEAMSTERS, LOCAL 251**

And

**Cases 01-CB-219768
 01-CC-219536
 01-CC-219746**

**INTERNATIONAL BROTHERHOOD OF
TEAMSTERS, LOCAL 25**

and

DHL EXPRESS (USA), INC.

**GENERAL COUNSEL’S REQUEST FOR SPECIAL PERMISSION TO APPEAL THE
DENIAL OF THE MOTIONS FOR SUMMARY JUDGMENT ON RESPONDENT
LOCAL 251’S AFFIRMATIVE DEFENSES**

On July 30, 2018, Charging Party DHL Express (USA), Inc. (“DHL Express”) moved for summary judgment on the affirmative defenses asserted by the International Brotherhood of Teamsters, Local 251 (“Local 251”), and Counsel for the General Counsel (“General Counsel”) filed a motion in support of DHL Express’s motion on the same day (collectively, the “Motions”). On August 13, Administrative Law Judge Elizabeth Tafe (the “Judge”) issued an Order denying the Motions (the “Order”).

On August 20, DHL Express filed a Request for Special Permission to Appeal Denial of Its Motion for Summary Judgment on Affirmative Defenses (“Charging Party’s Request”).¹ Pursuant to Section 102.26 of the Rules and Regulations of the National Labor Relations Board (the “Board”), the General Counsel hereby also requests special permission to appeal the Order.

¹ The General Counsel respectfully refers the Board to Charging Party’s Request pp. 3-11 for a recitation of the facts and procedural history.

I. THE MOTIONS ARE NOT UNTIMELY OR PROCEDURALLY DEFICIENT

Section 102.35(a)(8) of the Board's Rules and Regulations grants administrative law judges the authority to "[d]ispose of procedural requests, motions, or similar matters, including . . . motions for . . . summary judgment." The "authority exists notwithstanding the failure of the moving party to file such a motion directly with the Board at least 28 days prior to the hearing under Section 102.24 of the Rules." NLRB Division of Judges Bench Book, Section 10-400, Motions for Summary and Default Judgment (January 2018). The Board has upheld an ALJ's decision granting General Counsel's motion for summary judgment that was made on the first day of a hearing. *See Calyer Architectural Woodworking Corp.*, 338 NLRB 315, 315 (2002). In doing so, the Board specifically noted that the Rules and Regulations "clearly permit the judge to entertain and rule" on a motion for summary judgment at the hearing. *See id.* at 315 n.2; *see also PPG Indus., Inc.*, 337 NLRB 1247, 1249 (2002) (upholding an ALJ's decision granting a respondent's motion for summary judgment made after the General Counsel rested at hearing).

Although the Judge acknowledges that Section 102.35 of the Board's Rules and Regulations permits the filing of dispositive motions before a judge after a hearing opens, she maintains that the timing is not set forth in the rules. *See Order p. 5.* Notwithstanding this assertion, the plain language of Section 102.35(a) provides that a judge has the authority to rule on motions for summary judgment with respect to cases assigned to her "*between the time the [j]udge is designated and transfer of the case to the Board.*" (emphasis added). Thus, there is no rule stating that motions filed the day before hearing are untimely, and, in fact, the rules explicitly provide that such motions are timely because they are filed during the Board's designated period.

Despite the fact that the Motions are not precluded by any time limitation, the Judge further asserts that entertaining the Motions would interfere with the expected course of the scheduled hearing, inconvenience the parties, and potentially prejudice the opposing parties. *See* Order p. 5. Given the status of the proceeding, it is entirely unclear how these Motions resulted—or could result—in any of these consequences. The General Counsel proceeded with their case-in-chief without delay while the Motions were pending. Even the Order acknowledges that the hearing is adjourned until September 11 because of the unavailability of parties, rather than the Motions. *See* Order p. 2 n.3. Thus, the timing of the Motions has not affected the hearing schedule nor has it inconvenienced the parties. Moreover, the Judge provided Local 251 and Local 25 one week to respond to the Motions, and Local 251 did submit an Objection to Motion for Summary Judgment (“Opposition”) so there has been no prejudice to any of the parties.² The Motions were filed more than six weeks prior to the time that the Judge scheduled the hearing to resume. Nonetheless, the Judge denied the Motions based on timeliness and procedural grounds that do not exist instead of exercising the authority that the Board has granted her to fully address the merits of the Motions.³

