

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

MIDWEST TERMINALS OF	:	
TOLEDO INTERNATIONAL, INC.	:	
	:	Cases 8-CA-152192
Respondent,	:	
	:	
and	:	
	:	
LOCAL 1982, INTERNATIONAL	:	
LONGSHOREMEN'S ASSOCIATION, AFL-CIO	:	
	:	

**RESPONDENT MIDWEST TERMINALS OF TOLEDO INTERNATIONAL, INC.'S
RESPONSE TO NOTICE TO SHOW CAUSE**

Pursuant to the National Labor Relations Board's October 5, 2018 Notice to Show Cause why the complaint allegations involving the maintenance of purportedly unlawful work rules or policies should not be severed and remanded to the administrative law judge for further proceedings consistent with the Board's decision in *The Boeing Co.*, 365 NLRB No. 154 (2017), including reopening the record if necessary, Respondent Midwest Terminals of Toledo International, Inc. ("Midwest") hereby submits its position that this matter should not be remanded to Administrative Law Judge Eric Fine ("ALJ Fine"). Rather, Midwest maintains that the Board should overturn ALJ's rulings, findings and conclusions of law based upon the arguments and common sense reasoning Midwest submitted to the Board in its Exceptions using the Board's analysis in *The Boeing Co.*, 365 NLRB No. 154 (2017). Alternatively, Midwest maintains that he parties submit briefs directly to the Board, evaluating the rules and/or policies at issue using the criterion set forth in *Boeing*.

The parties participated in a three day hearing before ALJ Fine in December 2015 and January 2016. A considerable portion of those three days were related to the allegations

concerning the work rules and/or policies. ALJ Fine determined each and every work rule and/or policy violated §8(a)(1) of the Act because they either explicitly restricted activities protected by § 7, or employees would reasonably construe the language to prohibit § 7 activity. In doing so, ALJ Fine summarily marginalized Midwest's legitimate business justifications. Accordingly, Midwest maintains that a remand to ALJ Fine with the specific instruction to follow the Board's analysis as set forth in *The Boeing Co.* is a waste of Midwest's judicial resources because ALJ Fine will, in all likelihood, re-issue the same ruling notwithstanding the Board's instruction to follow the new *Boeing Co.* rules. Further, if the record were to be reopened, the parties would be required to file another post-hearing brief and, no matter what ALJ Fine determines on remand, either Midwest or the General Counsel would submit Exceptions to the Board Excepting to some or all of ALJ Fine's findings and conclusions of law.

Midwest maintains that there is sufficient evidence in the record allowing the Board evaluate the work rules and/or policies at issue in manner "consistent with the Board's 'duty to strike the *proper balance* between . . . asserted business justifications and the invasion of employee rights in light of the Act and its policy,' focusing on the perspective of employees, which is consistent with Section 8(a)(1)." See, *The Boeing Co.*, slip. op. p. 3 (2017) (italics in the original).

Accordingly, in an effort to promote judicial economy, and mitigate both time and expense burdens of the parties, Midwest proposes that the Board issue a briefing schedule instructing the parties to set forth their positions as to why each work rule and/or policy is lawful

or unlawful following the parameters of *The Boeing Co.*¹ Doing so would also allow for a quicker final determination by the Board.

No matter what the Board determines herein, Midwest maintains that the remaining allegations in the Complaint should not be severed so that if and when a party petitions for review or enforcement of the Board's Order, all the allegations in the Complain remain in a single case.

Dated at Dublin, Ohio on this 2nd day of November, 2018.

Respectfully submitted,

/s/ Aaron T. Tulencik

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¹ Counsel for Midwest reached out to the General Counsel prior to this filing and the General Counsel indicated they would not oppose submitting this issue directly to the Board via a briefing schedule.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on November 2, 2018, an electronic original of Respondent Midwest Terminals of Toledo International, Inc.'s Response to Notice to Show Cause was filed via the Department Of Labor, National Labor Relations Board electronic filing system, Executive Secretary and, further, that copies of the foregoing were transmitted to the following individuals by electronic mail:

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