UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 16

INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, LOCAL 28 (CERES GULF INC.)

and **Cases 16-CB-181716**
16-CB-194603

DONNA MARIE MATA, an Individual

COUNSEL FOR THE GENERAL COUNSEL'S REPLY TO RESPONDENT'S ANSWERING BRIEF

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I. The allegation that Respondent's training referral system is arbitrary is not new, nor a change in theory, and there is no due process issue.

Respondent was given notice and an opportunity to be heard, the fundamental elements of due process. *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313 (1950). Contrary to Respondent's argument in its answering brief, the allegation that its training referral system is arbitrary is not a "new theory," was timely alleged in the Complaint, and litigated at the hearing.

In its Answer Brief, Respondent cites *Lamar Central Outdoor d/b/a Lamar Advertising of Hartford*, 343 NLRB 261, 265 (2004) (quoting *Yellow Freight System, Inc. v. Martin*, 954 F.2d 353, 357 (6th Cir. 1992)). Respondent's Answering Brief at 11. There, the Board found that the General Counsel's expansion of the theory of violation was improper because the theory had not been fully litigated at the hearing. In *Lamar*, the General Counsel had originally alleged that the employer retaliated against an employee for his cooperation with the General Counsel in preparation for a Board proceeding. After the hearing, and after the issuance of the judge's decision, the General Counsel sought to argue that the discriminatee's action of threatening to obtain an attorney was also a threat to file an unfair labor practice charge, was protected, and was the motivation for the discharge. However, there had been no testimony about what the discriminatee meant when he threatened to retain counsel. The Board rejected the expansion of theories in that case because the parties had not litigated the key issue of what the employee meant and how his statement had been perceived. Id. at 266.

In contrast, here the General Counsel's theory did not change or expand – it was stated in the Complaint and was litigated fully at the hearing. In *Lamar*, there was no exploration of what the discriminatee meant when he testified that he threatened to retain counsel or what the

respondent understood the discriminatee's statements to mean. Here, the issue of Respondent's training procedure was explored and developed in detail, and considered extensively in the judge's decision, as discussed below.

First, the Consolidated Complaint put Respondent on notice of the allegations in accordance with Board Rules and Regulations. See Section 102.15(b) (stating that a Complaint must contain a "clear and concise description of the acts which are claimed to constitute unfair labor practices, including, where known, the approximate dates and places of such acts and the names of Respondent's agents or other representatives who committed the acts"). As Respondent notes, the Consolidated Complaint specifically states in paragraphs 9 and 10 that Mata was prohibited from being added to certification training lists and from receiving training, and in paragraph 13, that such a prohibition on receiving training was "arbitrary, discriminatory, or in bad faith" and has "breached the fiduciary duty it owes" to Mata. The fact that paragraph 12 alleges an unlawful motivation – that Respondent's conduct was based on gender – does not negate the arbitrary prong, which is not motivation-dependent.

Because the theory that Respondent's training referral system is arbitrary was litigated at the hearing, no due process violation can be found. The fundamental elements of procedural due process are notice and an opportunity to be heard. *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313 (1950). Congress incorporated these notions of due process in the Administrative Procedure Act, stating that "[p]ersons entitled to notice of an agency hearing shall be timely informed of … the matters of fact and law asserted." 5 U.S.C. Section 554(b). To satisfy the requirements of due process, an administrative agency must give the party charged a clear statement of the theory on which the agency will proceed with the case. *Bendix Corp. v. FTC,* 450 F.2d 534, 542 (6th Cir. 1971). The General Counsel did so here not only in its Complaint, but also

in its opening statement and in soliciting detailed testimony about Respondent's training referral system at the hearing. See *Akal Security, Inc.,* 354 NLRB 122, 124-125 (2009), reaffd. 355 NLRB 584 (2010) (finding no due process violation where the General Counsel primarily litigated its case under a *Wright Line* theory where a violation was ultimately found under *Burnup and Sims,* where it referred to its *Burnup* theory solely in its opening statement and posthearing brief). The General Counsel's opening statement explicitly stated that the case "involves the Union's *arbitrary* treatment of Charging Party, Donna Mata, *and* an allegation of discrimination based on gender" (emphasis added). (Tr. 13). The Respondent's conduct was *both* arbitrary because of its training system, *and* included an allegation of gender-based discrimination.

That the General Counsel alleges gender discrimination does not void all other allegations. To the contrary, as argued at the hearing and in the posthearing brief, Respondent's arbitrary and inadequate training system was precisely the problem; because the "system" was subject to just one person's subjective whims, discrimination occurred. Where there is a weak foundation, erosion occurs. The Respondent had a fiduciary and representative duty to Mata to maintain some semblance of a system that would ensure that job-seekers were not denied training for arbitrary or discriminatory reasons – that is the core of the duty of fair representation, which has been alleged in the charge, the Consolidated Complaint, and at the hearing. The record is replete with testimony about Respondent's procedures for administering training. See, e.g., "Facts" in General Counsel's Brief in Support of Exceptions at 4-9; Tr. 276, 306-313, 325-330, 374-376, 411. The necessary predicates for independently or jointly finding a Section 8(b)(1)(A) violation – an arbitrary training procedure and discriminatory application of it – are laid out fully in the record. Consequently, there is no due process violation.

Moreover, there can be no due process issue here because the arbitrary nature of the training referral system is closely connected to the allegations in the Complaint and, as discussed above, has been fully litigated. *Pergament United Sales,* 296 NLRB 333, 334 (1989), enfd. 920 F.2d 130 (2d Cir. 1990). In *Pergament,* the Board held that it "may find and remedy a violation even in the absence of a specified allegation in the complaint if the issue is closely connected to the subject matter of the complaint and has been fully litigated" (footnote omitted). As in *Pergament*, the issue of whether Respondent's training referral procedure was arbitrary was fully and fairly litigated. The details of the training referral procedure were critical to establishing that discrimination and arbitrary treatment occurred; as such, detailed testimony on the matter was elicited on the record, Respondent had a meaningful opportunity to cross-examine such testimony, and did so. See, e.g., "Facts" in General Counsel's Brief in Support of Exceptions at 4-9; Tr. 276, 306-313, 325-330, 374-376, 411. Similarly, the training procedure is overwhelmingly connected to the complaint allegations of arbitrary and discriminatory exclusion from training. A finding that Respondent's conduct in excluding Mata from training was unlawfully gender-based requires exploring how, when, whom, and where Respondent allowed other training-seekers to sign up for training. The lack of a procedure directly led to the subjective and unlawful conduct of Respondent's agent, and abundant direct and cross-examined testimony about these facts is memorialized in the record.

Because Respondent was given appropriate notice of the allegations and a full opportunity to respond to those allegations, there is no due process issue.

II. Conclusion

Contrary to Respondent's allegations in its answering brief, no due process violation can be found. For the foregoing reasons, Counsel for the General Counsel respectfully requests that the Board grant the General Counsel's exceptions and order any appropriate relief.

DATED at Houston, Texas this 2nd day of January, 2019.

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CERTIFICATE OF SERVICE

I hereby certify that Counsel for the General Counsel's Reply Brief to Respondent's Answering Brief in support of Exceptions to the Administrative Law Judge's Decision have been served this 2nd day of January, 2019 on the following:

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