II. THE MOTIONS SHOULD BE GRANTED ON THE MERITS

For the reasons set forth in Charging Party’s Request, Local 251’s five affirmative defenses should be dismissed because they have no basis in the law and are unsupported by the

² Local 251 concedes that such motions are permitted under Section 102.35(a)(8) and that no time limits are specifically imposed by the Board. Yet, Local 251 argues that the Motions unfairly prejudice Local 251 because its trial preparation is disrupted; the interim 10(l) stipulation must be extended; and it must prepare a record to support an objection that should have never been required. *See* Opposition p. 4. Local 251 has more than enough time to prepare for the hearing because it filed the Opposition five weeks before the hearing resumes; the 10(l) agreement is not extended due to the Motions because the hearing has been postponed due to Local 251 and Local 25’s unavailability; and the fact that a party involved in litigation has been given an opportunity to respond to a motion filed as part of litigation simply cannot be a basis for prejudice.

³ Although the Judge also asserts that neither the Charging Party nor the General Counsel offered any explanation why they filed the Motions on the day before the hearing, the Charging Party has provided an accurate and reasonable explanation for the timing of the Motions. *See* Charging Party’s Request pp. 11-12.

facts. “An affirmative defense is not triable simply because it is asserted by a respondent in litigation; it must be recognized as warranting the dismissal of the alleged complaint violations.” *Greyhound Lines, Inc.*, 319 NLRB 554, 556 (1995). Thus, a party must articulate a basis for pleading an affirmative defense. *See Flaum Appetizing Corp.*, 357 NLRB 2006, 2009 (2011); *see also Murcal Mfg. Corp.*, 231 NLRB 623, 624 (1977) (upholding an ALJ’s decision to strike an affirmative defense pled without factual foundation after the employer responded to a bill of particulars with only unsupported general allegations).

The Judge conceded some of the affirmative defenses are not meritorious on the record, but she refused to dismiss the defenses in her Order. Prior to withdrawing her ruling on the merits, the Judge agreed that the “de minimis unlawful picketing” theory asserted by Local 251 was not a recognized defense and granted the Motions with regard to this affirmative defense. Tr. 74-75.⁴ Similarly, the Judge acknowledged that the Board does not recognize a franchisee/franchisor defense to Section 8(b)(4)(B) violations, and she stated that Board law holds an entity is not a non-neutral party just because it is a franchisor. Tr. 75, 76, 83-84.

Moreover, Local 251’s Opposition is further evidence that the defenses are baseless. In support of its claim that brief unlawful picketing is de minimis and does not violate Section 8(b)(4)(B) of the National Labor Relations Act (the “Act”), Local 251 actually cites a quote from an ALJ’s decision concerning a blocking allegation under Section 8(b)(1)(A) of the Act. *See* Opposition p. 16. Local 251’s inability to cite any legal support for its “de minimis” theory regarding unlawful picketing is further confirmation that the affirmative defense is legally insufficient. With regard to the franchisee/franchisor defense, Local 251’s Opposition does not make even a single assertion—supported or unsupported—that DHL Express is a franchisor to

⁴ The General Counsel respectfully refers the Board to the transcript excerpts filed with the Charging Party’s Request because all transcript pages cited herein were filed by the Charging Party.

DHLNH, LLC (“DHLNH”) or explain any basis for asserting the alleged franchisor relationship exists. With regard to the alleged ally defense, Local 251 incredulously faults DHL Express for failing to prove a negative by presenting evidence showing that it did not support DHLNH during the labor dispute. *See* Opposition p. 16. The Board’s law and procedure does not place upon DHL Express the burden of disproving Local 251’s unsupported defense, but rather provides that Local 251 must assert a factual basis for the affirmative defense for which it has the burden to prove. For the reasons stated in Charging Party’s Request, Local 251 fails to meet that burden and does not assert any facts to support a conclusion that DHL Express performed “struck work.”⁵

Local 251’s joint employer defense is a transparent attempt to misuse the Board’s law and procedures to excuse secondary picketing. Prior to the picketing—and even after the picketing—Local 251 deliberately pursued a bargaining relationship with *only* DHLNH. This pursuit occurred through the Board’s representation proceedings, several unfair labor practice investigations, and through its bargaining relationship with DHLNH that now includes a comprehensive contract between Local 251 and DHLNH. Thus, Local 251 should be precluded from now arguing that DHL Express was not a neutral to the labor dispute between DHLNH and Local 251 based on a joint employer defense. Furthermore, as DHL Express argues, the Board has never recognized joint employer status as a viable defense to a certified union picketing a party without a duty to bargain in furtherance of a bargaining dispute with the employer to the certification.

The requirement that parties articulate a basis for pleading an affirmative defense is particularly relevant when a party’s defense has the effect of “opening up an avenue through

⁵ Furthermore, the Judge refused to dismiss Local 251’s “failure to state a claim” defense even though Local 251 effectively concedes it is without merit by not addressing it in the Opposition, and the Complaint clearly alleges violations of the Act.

which to subpoena documents and examine witnesses in order to discover evidence to support its defense.” *Flaum Appetizing Corp.*, 357 NLRB at 2009. Federal courts and the Board hold that defendants are not permitted to use affirmative defenses as a “fishing expedition” to discover the evidence needed to support the defense through a subpoena. *See id.* at 2010. As the Board explained, “[w]ithout such a requirement, a party can plead an affirmative defense with the mere hope of discovering evidence to support it.” *Id.* at 2009; *see also Murcel Mfg. Corp.*, 231 NLRB 623, 624 (1977) (explaining that a party that is unable to articulate a basis for an affirmative defense cannot instead serve a subpoena that is “embarking on an investigatory proceeding akin to discovery procedures for which the [Act] makes no provision”).

The Board’s concern and warning about baseless affirmative defenses and subpoenas is exactly what is happening in this case. Board law and procedure is structured to protect the public and parties that are affected by alleged secondary picketing, rather than become a vehicle for a union to continue the unlawful objectives it seeks to achieve through the picketing. The Order has the consequence of encouraging unions who enmesh neutral employers in a labor dispute through secondary picketing to plead baseless affirmative defenses in order to subpoena neutral employers to further involve them in the dispute. At the same time, the result discourages aggrieved parties from seeking recourse before the Board because they must weigh the risk of subjecting themselves to harassing subpoenas. Without these procedures and safeguards, parties—such as Local 251—are able to abuse the Board process and prohibit the General Counsel from ensuring parties will cooperate with its prosecution of unfair labor practices.

III. CONCLUSION

For the reasons set forth above and in the Charging Party's Request, the Board should grant the parties' request for special permission to appeal the Order.

Respectfully submitted,

/s/ Colleen M. Fleming
Colleen M. Fleming
Miriam Hasbun
Counsels for the General Counsel
National Labor Relations Board, Region 1
10 Causeway Street, 6th Floor
Boston, Massachusetts 02222
(857) 317-7785
Colleen.Fleming@nlrb.gov

CERTIFICATE OF SERVICE

I hereby certify that I e-filed this document through the Agency's website and e-mailed a copy to Marc Gursky at mgursky@rilaborlaw.com, Robert Fisher at RFisher@seyfarth.com, Michael Feinberg at maf@fczlaw.com, and Administrative Law Judge Elizabeth Tafe at elizabeth.tafe@nlrb.gov on this 20th day of August, 2018.

Respectfully submitted,

/s/ Colleen M. Fleming
Colleen M. Fleming
Counsel for the General Counsel
National Labor Relations Board, Region 1
10 Causeway Street, 6th Floor
Boston, Massachusetts 02222
(857) 317-7785